

Changes of Anti-Unfair Competition Law in China

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Abstract:

China's Anti-Unfair Competition Law has been revised twice in less than two years to have new anti-unfair competition behaviors included, the scope of market confusion behaviors defined, and the concept of "trade secrets", in particular, legally determined, as well as open and inclusive provisions imposed on unfair competition in the Internet field. This paper discusses the addition of "confidential obligations" and legal responsibilities, the regulation of "Internet" unfair competition behaviors, the extension of the scope of "trade secrets" protection and the return of the intrinsic nature of "commercial bribery".

Keywords: unfair competition, legislation, revision

I. Introduction

On September 2, 1993, China passed its first "Anti-Unfair Competition Law." On November 4, 2017, the Standing Committee of the Twelfth National People's Congress conducted the first major revision of the Act, having new anti-unfair competition behaviors included, the scope of market confusion behaviors defined, and the concept of "trade secrets", in particular, legally determined, as well as open and inclusive provisions imposed on unfair competition in the Internet field. for unfair competition behaviors in the Internet field. Following that, on April 23, 2019, the Tenth Meeting of the Thirteenth National People's Congress Standing Committee decided to amend the "Anti-Unfair Competition Law" just revised in 2017. This revision focuses on the relevant provisions with regard to trade secrets, enhances the scope of protection of trade secrets, and increases the penalties for trade secret infringements.

II. Addition of "confidential obligations" and legal responsibilities

Article 9 of the original "Anti-Unfair Competition Law" stipulates that disclosure, use or permitting others to use the trade secrets they possess in violation of the agreement or the right holder's requirements for trade secrets confidentiality shall be deemed an act of infringement of trade secrets. After the revision, the "in violation of the agreement" was amended to "in violation of the confidentiality obligation", which expanded the scope of the confidentiality responsibility of the enterprises' employees, partners and other personnel who might have

Access to trade secrets, thus addressed the issue of accountability regarding the violation of statutory confidentiality obligations.

In the previous legislation, the conditions under which one is obliged to "confidential obligations" originated from the stipulations of a confidentiality agreement and the requirements of the right holders, and such "confidential obligations" are contractual obligations. However, in judicial practice, some actors do not have contractual obligations of confidentiality, yet do need to assume confidentiality obligations due to the special nature of their identities. This requires an addition of statutory confidentiality obligations. The revised Anti-Unfair Competition Law, in response to this real demand in social life, extends the source of guarantee obligations from the agreement of two parties or the unilateral requirements to the direct provisions of the law for specific groups of people. Such amendments extend the scope of potential tort subjects and are of particular importance to the protection of trade secret right holders.

Similarly, the additions in this Article, namely "abetting, enticing, helping others to breach confidentiality obligations or violate the right holder's requirements for trade secrets confidentiality, obtaining, disclosing, using or allowing others to use the trade secrets of the right holders", and "natural persons other than the operators, legal persons and unincorporated organizations that carry out the illegal acts listed in the preceding paragraph shall be regarded as infringing on trade secrets", all of which expand the scope of liability for the infringement of trade secrets both in terms of acts and subjects. Pursuant to these expansions, cases that were previously difficult to characterize or pursue can be readily solved.¹

¹ Sun is the leader of the cadmium-nickel battery team of Company A who masters the core technology of cadmium-nickel battery and has signed a confidentiality agreement with Company A. In January 2016, Sun entered into an agreement with Company B which stipulates that a Company C shall be established by the two parties where Company B shall contribute the capital and the premises while Sun shall be responsible for the nickel-cadmium technology. In March 2016, Company C was established and Sun left Company A. Company C launched its nickel-cadmium battery and quickly occupied the market share that used to belong to Company A. Company B claimed that it did not entice or coerce Sun into leaking the nickel-cadmium battery technology and therefore did not infringe upon Company A. It would be more accurate and effective to investigate and pursue the infringement liability of Company B in accordance with the relevant content added in Article 9 of the Anti-Unfair Competition Law. (Excerpted from "New Saihan V: "Interpretation of the Newly Revised Anti-Unfair Competition Law, with the Focus Remaining on These Eight Aspects", 2018-3-15. <https://www.ijlass.org>

