



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

March 25, 2017

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 (SCLAO). This process reflects a continued positive effort to provide greater transparency in the formulation of policy and legislation.

USCBC has 200 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, and resolves many of USCBC's concerns with language in the previous draft revision.

USCBC appreciates that this revised draft took into account many of our previous comments, and respectfully submits the following additional comments on the draft revision for clarification and appropriate changes prior to issuance of the final version.

Comments on Chapter I: General Provisions

The current version of the 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 remains unclear how "disturbing the market order" differs from "disturbing the Socialist market economy." 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." The previous draft revision stipulated that "governments at the county level or above shall conduct supervision over and inspection of acts of unfair competition." It did not, however, clarify how the governments should conduct inspections. USCBC recommended adding information that clarified these measures, or designated specific implementation measures as guidance. Article 3 of the current draft revision stipulates

that the State Council will be in charge of determining major policies against unfair competition and establishing “coordinating mechanisms for efforts against unfair competition.” USCBC welcomes this change, which takes steps to better ensure uniformity in how inspections are undertaken. However, USCBC continues to recommend language requiring inspectors to protect companies’ trade secrets during inspections.

USCBC welcomes new language in Article 4 stipulating that offices of the Administration of Industry and Commerce (AIC) at or above the provincial level will investigate and handle acts of unfair competition. New language in Article 4 also provides that, where laws or administrative regulations direct other departments to investigate and handle such acts, those laws and regulations are to be followed. In order to eliminate confusion and ensure streamlined enforcement, USCBC recommends that Article 4 be further revised to explicitly give the Administration of Industry and Commerce comprehensive supervisory authority over unfair competition investigations and enforcement activities.

Comments on Chapter II: Acts of Unfair Competition

Article 5 of the previous draft prohibited business operators from “exploiting business logos” to carry out “acts of market confusion.” In the new draft, Article 6 instead prohibits business operators from using various “unfair tactics to engage in market transactions.” USCBC felt that “acts of market confusion” was a confusing term, vulnerable to interpretations that regulators did not intend for the law to encompass. We welcome this revision to prohibiting use of “unfair tactics to engage in market transactions”.

The list of “acts of market confusion” at Article 5 in the previous draft several times included the descriptor ‘well-known logos.’ USCBC noted in previous comments that it was unclear precisely what this term encompassed. We welcome revisions in Article 6 of the current draft, which provides more detailed descriptors.

USCBC notes that the acts prohibited in Article 6 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.

USCBC welcomes omission in the current draft of the term “comparative advantage position.” Article 6 of the previous draft specified that “business operators must not exploit a comparative advantage position” to carry out various acts of unfair competition. We noted in our comments on that draft that the meaning of “comparative advantage position” was unclear, that we did not understand how it differed from the term “dominant market position,” as used in the AML, and that it could potentially be subject to overly broad interpretation.

Article 7 stipulates the types of acts that are considered commercial bribery. USCBC noted in comments on the previous draft that it included several broad acts that could be part of normal, legal business dealings. We recommended that Article 7 be revised to clarify that conduct such as giving and accepting discounts, commissions and complimentary benefits, when done for a lawful commercial purpose and properly accounted for, did not constitute commercial bribery. USCBC welcomes revisions to Article 7 in the current draft that indemnify businesses against bribery provisions in such cases, provided that businesses have accurately accounted for these dealings in their books and records.

USCBC also welcomes the addition of language to Article 7 that limits employer liability when an employee engages in commercial bribery and the business operator has evidence showing that it was individual conduct. Where a company can demonstrate that it has formulated and instituted sophisticated compliance policies and procedures and that the employee violated these policies to take or offer bribes

without the company's knowledge, this should constitute evidence showing that the employee's conduct was "individual conduct."

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." Additionally, Article 13 stipulates that business operators must not "concoct or disseminate fake facts." 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.

Articles 9 and 10 address trade secret infringement. USCBC welcomes the addition of language in Article 10 specifying that "employees of state organs and professionals such as lawyers and certified public accountants shall keep confidential the trade secrets they learn in the course of performing their duties." USCBC recommends additional language specifying that where a trade secret holder can show reasonable suspicion that a third party improperly obtained, used or disclosed its trade secret, the third party must prove that it did not improperly obtain, use or disclose the trade secret.

Article 12 lists prohibited prize-promoted sales, including the stipulation in Article 12.3 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 in the current draft provides new language prohibiting certain technical online activity. Article 14's new provisions include language prohibiting operators from "using online technology to influence users choices against other operators," including "misleading, deceiving, uninstalling online products, and interfering with services" on others networks to influence consumer behavior. USCBC recommends clarifying how provisions in this article comport with or are different from provisions in other laws governing network products and services. USCBC also recommends adding language that specifies what government agencies and regulatory authorities are responsible for the supervision of unfair online competition.

Comments on Chapter 3: Supervision and Inspection

Article 16 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. New language in Article 10 does allude to the obligations of officials and professionals to keep confidential the commercial secrets they learn of in the course of their duties. However, USCBC recommends that similar language also be included in the chapter on supervision and inspection, 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 20 stipulates that business operators will be liable for damages when they violate the AUCL, but does not specify how liability will be determined. USCBC recommends additional language to address these issues.

USCBC welcomes the revision of Article 21 (Article 18 in the previous draft) to no longer stipulate that parties must attempt to negotiate certain unfair trade practice disputes prior to seeking relief via legal

channels. Article 24 details sanctions for violations of the business secrets provisions in Article 9 of the AUCL. The previous draft detailed these sanctions at Article 22 and included 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, but the language was omitted from the current draft. USCBC recommends reincorporating this language and also adding language that would enable 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.

USCBC welcomes the higher fines included in Article 24 of the current draft for individuals and companies that violate an entity's trade secrets. We also welcome new language at Article 24 detailing sanctions for State employees and professionals who infringe on trade secrets as specified in Article 10 of the current draft. Article 24 stipulates that State employees will be punished "in accordance with the law." USCBC urges that these punishments be more clearly articulated and that they be significant enough to reasonably deter infringement of trade and commercial secrets by state employees. Article 24 stipulates that professionals in violation of the provisions of Article 10 will be subject to a fine of up to 100,000 RMB, and "where the circumstances are serious, their practice licenses will be revoked by the relevant departments." USCBC would welcome further clarification of what constitutes "serious" circumstances.

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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