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The Anti-unfair Competition Law Is to Be Amended the Third Time

Edwarde Webre and Minning Wei

The State Administration for Market Regulation released an exposure draft of revisions to the Anti-unfair Competition Law of the People's Republic of China (the "**Exposure Draft**") on 22 November 2022 to seek public comment. Feedback was to be provided before 22 December 2022. Since it came into effect in 1993, the Anti-unfair Competition Law has been revised and amended in 2017 and 2019. With the economic developments of recent years, there are a few new competitive practices in the market deemed unfair by the authorities. In the Exposure Draft, supplementary provisions are proposed to be added for the governance of the existing unfair competitive practices including certain new types of unfair competitive practices, and enhanced the legal liabilities of the unfair competitors. Below are some key points to note.

1. General provisions

Article 2 of the Exposure Draft specifically provides that assisting others in committing unfair competitive practices shall also be deemed to be unlawful act. The newly added Article 4 brings the digital economy within the clear scope of the Anti-unfair Competition Law, providing that operators shall not take advantage of data and algorithms, technologies, capital advantages, platform rules and such to engage in unfair competition.

2. Supplementary provisions to the forms of existing unfair competitive practices

The Exposure Draft include supplementary provisions with regard to confusing practices, false promotion and taking advantage of technology to affect fair competition..

In Article 7, the use of without authorization of another operator's business logo that may influence keyword searches, to mislead the relevant public is added to be a new type of confusing practice.

In Article 9 with regard to false promotion, the scope of commercial promotions for this purpose are clearly defined to mainly include the display, demonstration, description, explanation, promotion or text marking of commodities through business premises, exhibition activities, websites, self-media, telephone, leaflets, etc., which do not constitute advertising.

In Article 16, setting links to one's own commodities or services by means of keyword association, false operation options or otherwise to drive traffic to the operator's own website and intercepting, shielding the contents or pages of the commodities or services legally provided by other operators without justifiable reasons can be deemed to be unfair competitive practices using technological methods.

3. New types of unfair competitive practices

Certain new types of unfair competitive practices are addressed in the Exposure Draft.

- a. Misusing a relatively dominant position

Article 13 of the Exposure Draft provides that any operator with a relatively dominant position shall not, without justifiable reason, commit any practices to impose unreasonable restrictions or additional unreasonable conditions on the business activities of its transaction counterparty, which may affect fair transactions and disrupt the fair competition order of the market. Six types of specific practices are listed in it, including forcing the transaction counterparty to sign an exclusivity agreement and tied sales. The term "relatively dominant position" includes the advantages of an operator in technology, capital, number of users, industry influence and other aspects, as well as other operators' reliance on such operator in transactions. Given the complexity of the reality, it is very difficult to determine the existence and the misuse of the relatively dominant position objectively. There shall be more specific and feasible criteria in the law. Otherwise there may be disputes in the implementation of such rules.

b. Malicious transactions

The newly added Article 14 governs the malicious transactions, which lists three specific practices that impede or disrupt the normal operation of other operators, including deliberately carrying out large-scale or high-frequency transactions to impede other operators' normal operation, maliciously ordering a large number of commodities in a short period of time without paying and returning goods or refusing to accept goods after malicious bulk purchase. This has been a particular issue in online commerce.

c. Improperly acquiring and using the business data of other operators

Article 18 of the Exposure Draft provides four types of improper acquisition and use of business data of other operators that infringes upon the legitimate rights and interests of other operators and consumers and disrupts the fair competition order of the market. The term "business data" for this purpose is defined to be data lawfully collected by operators which have commercial value and for which corresponding technical management measures have been adopted.

d. Unfair competitive practices in digital economy

There are three new articles regarding the unfair competitive practices in digital economy in the Exposure Draft. Article 15 provides that no operator shall take advantage of data and algorithms, technologies, platform rules and so on to disrupt the fair competitive order of the market by influencing user choices or otherwise. Article 17 reads that no operator shall take advantage of technical means, platform rules, etc. to improperly exclude or hinder the access to and transaction of the commodities or services legally provided by other operators in violation of industry practices or technical specifications, thus disrupting the fair competitive order of the market. Article 19 provides that no operator shall make use of algorithms to implement unreasonable differential treatment or unreasonable restriction for transaction counterparties in terms of transaction conditions by analysing user preference, transaction habit and other characteristics, which damages the legitimate rights and interests of consumers or other operators and the public interest, and disrupts the fair competitive order of the market. These provisions basically address the issues of unfair practices such as either-or choice on e-commerce platforms and big data discrimination in last few years that injure the competition and the customers.

4. Adjusting the legal liabilities of unfair competitors

Each illegal practice has its corresponding liability under the Exposure Draft. Overall, the fines imposed for the illegal practices are in the range of RMB 100,000 to RMB 500,000,000. For misusing a relatively dominant position, improperly acquiring and using other operators' business data, and using unfair competitive practices in digital economy like taking advantage of technological methods, in particularly serious circumstances, the supervision and inspection department of a people's government at the provincial level or above can impose on the operator a fine of not less than 1% but not more than 5% of its sales revenue of the previous year, and may order it to suspend business, and revoke the relevant business permit or business license; and if the legal representative, the person chiefly in charge and the directly liable persons of the operator are personally liable for the unfair competition practice, a fine ranging from 100,000 yuan to 1 million yuan shall be imposed.

It is worth noting that Article 41 of the Exposure Draft introduces provisions for settlement between operators. That is, where an operator is suspected of violating the provisions of the law, and the relevant operators have reached a settlement on the assumption of civil liability, or a people's court has made a ruling on civil liability, and the practice of the operators causes no harm to the fair competitive order and social public interests, no investigation may be conducted; the investigation may be terminated if having already been conducted, and the operator may be exempted from punishment if the investigation is completed.

In summary, large revisions are expected to be made to the existing Anti-unfair Competition Law. The new provisions will be worth carefully studying. The relevant operators should keep a close eye on the development of the Exposure Draft and assess its impact on its own business model. If there is any legal risk, the operators should consider making adjustment of their business plans in advance to cope with it. We will continue to monitor developments with respect to the amendment of the Anti-unfair Competition Law.

Want to know more?

Cynthia Chung
Partner

cynthia.chung@deacons.com
+852 2825 9297

Machiuanna Chu
Partner

machiuanna.chu@deacons.com
+852 2825 9630

Elsie Chan
Partner

elsie.chan@deacons.com
+852 2825 9604

Helen Liao
Partner

helen.liao@deacons.com
+852 2825 9779

Stefano Mariani
Partner

stefano.mariani@deacons.com
+852 2825 9314

Mark Stevens
Partner

mark.stevens@deacons.com
+852 2825 5192

Eduarde Webre
Consultant

eduarde.webre@deacons.com
+852 2825 9730

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