In practice, it is common for employees and former employees to infringe on trade secrets. According to statistics from some courts, such disputes account for more than 90% of the total number of trade secret cases.² Previously, as the Anti-Unfair Competition Law restricted the subject of infringement of trade secrets to “operators”, the scope was relatively narrow, and the requirement with regard to the purpose of the infringer was rather high in that it demanded the existence of a business purpose. And it is rather controversial as to whether the employees and former employees who obtain and disclose trade secrets for non-commercial purposes can be regarded as operators and whether they can be investigated for legal liability under the Anti-Unfair Competition Law.³ In recent years, a consensus has gradually been reached regarding these issues over the relevant debates. Therefore, the revision of the Anti-Unfair Competition Law solidifies the experience in practice and the consensus in debates as legal provisions, thus the liabilities for all the infringement of trade secrets by employees and former employees can be pursued in accordance with the Anti-Unfair Competition Law.

In terms of legal liability, the amount of civil compensation for malicious infringement has been increased. Article 17 of the amended Anti-Unfair Competition Law stipulates that the amount of compensation for an operator who has been harmed by unfair competition shall be determined according to the actual loss inflicted by the infringement; where it is difficult to calculate the actual loss, the compensation shall be determined based on the benefits derived by the infringer from the infringement. Where an operator maliciously commits an act of infringement of trade secrets, and the circumstances are serious, the amount of compensation may be determined as one to five times of the amount determined according to the above method. The amount of compensation shall also include reasonable expenses incurred by the operator to stop the infringement. Where an operator violates

//baijiahao.baidu.com/s?id=1628085863994021106&wfr=spider&for=pc. Last accessed: 2019-8-1.)

² Li Zhanke et al: “Detailed Analysis of Revised ‘Anti-Unfair Competition Law’”, *China Market Monitor*, 2019-5-22.

³ “In the previous first-review draft, on the basis of the current Anti-Unfair Competition Law, new regulations were imposed: the employees and/or former employees of the trade secret right holders who obtain the trade secrets of the right holders by theft, bribery, coercion or other improper means shall be deemed to have committed an act of infringement of trade secrets; the professionals of state organs, lawyers, certified public accountants, etc. shall keep confidential the trade secrets they get to be aware of during the performance of their duties. For this regard, some members of the Standing Committee of the National People’s Congress point out that the subject of the Anti-Unfair Competition Law shall be the operator, and the employees and/or former employees of the trade secret right holders are not the operator, and therefore, for their act of infringement of trade secrets, the right holders may seek relief through other legal channels; the relevant laws have provided for the commercial confidentiality obligations of the staff in state organs, lawyers, certified public accountants, and other professionals, and therefore it is not necessary for the Anti-Unfair Competition Law to repeat such provisions. The second-review draft adopted the above viewpoints and deleted the “circumstances regarding employee/former employees’ infringement of trade secrets” in the first-review draft, “professionals have confidentiality obligations to trade secrets” and other provisions.” (Wang Shu: “Anti-Unfair Competition Law Draft Amendments to Delete ‘Circumstances Regarding Employees/Former Employees’ Infringement of Trade Secrets”, the Beijing News, 2017-08-28).

Articles 6 and 9 of the Act, and it is difficult to determine the actual loss suffered by the right holder as a result of the infringement as well as the benefit obtained by the infringer out of the infringement, the people's court may grant the right holder a compensation of up to 5 million yuan based on the circumstances of the infringement. The relevant previous provisions stipulated a maximum compensation limit of 3 million yuan without any punitive damages. Even when faced with a malicious infringement of trade secrets, the amount of compensation available to the right holder can only be determined in accordance with the regulations regarding the actual loss suffered as a result of the infringement and the benefit obtained by the infringer out of such infringement. The new legislation stipulates that punitive damages can be awarded in the case of serious conduct of malicious infringement of commercial secrets, i.e. the amount of compensation can be determined as one to five times of the amount determined according to the calculation method prescribed by law. Adjusting the maximum amount of infringement compensation from 3 million yuan to 5 million yuan will undoubtedly help optimize the business environment and increase the cost of discredit. As for the administrative penalty, the revised Article 21 once again imposed a heavier administrative penalty. For acts of violations, an added penalty of "confiscation of illegal income" has been imposed, and the upper limits of fines has been raised from 0.5 million yuan and 3 million yuan to 1 million yuan and 5 million yuan respectively, greatly strengthening the deterrent effect of the law, also a very conducive move to crack down on infringement of trade secrets.

