The Anti-Unfair Competition Law Amendment and Administrative Law Enforcement

BUREAU OF PRICE SUPERVISION AND ANTI-UNFAIR COMPETITION, STATE ADMINISTRATION FOR MARKET REGULATION

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1. Anti-Unfair Competition Law Enforcement

The Anti-Unfair Competition Law Amendment was passed by the National People’s Congress on 4th November 2017

The Anti-Unfair Competition Law Amendment took effect on 1st January 2018
The Anti-Unfair Competition Law is a fundamental law for market regulation. It was passed by the National People’s Congress on 2nd September 1993 and took effect on 1st December 1993.

The Anti-Unfair Competition Law has been crucial in prohibiting unfair competition behavior, market regulation and protecting both businesses and consumers over the past two decades. Ever since the Anti-Unfair Competition Law took effect, 710,000 cases with a total value of more than 60 billion CNY have been investigated nationwide. The amount of fines reached 10.5 billion CNY.

In the first half of 2018, 8,294 cases with a total value of 5.7 billion CNY have been investigated nationwide. The amount of fines reached 240 million CNY.
2. Content of the Anti-Unfair Competition Law Amendment
Content of the Anti-Unfair Competition Law Amendment

• Number of articles reduced from 33 to 32

• 7 instead of 11 acts of unfair competition

• Change in wording from “disturbing the socio-economic order” to “disturbing the market competition order”

• Added provisions on infringing “consumer rights”
Article 2  A business operator shall, in the market transactions, follow the principles of voluntariness, equality, fairness, honesty and credibility and observe the generally recognized business ethics.
Unfair competition as mentioned in this Law refers to a business operator’s acts violating the provisions of this Law, infringing upon the lawful rights and interests of another business operator and disturbing the socio-economic order.
A business operator as mentioned in this Law refers to a legal person, other economic organization and an individual engaging in commodities marketing or profit-making services (commodities referred to hereinafter include services).

Article 2  A business operator shall, in the production and business activities, follow the principles of voluntariness, equality, fairness, honesty and good faith, comply with laws and adhere to business ethics.
An unfair competition act as mentioned in this Law refers to in the production and operating activities, a business operator’s act violating the provisions of this Law, disrupting the market competition order and infringing upon the lawful rights and interests of another business operator or consumer.
A business operator as mentioned in this Law refers to a natural person, a legal person and an organization without legal person qualifications engaging in the production or business operations of commodities or providing services (commodities referred to herein after include services).
Correlations, Improvements and Reinforcements

Correlations

Correlation with the Anti-Monopoly Law – removed 4 acts on restricting competition:

- Public utility enterprises restricting competition (former Article 6)
- Abusing administrative power to restrict competition (former Article 7)
- Selling commodities at prices lower than the costs (former Article 11)
- Tie-in sale of commodities or inclusion of other unreasonable conditions

Correlation with the Law on Tenders and Bids – removed the article on collusion with each other in bidding (former Article 15)
Correlations, Improvements and Reinforcements

Correlation with the Trademark Law:

- Removed former Article 5, Paragraph 1 on counterfeiting a registered trademark of another person
- Correlation with Article 58 of the Trademark Law – Naming a company with a trademark of another person causing unfair competition will refer to Article 6 of the amended Anti-Unfair Competition Law

Correlation with the Advertisement Law:

- Violations of Article 8 of the amended Anti-Unfair Competition Law will be considered as false advertising and will refer to Article 20 of the Advertisement Law
Improvements

- Added a new Act of Unfair Competition: Act of Unfair Competition in the Internet Sector
- Added “the State Council establishing the Anti-Unfair Competition Coordination Mechanism”
- Revised the existing 6 Acts of Unfair Competition
Reinforcement of law enforcement and legal liability

1. Added administrative penalties, including closing down the company, freezing the company’s assets and supervision on the company’s bank accounts, etc.; Also stipulated the reporting and approval procedures for such penalties for authorities on municipal or higher level (Article 13).

2. Clarified the responsibilities of the bodies being investigated on which shall provide relevant documents; Added legal liabilities for refusing or obstructing investigations (Article 14 and Article 28).

3. Clarified the non-disclosure requirements for law enforcement authorities and their staff, and the legal liabilities for breaching these requirements (Article 15 and Article 30).

4. Clarified the responsibilities of the authorities to respond and process cases (Article 16).

5. Added the principle of prioritizing civil liabilities (Article 27).

6. Improved the provision on assessing damage and the corresponding penalty; Stipulated the provisions on situations that apply lenient penalties or no penalties (Article 25).

