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China Revised Its Anti-Unfair Competition

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1. China Revised its Anti-Unfair Competition Law

Since the adoption of the Anti-Unfair Competition Law (“**ACL**”) in 1993, China revised the ACL for the first time at the occasion of the 30th meeting of the Standing Committee of the 12th National People’s Congress, which took place on 4 November 2017. The revised ACL, which entered into force on 1 January 2018, contains a number of important amendments. Seven unfair competition activities have been revised and amended, five unfair competition activities have been omitted and the authorities have been given more extensive powers to enforce the law.

A. The following seven unfair competition activities have been revised and amended:

- 1) Amendment of the regulations regarding acts of confusion. Acts of confusion are acts that cause a person to mistakenly consider a product to be the product of another manufacturer. Article 6 of the revised ACL provides the following non-exhaustive list of illegal acts of confusion: unauthorized use of a label identical or similar to the name or packaging, among others, of another person’s commodity with a certain reputation; unauthorized use of another person’s name; unauthorized use of another person’s domain name’s main parts, the name of a website or a web page with a certain reputation; and other acts of confusion that suffice to cause a person to mistakenly take a product for a product from another manufacturer.
- 2) Extension of the scope regarding business bribery. The circle of persons that are considered bribe-takers has been extended. Now, not only the person that actually accepts a bribe is punishable but also the third party that abuses its power and influence to affect the transaction.
- 3) Improvement of the regulation on misleading commercial publicity. Misleading commercial publicity was prohibited under the ACL, now this provision is deleted from the ACL as a similar rule has been added to the Advertisement Law.
- 4) The amount of the top prize for lottery-based campaigns has been raised from the original maximum of RMB 5’000 to a maximum of RMB 50’000. So, a lucky draw prize cannot now be worth RMB 50’000 instead of only RMB 5’000.

- 5) Making up and disseminate false or misleading information to damage the goodwill or reputation of a competitor is now prohibited and under the threat of a penalty, which was previously not the case, albeit such activities were illegal already.
- 6) Supervisory inspection authorities and their employees are now obliged to keep trade secrets of the subjects they supervise.
- 7) Regulations on online activities are newly added. The ACL will also be applicable to business conducted online, which was not the case before. In this respect, it is explicitly prohibited to do the following: inserting a link or forcing a URL redirection; forcing users into altering, shutting down, or uninstalling an online product or service; causing in bad faith incompatibility with an online product or service.

B. Deletion of five anti-competition activities

Since respective provisions have been added to other laws, the following five anti-competition activities have been omitted from the ACL, although they still remain illegal: an enterprise which has a dominant position in a specific market effectively forces others to purchase the commodities; forcing a purchaser to buy additional commodity that comes together with the product; selling commodity at a price lower than the commodity's cost; abuse of administrative power by administrative organ or organization empowered by a law or administrative regulation to eliminate or restrict competition and collusion for bidding.

C. Strengthening of supervision and examination

Against the weak and insufficient supervision of the old Anti-Unfair Competition Law, the revised version reinforces and strengthens the competence and duties of executive authorities. The authorities are empowered to seize and impound property relating to the suspicious acts of unfair competition. Furthermore, a duty of the business to coordinate with authorities was added and the penalties for violating this duty were raised heavily.

2. Revision of Administrative Measures for the Registration of Enterprises from Foreign Countries (Regions) that Engage in Production and Business Operations within Mainland China

Over 25 years ago, on 15 August 1992, the Administrative Measures for the Registration of Enterprises from Foreign Countries (Regions) that Engage in Production and Business Operations within Mainland China (the “**Measures**”) was adopted by the State Administration for Industry and Commerce (“**AIC**”). Its purpose was to promote economic cooperation with foreign countries, to strengthen enterprises from foreign countries (regions) that are engaged in production and business within China, to protect their interest and rights, and to maintain economic order.

On 27 October 2017, the AIC revised the Measures for the second time only. The most significant modification is the abolishment of charging a registration fee to apply for business registrations and alterations of business registrations.

Furthermore, foreign companies not only need to register with the local AIC – as all other companies have to – but they also need to register the actual business activity, if it is within one of the following fields:

- (1) exploration and exploitation of onshore and offshore oil and other mineral resources;
- (2) contract projects for the construction and furnishing of houses and civil engineering, or the installation of circuit pipelines and equipment;
- (3) operation and management of foreign-invested enterprises by contracts or authorization;
- (4) branches established in China by foreign banks, and
- (5) other production and business permitted by the State.

3. China (Shanghai) Pilot Free Trade Zone for Small and Medium-Sized Enterprises: New Notice of the Shanghai Municipal Development and Reform Commission regarding the Monopoly Agreement Exemptions issued

According to article 15 of the Anti-Monopoly Law, enterprises may be exempt from the prohibition of monopolies and actually be allowed to have monopolies in their respective fields, if they meet certain conditions.

On 20 September 2017, the Shanghai Municipal Development and Reform Commission published the *Guiding Opinions on Monopoly Agreement Exemptions in the China (Shanghai) Pilot Free Trade Zone for Small and Medium-Sized Enterprises* (the “**Guiding Opinion**”), which came into effect on 25 October 2017 and, according to statements of government officials, are supposed to promote the healthy development of Small and Medium-Sized Enterprises (the “**SMEs**”).

The Guiding Opinion defines under what conditions the SMEs in the Pilot Free Trade Zone may benefit from the an exemption set forth in article 15 of the Anti-Monopoly Law.

A. Scope of Application

SMEs may submit a written application and relevant materials to the Law Enforcement Agencies for an exemption if the following conditions are satisfied: the SME is of the opinion that Article 15 of the Anti-monopoly Law is applicable to its relevant agreement; at least one party to the agreement is registered within the free trade zone; and, the relevant market is within the administrative regions of Shanghai.

B. Standards for Recognizing SMEs

Based on the Guiding Opinion, whether or not a company is considered an SME depends on the number of employees, the operating income, the total assets, the industry characteristics and other factors on relevant markets and by reference to the Standards for Classification of SMEs (Gong Xin Bu Lian Qi Ye [2011] No. 300).

C. Conditions for Applying for Exemption

In the application, the SMEs must evidence that the purpose of the monopoly is to improve technologies or product quality, to reduce cost, and to enhance efficiency, to unify specifications and standards of products, or to implement specialized division of production; to increase the efficiency and competitiveness of small and medium-sized

undertakings; to serve public interests in energy conservation, environmental protection and disaster relief; to mitigate sharp decrease in sales volumes or obvious overproduction caused by economic depression. The SMEs must also prove that the monopoly agreement will not severely restrict competition on the relevant market; and the monopoly agreement enables consumers to share the resulting benefits or will not substantially restrict competition in the relevant market.

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