In terms of the burden of proof, the newly amended Anti-Unfair Competition Law added an Article 32, which changes the previous rules, and clearly stipulates the transfer of the burden of proof of the parties in the civil trial procedure for infringement of trade secrets. According to the rule of "the burden of proof rests with the claimants" in the civil lawsuit, the previous "Anti-Unfair Competition Law" assigns the burden of proof to the trade secret right holder and requires the right holder to prove the underlying trade secret rights and the existence of infringement.⁴ Under the new rules, as long as the right holder provides prima facie evidence that his/her trade secret has been violated, the alleged infringer must prove that he/she commits no infringement of trade secrets. This increases the burden of proof on the infringer and protects more effectively the legitimate rights and interests of the right holder of trade secrets.⁵

⁴ "According to the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases of Unfair Competition", the burden of proof regarding the constitution of a trade secret and the existence of infringement is assigned to the plaintiff. The enormously heavy and difficult burden of proof in trade secret cases has always been the pain spot for the right holders. Throughout the commercial secret infringement cases released by the China Judgment Document Network, out of all the cases of infringement of trade secrets tried in the courts from 2013 to 2017, 63.19% of them lost the lawsuit, 27.54% claimed partial victory, and only 9.27% won the case; the first-instance withdrawal rate of trade secret cases was also higher than other cases of unfair competition disputes." (Li Zhanke et al: "Detailed Analysis of Revised 'Anti-Unfair Competition Law'", China Market Monitor, 2019-5-22.)

⁵ For instance, in the case of infringement of trade secrets by Jinyu Electric Appliance Co., Ltd., which was investigated and dealt with by Suzhou Industrial and Commercial Bureau, acting on the complaints of Kinglake Electric Appliance Co., Ltd.,

III. Regulation of "Internet" unfair competition behaviors

Unfair competition in the Internet field has been a hot spot in recent years. The increase of unfair competition in the Internet field is also a focus of the revision of the Anti-Unfair Competition Law, and also a hot topic in recent years in the discussion of the revision of the Anti-Unfair Competition Law.⁶ In the Internet era, the carriers of trade secrets are mostly electronic data stored in computer systems. The way to steal trade secrets has also been "upgraded" and become much simpler, from which many unfair competition behaviors that do not exist in or cannot be adjusted by the original "Anti-Unfair Competition Law" have also been derived.⁷ And the judicial practice has also been

Suzhou Industrial and Commercial Bureau seized on the spot the production task list, export orders, inspection standards and inspection records, structural data sheets, drawings and product specifications and other documents of the defendant enterprise as such business information and technical information were consistent with Kinglake, the plaintiff's trade secrets, and the defendant company could not provide evidence that such business information and technical information used by it were legally obtained. In addition, the general manager of Jinyu Company at that time was a former employee of Kinglake Company who used to be the head of a branch of Kinglake Company, who had the access to those trade secrets. Under this circumstance, Suzhou Industrial and Commercial Bureau asserted that Jinyu Company had violated the business secrets of Kinglake. (Dong Yunlong: "The Four Aspects of the Revised Anti-Unfair Competition Law", Labor News, 2019-05-08.)

⁶ "The Anti-Unfair Competition Law (Revised Draft for Review)" has added and revised some provisions, which are highly targeted to the Internet industry competition rules. Law experts generally believe that, with reference to the legislative and judicial experience of other civil law countries, and in consideration of the connection with other laws such as the Anti-Monopoly Law, a comparative advantage position should not be stipulated in the Anti-Unfair Competition Law. A comparative advantage is not a typical unfair competition behavior, but rather an unfair trading behavior that restricts competition, the inclusion of which is inconsistent with the legislative objectives of the Anti-Unfair Competition Law. What's more, the pattern of manifestation of unfair competition provided by the special clause on Internet unfair competition in the review draft is too specific. Against a background under which the Internet is rapidly developing, in order to create a level playing field for the Internet market, legal regulation should be more forward-looking. Therefore, scholars suggest adopting a generalization and enumeration method that, to a certain extent, abstracts and classifies the new Internet unfair competition behavior". (Tian Chen: "Reputed Internet Companies and Legal Experts Discussed the 'Anti-Unfair Competition Law (Revised Draft for Review) in Beijing'", People's Network-Rule of Law Channel, <http://legal.people.com.cn/GB/n1/2016/0325/c188502-28226950.html>. Last accessed: 2019-8-1.)