7. Improved other provisions on legal liabilities.
3. Seven Acts of Unfair Competition
1. Acts of Confusion
Article 5  A business operator shall not harm his competitors in market transactions by resorting to the following unfair means:
(1) counterfeiting a registered trademark of another person;
(2) using for a commodity without authorization a unique name, package or decoration of a famous commodity, or using a name, package or decoration similar to that of a famous commodity, thereby confusing the commodity with that famous commodity and leading the purchasers to mistake the former for the latter;
(3) using without authorization the name of another enterprise or person, thereby leading people to mistake their commodities for those of the said enterprise or person;
(4) forging or counterfeiting authentication marks, famous and excellent product marks or other product quality marks on their commodities, forging the origin of their commodities or making false and misleading indications as to the quality of their commodities.

Article 6  An operator shall not commit any of the following confusion acts, which cause its products from being mistaken for the products of others or from being mistaken as having specific connection with others
(1) using without authorization a mark identical with or similar to others' product names, packaging or decoration that has certain influence;
(2) using without authorization others' enterprise names (including abbreviations, trade names, etc.), social organization names (including abbreviations, etc.) or names (including pen names, stage names, translated names, etc.) that have certain influence;
(3) using without authorization the main parts of others' domain names, website names, webpages, etc. that have certain influence;
(4) Other confusion acts which are sufficient to cause its products from being mistaken for the products of others or from being mistaken as having specific connection with others.
Summary

1. Removed the provision on counterfeiting another person's registered trademark;

2. Removed provisions on false representations of counterfeit origins that mislead as to the quality of the goods;

3. Introduced the concept of “marks”, broadening the scope of protection for a mark, and clarifying the conditions under which the protected label “has certain influence”;

4. Improved the provision on the consequences of confusion acts and unified the constituent elements of confusion acts;

5. Added Miscellaneous Provisions on confusion acts;

6. Targeted corrective actions were taken for improper registration and the use of enterprise names.
Concept of “marks” and examples

“Marks” include:

• Marks for commodities: names, packaging or decoration of a commodity
• Marks for market entities: names of enterprises, organisations and individuals
• Marks for other business activities: domains, names of websites or website content
Marks for commodities: names, packaging or decoration of a commodity
Marks for market entities: names of enterprises, organisations and individuals

“Qingfeng” Case

Mark owner:
北京“庆丰包子铺”
Beijing Qingfeng Bun Shop

Enterprise name:
济南庆丰餐饮管理有限公司
Jinan Qingfeng Food Management Co. Ltd.
Examples on enterprise names

Controversy: Does Jinan Qingfeng Food Management Co. Ltd. registering “Qingfeng” as enterprise name cause unfair competition?

Supreme People’s Court:

According to the facts ascertained by the first and second instance, the Qingfeng Bun Shop opened in 1956 and began to use the “Qingfeng” enterprise name on 5th January, 1982. It has been more than 27 years until the registration of Jinan Qingfeng Food Management Co. Ltd., which arbitrarily registered the “Qingfeng” Baozipu as enterprise name and operated the same goods or services.

This act caused confusion and constitutes unfair competition.
Marks for other business activities: domains, names of websites or website contents

Confusion in domain names

http://www.hao360sou.com

and

http://www.hao360.cn
360公司
https://hao.360.cn/
Names of characters
How to understand the conditions under which “marks” are protected – “has certain influence”

“Has certain influence” can be understood as being different from other commodities, having certain publicity in the market and being known by the public

The evaluation of “publicity” could take the time of sale, geographical location of sales, sales amount and sales target into consideration. The duration, extension and scope of marketing shall also be considered.
Miscellaneous Provisions on confusion acts

Article 6, Paragraph 4: Other confusion acts which are sufficient to cause its products from being mistaken for the products of others or from being mistaken as having specific connections with others

Applicable situations:

1. Resolving conflicts of rights
2. Regulating “marks” unidentified by the law
3. New confusion acts that cause market confusion
Resolving conflicts of rights

Article 6, Paragraph 4 prohibits other confusion acts which are sufficient to cause its products from being mistaken for the products of others or from being mistaken as having specific connections with others. This will effectively resolve conflicts of rights when trademarks or enterprise names are being used.

Trademark Law, Article 58: Using registered or unregistered trademarks of another person as its own enterprise name constitutes unfair competition
Resolving conflicts of rights – Budweiser Case

Anheuser-Busch InBev is a Fortune 500 company. “Anheuser-Busch”, “Budweiser” and “InBev” are all trademarks and enterprise names.

Examples of infringements:
• Shandong Budweiser InBev Beer Co. Ltd.
• Qingdao Royal InBev Beer Co. Ltd.
• Qingdao Royal Inbev Beer Marketing Co. Ltd.

