
SAIC Announces Beginning of Revision Process to Anti-Unfair Competition Law

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China's State Administration for Industry and Commerce (SAIC) has announced that it has formally begun the task of revising the Anti-Unfair Competition Law (AUCL).¹ SAIC's Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau held the first revision session in Beijing on February 28. Competition enforcement officers from local administrations for industry and commerce (AICs) including Jiangsu, Zhejiang, Shanghai and Guangdong, as well as law professors and scholars from Beijing University, Renmin University and China University of Political Science and Law, discussed framework, content and coordination.

SAIC is one of China's three competition law enforcement agencies with responsibility for non-price related abuse of dominance and monopoly agreements. It also has broad responsibilities with respect to the regulation of market order and consumer protection under the AUCL and other statutes.

The AUCL was enacted in 1993 and is enforced by SAIC. Through 2013, the 20th anniversary of the AUCL, there had been about 550,000 enforcement cases under the AUCL. The revision of the law first began in 2003 when the State Council commissioned SAIC to amend the AUCL to adapt to China's rapidly evolving market economy and legal landscape. After extensive surveys and consultations, SAIC submitted a draft revision to the State Council on October 8, 2009,² reflecting in particular adaptation to the newly promulgated Anti-Monopoly Law (AML, 2008) and amendments to China's intellectual property laws.

Under the AUCL in its current form, unfair competition is defined as activities which damage the legal rights and interests of other parties, disturb the order of the social economy, and otherwise violate the statute.³ While the AUCL is directed primarily at fraudulent or deceptive commercial activities, it also prohibits five types of monopolistic conduct, some of which are also regulated under the AML, including abuses of authority by utilities to eliminate competition,⁴ administrative restrictions on competition from enterprises in other jurisdictions,⁵ the sale of commodities below cost to drive competitors out of the market except under certain limited circumstances,⁶ tying the sale of one product to the sale of another product,⁷ and collusion in bidding.⁸

Article 15 of the 2009 draft revision would prohibit undertakings from using an advantageous position (a threshold that appears to be significantly less stringent than the threshold requirement of market dominance under the AML) to engage in anti-competitive conduct such as unreasonably limiting the business activity of a transaction counterparty, and unreasonably requesting a transaction counterparty to provide an economic benefit, purchase goods or services designated by the undertaking, or accept other unreasonable transaction terms. These provisions could be problematic as they do not specify the criteria for what constitutes an "advantageous position" or the requirement to establish the "unreasonableness" of the conduct in question, thereby making unclear the extent to which they conflict with Article 17 (abuse of dominant market positions) of the AML. The revision is particularly problematic for vertical relationships, restricting the latitude of producers and importers with respect to distribution and/or retailers.

The draft revision in typical Chinese regulatory language also introduces a "catch-call" provision that permits SAIC to define conduct that constitutes "unfair competition" under a broad range of principles, including fairness, equality, honesty and good faith, public order and commonly accepted business ethics. The draft revision also expands the scope of SAIC and AICs' enforcement powers to correspond to those granted by the AML, but without even the due process safeguards provided under the AML, such as the grounds and time period for investigations and the maximum period of time in which the authorities may take certain measures (such as seizing products or freezing bank accounts). Higher penalties are also provided by the draft revision on most violations.

Revision was intended in considerable part to harmonize the AUCL with the AML. The 2009 draft revision revealed the persistence of considerable gaps. The resumption of the drafting process may indicate greater recognition of the need to harmonize the AUCL so as not to undermine the AML by imposing looser enforcement criteria for conduct that would be permissible under the AML. Other important provisions that may be subject to revision include commercial bribery, illegal advertising, trademark infringement and protection of trade secrets, based on the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau's 2013 work report.⁹

¹ See SAIC, Work Dynamic, SAIC has formally initiated the task of revising the Anti-Unfair Competition Law (Mar. 3, 2014), *available at* http://www.saic.gov.cn/fldyfbzdzj/gzdt/201403/t20140303_142680.html.

² See AUCL amendment draft dated Oct. 8, 2009, *available at* <http://www.xthd.gov.cn/dvbbs/dispbbs.asp?boardid=4&id=671>.

³ AUCL, Article 2.

⁴ AUCL, Article 6, and AML, Article 17(4) applicable to business operators with dominant market positions.

⁵ AUCL, Article 7, and AML, Article 33.

⁶ AUCL, Article 11, and AML, Article 17(2) applicable to business operators with dominant market positions.

⁷ AUCL, Article 12, and AML, Article 17(5) applicable to business operators with dominant market positions.

⁸ AUCL, Article 15.

⁹ See SAIC, Work Dynamic, Key work for SAIC's Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau in 2013, *available at* http://www.saic.gov.cn/fldyfbzdzjz/gzdt/201302/t20130219_133364.html.

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