⁷ "From the perspective of the types of unfair competition disputes involving networks, such cases are of three main types: one is the unfair competition disputes emerged during the transition of offline business to online business, such as the first online auction case in China, which is a typical example of such disputes; the second is the unfair competition disputes triggered off by the new business models, such as the first online credit rating commercial defamation case in China, which is caused by the new business model of Internet financing; the third is the unfair competition disputes triggered off by the implementation of tort via the use of new technology, such as the "Mai Mai Case" -- China's first case of unfair competition disputes involving user data, the case involving the alteration of browser UA to skip advertising, and the unfair competition

rather restraining pursuant to the "general terms" of the Actor "the principle of non-interference unless out of public interest necessity", rendering it hard to identify and hold accountable some of the newly devised unfair competition behaviors." Before the revision of the Anti-Unfair Competition Law, the obtainment of trade secrets through the aforementioned means can only be identified as an infringement by way of "other improper means." In the Internet era, as operators are using the Internet as a carrier, the "Anti-Unfair Competition Law" revised in 2017 explicitly includes, for the first time in history, domain names, websites, and web pages in the scope of protection against confusion behaviors, and classifies the unfair competition behaviors in the Internet field, which is undoubtedly a major development and progress of the Anti-Unfair Competition Law.

Article 12 of the "Anti-Unfair Competition Law" carries the following provisions for unfair competition behaviors in the Internet field: "Operators using networks to engage in production and business activities shall comply with the provisions of this law. Operators shall not use technical means, by way of influencing users' choices or otherwise, to engage in the following acts that impede or disrupt the normal operation of the network products or services provided by other operators: (1) to insert links or force a target jump in the legally provided network products or services of other operators without the consent of the latter; (2) to mislead, deceive, force users to modify, shut down, or uninstall the network products or services legally provided by other operators; (3) to maliciously implement incompatibility with the network products or services legally provided by other operators; (4) other acts that impede or undermine the normal operation of the network products or services legally provided by other operators." Among them, the newly added Paragraph 1 explicitly clarifies that operators using networks to engage in production and business activities shall abide by the provisions of this Law, and the reason behind such addition is the consideration of the fact that some of the unfair competition behavior in the Internet field are actually the extension of the traditional acts of unfair competition in the Internet field, with an emphasis on the consistency of legal production and law-abiding operations. Paragraph 2 carries some general provisions, emphasizing that "operators shall not use technical means, by way of influencing users' choices or otherwise, to engage in the following acts that impede or disrupt the normal operation of the network products or services provided by other operators," and adds Sub-paragraph 4 "other acts that impede or undermine the normal operation of network products or services legally provided by other operators" which, serving as a clause that covers matters not explicitly addressed therein, embodies its inclusiveness, openness and adaptability to the characteristics of the Internet.

In addition to these special provisions, other provisions of the Anti-Unfair Competition Law also regulate the unfair competition behavior in the Internet field. The provisions of Paragraph 3, Article 6 of the Act prohibit counterfeit and confusion behavior in the Internet field, i.e. unauthorized use of main parts of domain names, website names, web pages, etc., of others that are of certain influence, which might mislead consumers to identify as products of others or to believe there is certain

dispute involving the discriminatory treatment by Sogou Input Method of search engines." (Beijing Haidian District Court: "Analysis of Typical Cases of Network Unfair Competition", Economic Information Daily, April 25, 2018).

association with others. Such use is of unfair competition and shall constitute commercial confusion. For instance, in the case of unfair competition disputes of Beijing Five Eight Information Technology Co., Ltd. vs. Five Eight Tongcheng (Beijing) Real Estate Brokerage Co., Ltd., the court found that the term “58 Tongcheng” has established a specific and solid association with the website operated by the Five Eight Information Company and the services provided by the said website, and has achieved a relatively strong salience that is sufficient enough to distinguish the source of goods or services.⁸ Article 8 of the Act stipulates that operators shall not make false or misleading commercial propaganda on the “sales status” or “user evaluation” of their goods to deceive or mislead the consumers; nor shall they organize false transactions or otherwise to help other operators make false or misleading commercial promotions. The “sales status” and “user evaluation” referred therein are mainly targeted at the e-commerce field where false propaganda is rampant, aiming to regulate behaviors such as the employment of “water army (people hired to post misleading messages online)” offline to “make false transactions and evaluations online” by e-commerce platform operators. In the revision in 2019, “electronic intrusion” was added to Paragraph 1(a), Article 9, which is a more explicit response to the needs of the development of the Internet. However, the clause does not clearly define what constitutes an “electronic intrusion”. The crime of illegally obtaining computer information system data as stipulated in Paragraph 2, Article 185 of the Criminal Law also regards “intrusion” as a constitutive element of crime. It would be advisable to take that into consideration when offering detailed interpretation of the term “electronic intrusion” in the relevant supporting judicial interpretations..⁹