How to protect trademarks and enterprise names?
Principles of Identification in Conflict of Rights cases

Factors in conflict of rights cases:

1. Protect the legitimate rights and interests of the preceding right owner.

2. Proactive or passive:
   - Infringing others proactively, such as using the publicity of another person for marketing and promotion.
   - Infringing others passively: actions of non-compliance, such as false advertising which has caused market confusion.
2. Commercial Bribery
**Article 8** A business operator shall not resort to bribery, by offering money or goods or by any other means, in selling or purchasing commodities. A business operator, who offers off-the-book rebate in secret to a unit or an individual, shall be deemed and punished as offering bribes; and a unit or an individual that accepts off-the-book rebate in secret shall be deemed and punished as taking bribes.

A business operator may, in selling or purchasing commodities, expressly allow a discount to the other party and pay a commission to the middleman. A business operator who gives a discount to the other party and pays a commission to the middleman must truthfully enter them into the account. A business operator who accepts a discount or a commission must also truthfully enter it into the account.

**Article 7** A business operator shall not bribe the following units or individuals by offering money, goods or by other means, so as to seek a trading opportunity or a competitive advantage:

1. a staff from the opposite side of a transaction;
2. a unit or an individual who handles relevant matters upon entrustment of the opposite side of a transaction;
3. a unit or an individual who affects a transaction by using functional power or influence.

A business operator may, in a transaction activity, pay a discount to the opposite side of a transaction in an express manner, or pay a commission to the middleman. Where a business operator pays a discount to the opposite side of a transaction or pays a commission to the middleman, such discount or commission should be truthfully entered into the account. Where a business operator accepts a discount or a commission, such discount or commission should also be truthfully entered into the account.

Where a staff from a business operator conducts a bribe, it shall be deemed as the act of the business operator; however, except that the business operator has evidence to prove the act of the staff is irrelevant with seeking a trading opportunity or a competitive advantage for the business operator.
Provisions on Commercial Bribery

Amendments:

1. Identified the bodies that could be affected by commercial bribery

2. Added disclaimers for individual bribery and business operators

3. Stricter administrative penalty for commercial bribery
   ◦ Provision on “Confiscation of illegitimate gains” remains
Article 7: A business operator shall not bribe the following units or individuals by offering money, goods or by other means, so as to seek a trading opportunity or a competitive advantage:

1. a staff from the opposite side of a transaction;

2. a unit or an individual who handles relevant matters upon entrustment of the opposite side of a transaction;

3. a unit or an individual who affects a transaction by using functional power or influence.
2. Added a disclaimer for individual bribery and business operators

Where staff from a business operator conducts a bribe, it shall be deemed as the act of the business operator; except in the case that the business operator has evidence to prove that the act of its staff is irrelevant when seeking a trading opportunity or a competitive advantage for the business operator.
3. False or Misleading Commercial Publicity
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<th>2017</th>
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<td><strong>Article 9</strong> A business operator may not, by an advertisement or other methods, make false or misleading publicity of its commodities as to quality, ingredients, performance, usage, producers, term of validity or origin, etc. An advertisement operator may not act as an agent for, or design, produce or release a false advertisement while he/she clearly knows or ought to know its falsehood.</td>
<td><strong>Article 8</strong> A business operator shall not make false or misleading commercial publicity of its commodities as to performance, function, quality, sale status, user evaluation and awarded honors, etc. to deceive or mislead the consumers. A business operator shall not help other business operators make false or misleading commercial publicity by means of organizing false transactions, etc.</td>
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A business operator shall not make false or misleading commercial publicity for its own commodities as to performance, function, quality, sales status, user evaluation and awarded honors, etc. to deceive or mislead consumers:

1. The content is untrue – false publicity
2. The content is true but misleading
3. Defamation
4. Hoax
5. Other false or misleading publicity
• Added the provision on “providing assistance to false publicity”

• Article 8, Paragraph 2 prohibits business operators from organizing fake transitions that cause false or misleading publicity.

Example: leaving fake positive reviews for the business operator
Applicability of the Anti-Unfair Competition Law and the Advertisement Law

- Article 20, Paragraph 2: Violation of Article 8 constitutes false advertising and shall be referred to the Advertisement Law.

- The applicability of the Anti-Unfair Competition Law and the Advertisement Law in law enforcement:

  The Advertisement Law is a special law which shall be applied before the Anti-Unfair Competition Law. When the former is not applicable, the latter shall be the alternative.
4. Infringement of Trade Secrets
Article 10 A business operator shall not use the following means to infringe upon a trade secret:
(1) obtaining an obligee’s trade secrets by stealing, luring, intimidation or any improper means;
(2) disclosing, using or allowing another person to use an obligee’s trade secrets obtained by the means mentioned in the preceding item;
(3) in violation of an agreement or against an obligee’s requirement of keeping trade secrets, disclosing, using or allowing another person to use the trade secrets he/she possesses.

Obtaining, using or disclosing another person’s trade secrets by a third party who clearly knows or ought to know illegal acts listed in the preceding item shall be deemed as infringement upon trade secrets.

