



US-China Business Council Comments on Draft Revised Anti-Unfair Competition Law

March 25, 2016

The US-China Business Council (USCBC) and its member companies appreciate the opportunity to participate in the consultation process for revisions to the Anti-Unfair Competition Law (AUCL), and to provide feedback in response to the request for comments issued by the State Council Legislative Affairs Office. This process reflects a continued positive effort to provide greater transparency in the formulation of policy and legislation.

USCBC has approximately 210 member companies with significant investment and operations in China across all industry sectors, including global leaders in innovation that hold thousands of patents in manufacturing, information technology, pharmaceuticals, services, and other areas. Our companies support China's right to regulate a fair and competitive market, as well as its goals of promoting innovation and competition, enhancing efficiency, and safeguarding consumer and public interests. Developing laws and regulations to support these goals is the foundation of a modern economy.

USCBC welcomes efforts to revise the AUCL and is pleased to provide constructive recommendations to support the continued improvement of China's competition enforcement framework. USCBC appreciates that the draft revision seeks to create consistency with other measures such as the Anti-monopoly Law (AML), Advertising Law, and Trademark Law. It also seeks to clarify anti-competitive behaviors that will be regulated beyond what is included in other existing laws and regulations that govern market competition.

USCBC respectfully submits the following comments on the draft revision for clarification and appropriate changes prior to issuance of the final version.

Comments on Chapter I: General Provisions

Current law defines unfair competition as "acts of operators which violate the provisions of this Law, with a result of damaging the lawful rights and interest of other operators, and disturbing the Socialist market economy." The proposed amendment in Article 2 similarly defines unfair competition but modifies the final clause to read "disturbing the market order." It is unclear what the new clause means, or how it differs from "disturbing the Socialist market economy." Given this confusion, USCBC recommends that the term be clarified or deleted.

Article 3 requires government at all levels to "adopt measures to stop acts of unfair competition," and stipulates that "governments at the county level or above shall conduct supervision over and inspection of acts of unfair competition." It does not, however, make clear how inspections are to be undertaken and what measures will ensure the protection of companies' trade secrets when such inspections are underway. USCBC recommends adding information that clarifies these measures, or designates specific implementation measures as guidance.

Comments on Chapter II: Acts of Unfair Competition

In general, it is unclear whether the definitions of the terms “fake” and “well-known” as used in the revision are consistent with the meanings of these terms in other regulations. USCBC recommends that these terms be consistently defined in all appropriate regulations.

Article 5 details acts of “market confusion” that “business operators must not exploit business logos to carry out.” Acts of “market confusion” is an ambiguous concept, and could be broadly interpreted to include acts that regulators did not intend for the law to encompass. To be consistent with the overall context, we recommend revising the language in Article 5 to refer to “acts of unfair competition” or “anticompetitive behavior,” rather than “acts of market confusion.”

In addition, the acts prohibited in Article 5 of the revision are all ones carried out directly by a business operator. Indirect actions of this sort are also of concern. For instance, a business operator should be liable for market confusion prohibited under this article if it knew or should have known that a third party was engaging in such prohibited conduct but still assisted the third party in the prohibited manufacturing, processing, sale or exporting activity. As a consequence, USCBC recommends adding language to specify that indirectly aiding and abetting misuse of business logos is also prohibited. Similar types of abuse should also be barred, so we recommend adding language that addresses exploitation of trade dress and product design.

Article 6 stipulates that “business operators must not exploit a comparative advantage position (相对优势地位)” to carry out various acts of unfair competition. The meaning of “comparative advantage position” is unclear. As drafted, the term could be interpreted to encompass any party that asserts a patent, trademark, copyright or other IP right. To address this potential for an overly broad interpretation, USCBC recommends clarifying the meaning of “comparative advantage position” (相对优势地位) so that it is clear how this differs from “dominant market position” (市场支配地位), the term used in the AML. We also recommend adding language to explain how “comparative advantage position” is determined, similar to the explanatory language in Article 18 of the AML. In addition, clauses 4 and 5 of Article 6 employ vague terms such as “*justifiable* reasons,” (正当理由) “*abusively* overcharging,” (滥收费用) or “*unreasonably* demanding,” (不合理地要求) that could excessively restrict market activity. USCBC recommends omitting this language or providing additional explanation as to the precise meaning of these terms.

Article 7 stipulates the types of acts that are considered commercial bribery, but includes several broad acts that could be part of normal, legal business dealings. For instance, the books and records provision could result in minor violations without corrupt intention triggering sanctions against business operators. USCBC recommends eliminating these provisions. In addition, USCBC recommends clarifying specifically what conduct constitutes “commercial bribery” so that it cannot be misconstrued to encompass normal business dealings. The language in Article 7 should make clear that conduct such as giving and accepting discounts, commissions and complimentary benefits, when done for a lawful commercial purpose and properly accounted for, does not constitute commercial bribery. Alternatively, commercial bribery could be more explicitly defined as “secret activity between undertakings conducted in pursuit of illegitimate benefits and to the detriment of others.”