IV. Enhancement of the protection of "trade secrets"

In Article 9 of the revised Anti-Unfair Competition Law, the extension of “trade secrets” has been significantly expanded: “The trade secrets referred to in this Law refer to the technical information, operational information and other business information that are not known to the public and have commercial value, and are subject to the corresponding confidentiality measures adopted by the right holder of such information.” Compared with the “Unfair Competition Law” of 2017, the wording in

⁸ “The New Anti-Unfair Competition Law carries provisions with regard to unfair competition involving the Internet”, Red Shield Forum, 2017-12-01.

https://www.sohu.com/a/208011616_100009597. Last accessed: 2019-8-2.

⁹ The object of “intrusion” under the stipulation of illegal access to computer information system data is not a computer system in the fields of national security, national defense security and cutting-edge technology. Otherwise, such “intrusion” will constitute the illegal access to computer information system provided in Paragraph 1 of Article 285. The crime of. For the “electronic intrusion” stipulated in the newly amended “Anti-Unfair Competition Law”, the object of intrusion is not subject to the foregoing provisions, and should include all electronic carriers having information on the trade secrets of others stored in, including digital office systems., server, mailbox, cloud disk, application account, etc.” (“Detailed Analysis of Revised “Anti-Unfair Competition Law”)

“... of practicality and can bring economic benefits to the right holders” in the definition of “trade secrets” was amended as “... having commercial value.” Through this generalized expression, the pattern of manifestation of trade secrets is no longer limited to “technical” or “operational” information. This amendment is not only in line with the internationally accepted “trade secrets” law, but also a special amendment aiming at addressing the problems in judicial practice. In judicial practice, what is meant by “practicality” and how to prove that “practicality” can bring economic benefits to right holders can easily cause ambiguity and controversy. For example, should the experimental data in the process of technological development be regarded as practical? The new legislation changes the expression into “... having commercial value” to accurately convey the substantive attributes of trade secrets and the amended expression can be easily understood by the public.

The combination of “commercial value” and “commercial information” provides a broader scope for corporate trade secret protection and extends the scope of trade secrets. The use of “commercial information” as the central word for the added “technical information” and “operational information” covers the information that can hardly be defined as technical information or operational information, but has commercial value, such as the identity of a shareholder concealed by a company, shareholding ratio, a person holding shares on behalf of the shareholder, etc., which can be regarded as business information and included in the protection system of trade secrets. The limitation of “... are subject to the corresponding confidentiality measures adopted by the right holder ...” also imposes specific requirements for the confidentiality responsibility of the enterprise, which helps to improve and perfect the trade secret protection system. Enterprises, technology enterprises in particular, must closely combine trade secret protection with other intellectual property rights protection, and do a good job in adopting precautionary measures, having in-process control and safeguarding legal rights following any confidentiality incident.

As for the provisions on the means of trade secret infringement and the infringement act, Article 9 of the Act adds the use of “electronic intrusion” means to obtain the trade secrets of the right holders, and for the first time regulates the means of illegal, indirect obtainment of trade secrets, i.e., “abetting, enticing, helping others to breach confidentiality obligations or violate the right holder’s requirements for trade secrets confidentiality, obtaining, disclosing, using or allowing others to use the trade secrets of the right holders”.

Similarly, in Article 9 of the Act, “where a third party is fully aware of or should have known the illegal acts as listed in the preceding paragraph committed by the employees, former employees of the trade secret right holder or other units or individuals, still obtain, disclose, use or allow the use of the trade secrets, such act of the third party shall be regarded as infringement of trade secrets.” And, on the basis of the original regulations, the addition of “... the employees, former employees of the trade secret right holder or other units or individuals ...” has significantly expanded the infringement subject of “trade secrets”. In practice, common trade secret infringements are mostly disclosure of the trade secrets of right holders by employees during the employment; resigned employees taking away trade secrets; employees departing upon expiration of labor contracts without handing over trade secrets;

employees obtaining trade secrets via electronic intrusion during employment; employees becoming shareholders of or establishing peer companies during employment and using trade secrets; suppliers violating trade secret protection agreements to infringe upon trade secrets; competitors sending agents into the company to obtain trade secrets. Therefore, on the basis of carrying entity operators of infringement of trade secrets, the inclusion of other natural persons, legal persons and unincorporated organizations as the subject of infringement of trade secrets is conducive for the supervision and inspection department to quickly identify the parties involved and subject the same to the administrative law enforcement and administrative penalty to be administered by administrative organs.