“Trade secrets” mentioned in this Article refers to technical information and business operation information which is unknown to the public, can bring economic benefits to an obligee and has practicability and for which the obligee has adopted secret-keeping measures.

Article 9 A business operator shall not carry out the following acts which infringe upon trade secrets:
(1) obtaining an obligee’s trade secrets by stealing, bribery, fraud, intimidation or any improper means;
(2) disclosing, using or allowing another person to use the trade secrets he/she possesses.
(3) in violation of an agreement or against an obligee’s requirement of keeping trade secrets, disclosing, using or allowing another person to use the trade secrets obtained by the means mentioned in the preceding item;

“Trade secrets” mentioned in this Law refers to technical information and business operation information which is unknown to the public, has a commercial value and for which the obligee has adopted corresponding secret-keeping measures.
Amendments

Article 9, Paragraph 3: “Trade secrets” mentioned in the Law refers to technical information and business operation information which is unknown to the public, has a commercial value and for which the obligee has adopted corresponding non-disclosure measures:

1. Improved the definition of trade secrets; removed the requirement of “practicality”; corresponding to the definition in TRIPS.

2. Added “corresponding” in front of “measures to protect the secrets”.

3. Stipulated the liability to protect the secrets when the authority and its staff are conducting investigations.

4. Stricter administrative penalty for infringements on trade secrets.
5. Inappropriate Prize-Giving Sales
**Article 13** A business operator shall not engage in the following prize-giving sales:
(1) prize-giving sale conducted by such deceptive means as falsely declaring to have a prize or intentionally making a designated insider win the prize;
(2) prize-giving sale employed as a means to sell goods of low quality at a high price;
(3) prize-giving sale in form of lottery-drawing with the amount of the highest prize exceeding 5000.

**Article 10** A prize-giving promotion conducted by a business operator shall not have the following circumstances:
(1) prize-giving sales information like the type, conditions and requirements and the amount of a prize is not clear, which will affect in claiming a prize;
(2) prize-giving sale conducted by such deceptive means as falsely declaring to have a prize or intentionally making a designated insider win the prize;
(3) prize-giving sale in form of lottery-drawing with the amount of the highest prize exceeding 50,000.
Amendments:

3 situations:

1. Prize-giving sales information, such as the type, conditions and requirements and the amount of a prize, is not clear, which will affect claiming a prize;

2. Prize-giving sales conducted by deceptive means, such as falsely declaring to have a prize or intentionally making a designated insider win the prize;

3. Prize-giving sales in form of lottery-drawing with the amount of the highest prize exceeding 50,000.
6. Commercial Defamation
1993

**Article 14** A business operator shall not *fabricate or spread false facts* to injure his competitors’ commercial credit or the reputation of his competitors’ commodities.

2017

**Article 11** A business operator shall not *make up or propagate false information* or *misleading information* to impair his competitors’ commercial credit or the reputation of his competitors’ commodities.
Amendments

Article 11: A business operator shall not make up or propagate false information or misleading information to impair his competitors’ commercial credit or the reputation of his competitors’ commodities.

1. Improved the definition of commercial defamation
   - Changed “fabricate or spread” to “make up or propagate”.
   - Changed “false facts” to “misleading information”

2. Added provision on administrative liability

Fine of up to 3 million
Constituents of Commercial Defamation

1. Object: Reputation of the business or commodity
2. Making up or spreading false or misleading information or defamation as a fact
3. Subject: Business operator; the perpetrator and the victim are in competition
4. The perpetrator’s conduct is on purpose
5. Result: The victim suffers in that the reputation of the business or commodity is being demnified
Acts of Unfair Competition on the Internet

2 types of Acts of Unfair Competition on the Internet:

- The extension of the act of unfair competition in the traditional sectors to the Internet sector, such as counterfeits and false publicity on the Internet.

- Exclusively in the area of the Internet: using technical measures to conduct acts of unfair competition
Article 12, Paragraph 2

“Misleading, deceiving or forcing a user to change, close or uninstall an internet product or service which is legally provided by other business operators”

- Using technical measures
- Influencing the users’ choice
- Obstructing other internet products or services which are legally provided by other business operators
Behaviors

- Inserting links or forcing redirection without permission
- Misleading, deceiving or forcing users to change, close or uninstall other internet products legally provided by other business operators
- Maliciously causing incompatibility issues with other internet products legally provided by other business operators
- Other behaviors that are obstructing other internet products or services which are legally provided by other business operators
Administrative Law Enforcement of Unfair Competition on the Internet

- Article 2 as a reference for identifying acts of unfair competition on the internet
- Fully respect previous cases and the principles and rules
- Broaden the definition of “competition relation” when identifying unfair competition on the internet
- Scrutiny in administrative law enforcement and supervision
- Innovation in supervision and improvement of the supervision on the internet
- Self-discipline in the sector and social co-governance
感谢！Thank you!