Finally, as pertains to Article 7, USCBC recommends adding language to limit employer liability when an employee engages in commercial bribery despite the employer’s express prohibition of such conduct. The language in the [translated] draft currently reads “Commercial bribe-taking conducted by the employee(s) that is against an undertaking’s interests and is provable by evidence shall not be deemed as the conduct of that undertaking.” USCBC recommends revising this section to read: “Commercial bribe-taking conducted by the employee(s) in violation of the undertaking’s rules shall not be deemed as the conduct of that

undertaking.” Where an undertaking can prove that it has formulated sophisticated compliance policies and plans and that the employee violated these policies to take or offer bribes without the undertaking’s knowledge, the undertaking should not be held liable for the employee’s conduct. The undertaking should not be required to prove that such employee misconduct is against its interests.

Article 8 bars misleading business publicity activities. USCBC recommends that the prohibition against portraying “not-established scientific views or phenomena” as established ones should be refined to prohibit the use of scientific marketing claims that are not supported by reasonable evidence. In such cases, the burden should be on the enforcement agency or plaintiff to prove that the claims were false or deceptive. In addition, what constitutes “reasonable” evidence in these types of cases depends on a number of factors relevant to the benefits and costs of substantiating a particular claim. USCBC recommends that the types of factors taken into consideration should include the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation of the claim, and the amount of substantiation experts in the field believe is reasonable. Given the global nature of the products legally sold in China, evidence from testing or studies conducted outside of China should also be admissible as a defense. Article 10 lists prohibited prize-promoted sales, including the stipulation in Article 10.3 that business operators must not set unreasonable conditions for prize redemption when carrying out promotions that involve prizes. USCBC recommends providing clarification as to what constitutes “unreasonable conditions.”

Article 14 functions as a catch all provision for other acts of unfair competition not specifically detailed in Chapter 2, and provides discretion to the State Administration of Industry and Commerce (SAIC) to determine what acts constitute “other acts of unfair competition.” USCBC recommends adding language that sets standards and guidelines for SAIC’s exercise of this discretion, so that determinations of what constitutes “other unfair competition acts” are consistent. As an additional measure to ensure consistency, we recommend limiting this authority to central level SAIC offices.

Comments on Chapter 3: Supervision and Inspection

Article 15 details the powers of supervision and inspection departments to investigate acts of unfair competition, but does not provide for the protection of businesses’ confidential information. USCBC recommends that additional language be added to specify that in the course of an AUCL infringement investigation, any information considered to be confidential be strictly protected, not publically disclosed, and not shared between AUCL investigators and other agencies or entities without the explicit consent of the rights owner.

Comments on Chapter 4: Legal Responsibility

Article 17 stipulates that business operators will be liable for damages when they violate the AUCL, but does not specify how liability will be determined or how damages will be measured. USCBC recommends additional language to address these issues.

Article 18 requires that parties attempt to negotiate disputes prior to seeking relief via legal channels. USCBC recommends clarifying what constitutes a refusal to negotiate, which would help to ensure that one party does not abuse this provision to drag out negotiations unnecessarily.

Article 19 provides for the imposition of fines for violations of the unfair trading provisions listed in Article 6 of the AUCL, based on “illegal income.” USCBC recommends clarification of what constitutes illegal income in this context. Furthermore, USCBC notes that Article 19 allows for fines based on a multiple of “illegal revenue.” A fine of “one to five times the illegal revenue” could force a company into insolvency and exceed the competitive harm the fine is aimed at addressing. USCBC recommends revising this formula so that potential penalties are not disproportionately severe. Providing clear guidance as to how fines are calculated would also help to eliminate uncertainty.

Article 22 details sanctions for violations of the business secrets provisions in Article 9 of the AUCL. USCBC appreciates the inclusion of language to allow burden shifting in instances where a trade secrets rights owner can show that information used by another party is substantively the same as its own trade secrets and the other party had access to these trade secrets. This is an important option for rights holders to be able to exercise. USCBC recommends enabling rights holders to exercise this option where there is a *likelihood* that another party with access to trade secrets has misused them, rather than requiring that rights holders demonstrate proof. In addition, further clarification of what constitutes “substantively the same” would be helpful in effectively enforcing this measure.

Finally, the revision would benefit from the addition of a provision that allows for legal recourse regarding decisions made by government and regulators. NDRC recently proposed experiments in Shanghai that would enable private companies to undertake such actions, to review certain government measures adopted in NDRC’s enforcement of anti-competition law. USCBC encourages the addition of similar provisions in the AUCL.

USCBC thanks the State Council Legislative Affairs Office for providing this opportunity to comment on the draft revisions to the Anti-Unfair Competition Law. We hope that these comments are constructive and useful. We would appreciate the opportunity for further dialogue on these issues and are happy to follow up as appropriate.

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