In order to enhance protection, the new Anti-Unfair Competition Law also amends the “profits obtained via infringements” as “interests obtained via infringements”, where the latter’s extension is even larger, covering the various benefits obtained by the infringer via infringements, such as the increase in wage incomes, the proceeds of selling trade secrets, etc. The new law changes “the reasonable expenses paid by the operator for investigating unfair competition” to “the amount of compensation should also include the reasonable expenses incurred by the operator to stop the infringement” where the extension of stopping the infringement is obviously expanded to include the attorney fees, appraisal fees, etc. for safeguarding the rights. The revised "Anti-Unfair Competition Law" adds a new Article 27: "Operators in violation of the provisions of this Law shall assume the civil, administrative and criminal responsibilities, and if their property is insufficient to cover the compensation, priorities shall be given to the assumption of civil liabilities in the disposition of such property. According to this, infringement of the trade secrets of others entails not only the assumption of civil liabilities, but also that of administrative or criminal liabilities. Administrative liabilities may involve fines, and criminal liabilities may involve penalties, and when the property of the perpetrator is insufficient for the simultaneous payment of the two, priorities shall be given to the payment of civil compensation.

The enhancement of the protection of trade secrets is also reflected in the requirements of law enforcement officials and government supervision departments. First of all, law enforcement officials will be punished for leaking trade secrets. Article 15 of the revised Anti-Unfair Competition Law stipulates that the supervision and inspection department and its staff shall be obliged to keep confidential the business secrets that are known to them during the investigation. Article 30 stipulates that the staff of the supervision and inspection department divulging the business secrets that are known to them during the investigation shall be subjected to disciplinary action in accordance with the law. Secondly, the government supervision and inspection department shall have the responsibility of investigation and treatment. Article 16 of the Act stipulates that any unit or individual shall have the right to report to the supervision and inspection department for suspected acts of unfair competition, and the supervision and inspection department shall promptly handle the case in accordance with the law after receiving the report. The supervision and inspection department shall publish the telephone number, mail box or e-mail address for such reports and keep confidential the particulars of the

reporter. In case of real-name reporting where relevant facts and evidence are provided, the supervision and inspection department shall inform the informant of the result of the treatment.¹⁰

V. Definition of the scope of “commercial bribery”

Commercial bribery is essentially an improper exchange of interests. In commercial bribery, the benefit carrier induces through the transmission of improper interests the benefit recipient to betray the employer, the entrusting party or third-party interests in violation of his/her loyalty or fiduciary duty, and to use his/her authority and influence to gain advantages for the benefit carrier. Aiming at protecting the healthy development of the market economy, the relevant provisions in the revised Anti-Unfair Competition Law further defines the behavior of “commercial bribery” in an attempt to address the many issues of the previous laws including the excessively generalized clauses, nonconformity of enforcement standards for commercial bribery, and the difficulty in the grasp of the scope of law enforcement in different localities.

Article 7 of the new "Anti-Unfair Competition Law" stipulates that: operators shall not use property or other means to bribe the following units or individuals in order to obtain trading opportunities or competitive advantages: (1) functionary of the counterparty of transactions; (2) units or individuals entrusted by the counterparty of transactions to handle the relevant affairs; (3) units or individuals exploiting authority or influence to influence the transactions. In trading activities, operator may offer discount to the counterparty of the transaction in an express manner, or pay commission to the intermediary. Where an operator pays a discount to the counterparty of the transaction or pays commission to the intermediary, such payment shall be accounted for truthfully. Operators who accept discounts and/or commissions shall also have such payment accounted for truthfully. Where the employee of an operator conducts an act of bribery, such act of bribery shall be deemed to be the behavior of the operator unless the operator has evidence that the act of such employee is not related to the securement of transaction opportunities or competitive advantages for the operator.¹¹

¹⁰The amendment of "Anti-Unfair Competition Law" is in line with the revision of "Foreign Investment Law" adopted at the Second Meeting of Thirteenth National People's Congress on March 15, 2019. Article 23 of the Foreign Investment Law stipulates that: "The business secrets of foreign investors and foreign-invested enterprises that are known to the administrative organs and their staff members in the course of the performance of their duties shall be kept confidential and shall not be disclosed or illegally provided to others." Article 39 stipulates that: "Where a staff member of an administrative organ abuses his/her power, neglects his/her duties or engages in malpractices in the promotion, protection and management of foreign investment, or divulges or illegally provides others with trade secrets that he or she becomes aware of in the course of performing his/her duties, he/she shall be punished according to law; where such behavior constitutes a crime, he/she shall be held criminally responsible."

¹¹ "Paragraph 1 of Article 7 of the revised draft stipulates that the operator shall not use property or other means to bribe the counterparty of the transaction or a third party that may affect the transaction; Paragraph 4 provides that the so-called third parties that may affect the transaction referred to in Paragraph 1 of this Article refers to the units and/or individuals that may

Previous legislation stipulated that the purpose of commercial bribery was to “sell or purchase goods”, yet in practice, however, the purpose of commercial bribery is not limited to selling or purchasing goods. If commercial bribery can only happen in the course of sale or purchase of goods, it will be difficult to identify the nature of many acts of commercial bribery. Therefore, the amended legislation expands the scope of the purpose of commercial bribery, determines that the purpose of commercial bribery is to “secure trading opportunities or competitive advantages”, which expands the scope of regulating and combating commercial bribery. This was also one of the purposes of amending the Anti-Unfair Competition Law.

The new law has significantly expanded the scope of the subject of bribery.¹² The old law simply described the party accepting bribes as “the unit or individual of the counterparty”, which renders it a tough job to identify the relationship between the trading entities where such trading entities resort to various means to evade legal liability in an attempt to secure illegitimate interests. For example, in the sale of drugs, some hospitals require that the drug factory must accept its designated agency as a seller, otherwise it will refuse to purchase drugs from certain pharmaceutical companies. These intermediaries are neither the drug buyer nor the seller, but they help the buyer and the seller to realize the transmission of improper benefits, and they also benefit from such activities. Therefore, they should also be subjected to the regulation by the Anti-Unfair Competition Law. The revised legislation expands the subject of bribery to “other persons who are closely related to the transaction behavior”, and clearly stipulates that the act of bribery of the employee of an operator shall be deemed to be the behavior of the operator (unless the operator has evidence that the behavior of the such employee is

exploit their authority to influence the transaction. Some members of the Standing Committee as well as some local governments and departments point out that the scope of “units and/or individuals that may exploit their authority to influence the transaction” is not clear, and recommend further clarification of such definitions; some opinions suggest that the Criminal Law provides for bribery to state organs, state-owned companies, enterprises, institutions, people's organizations or state functionaries, as well as bribery to non-state functionaries, and recommend that certain linkage to the Criminal Law be made when defining the relevant terms in this Article. The regulations are linked. The Law Committee has proposed to merge Paragraph 1 and Paragraph 4 of Article 7 of the revised draft.” (The Law Committee of the National People's Congress: “Report on the Revision of the ‘Anti-Unfair Competition Law of the People's Republic of China (Revised Draft)’”, “the Chinese National People's Congress Network, November 4, 2017.

http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-11/04/content_2031357.htm. Last accessed: 2019-8-2.)

¹² “Commercial bribery has always been the focus of investigations against unfair competition. However, due to the significant changes in the characteristics of commercial bribery, bribery via fraudulent accounts between operators has become obsolete and been replaced by offering or accepting bribes through third parties, and the current law fails to provide for behaviors of third parties, making it hard to effectively regulate the third parties in commercial bribery cases”(Zhao Wenjun: “Four Highlights of the First Revision of Anti-Unfair Competition Law”, Xinhua net, February 22, 2017.

http://www.npc.gov.cn/zgrdw/npc/cwhhy/12jcw/2017-02/23/content_2007867.htm. Last accessed: 2019-8-3.)

not related to the securing of transaction opportunities or competitive advantages for the operator). Such provisions are prescribed in recognition of the existing market business model, and are also reforms in line with the development of the market economy, which is conducive for the better identification of commercial bribery acts, helps to eliminate unfair competition and ensure the normal functioning of the market economy.¹³

The revised commercial bribery clause explicitly identifies the three types of subject of bribery, namely the functionary of the counterparty of transactions, units or individuals entrusted by the counterparty of transactions to handle the relevant affairs and units or individuals exploiting authority or influence to influence the transactions, and excludes the “unit of the counterparty” from the scope of the bribe-taking subject, and the extension of commercial bribery is thus made more explicit, and the trading counterparties’ acts of benefits offering and taking (such as sales rebates, admission fees, etc.) that were previously investigated as acts of commercial bribery are no longer identified as acts of commercial bribery. In other words, if it is not for the purpose of securing trading opportunities or

¹³ The effect was obvious after the implementation of the new law. For example, a medical equipment manufacturing company in Xuanhua District, Zhangjiakou City successively entered into cooperation agreements with 8 hospitals in Hengshui, Xingtai and other cities to provide free of charge each such hospital one automatic biochemical analyzer. The agreement is that, during the 5-year cooperation period, the analyzers shall be used by the hospitals, and the company shall provide supporting reagents, and the hospitals must purchase the reagents in an amount up to 150,000 yuan or 200,000 yuan per year, and following the expiration of the 5-year term of the contract, the proprietary right of the analyzers shall be vested to the hospitals. The contract also stipulates that, if either party elects to terminate the performance of the contract, such party shall pay to the other party a one-time compensation payment of 20% of the total amount of the cooperation project. Is the free provision of analyzers an act of commercial bribery? How to identify the "counterparty" in the new "Anti-Unfair Competition Law"? The Market Supervisory Authority determines that the company commits an act of commercial bribery and imposes penalties in accordance with the provisions of Paragraph 3 of Article 7 of the Act. The train of thought and reasoning of the case-handling personnel are in line with the provisions of the new law: "Though the company involved did not directly sell the reagents to the patients, it did provide the analyzers to the hospitals free of charge, and then indirectly sold the reagents to the patients through the hospitals. On the surface, the hospitals are the trading counterparties of the company, yet in reality, the reagents are ultimately paid by patients and the national health insurance. Thus, the patients are the company's trading counterparties, and the hospitals are but the influential units". "In order to reach the sales amount stipulated in the agreement, the 8 hospital would inevitably increase the intensity or frequency of inspections. At the same time, in order to avoid the assumption of liquidated damages, the hospitals could only purchase reagents from the company that are significantly pricier than the similar products in the market. And, as the analyzers were encrypted with special codes, it is virtually impossible for the hospitals to use reagents from other manufacturers. It can be seen that the company provided analyzers for the hospitals in an attempt to secure the market and gain a competitive advantage, and exclude other competitors, which undermines the market economy order of fair competition and also puts a burden on the hospitals, patients and national health insurance." (Li Xiangli: "The Economic Inspection Detachment of the City's Market Supervisory Authority Uncovered a Case of Commercial Bribery", Zhangjiakou News Net, March 6, 2019. <https://news.sina.com.cn/o/2019-03-06/doc-ihsxncvh0198922.shtml>. Last accessed: 2019-8-3)

competitive advantages, even if an improper benefit offering and taking exists in the business operation, it will not be treated as an act of commercial bribery.

The new rules that distinguish between the employee's act of duty and personal behavior also reserve space for corporate exemptions. In the past enforcement of commercial bribery, all the acts of commercial bribery of the employee were identified as corporate behavior. The revised commercial bribery clause presumes the employee's act of bribery as the operator's behavior with exceptions prescribed, i.e., where the operator has evidence that the act of such employee is not related to the securement of transaction opportunities or competitive advantages for the operator, which, while setting aside space for corporate exemptions, also promotes the enterprises to strengthen their internal compliance management against commercial bribery.

VI. Conclusion

China's "Anti-Unfair Competition Law" has been successively revised within the past two years, mostly for purposes of intellectual property protection. The most recent revision in particular is made only on trade secrets in intellectual property rights, highlighting the new, upgraded efforts of Chinese government in strengthening the protection of intellectual property. At the same time, such revision is also in line with the requirements of the new "Foreign Investment Law" for the protection of intellectual property rights. The new Anti-Unfair Competition Law regulates the relevant behaviors of various entities in the protection of intellectual property rights, and will play a more active role in the establishment of a fair competition order in the market and the protection of the legitimate interests of right holders.