How to Compete Fairly in the Digital Era – Implications of the New Anti-Unfair Competition Law

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Introduction

On 4 November 2017, the Standing Committee of the National People's Congress of China finally passed the long-awaited amendments to the Anti-Unfair Competition Law (AUCL), which takes effect on 1 January 2018. This is the first time the AUCL has been amended since it came into effect in 1993, and it will have significant impact on business practice in China.

The revision of the AUCL covers various legal issues, such as acts of confusion (Article 6), commercial bribery (Article 7), false or misleading business promotion (Article 8), infringement upon trade secrets (Article 9), illegal prize-giving sales (Article 10), spread of rumors or misleading information (Article 11), and Internet-related unfair competition by technical means (Article 12).

In particular, the revised AUCL included a new section addressing the Internet-related unfair competition. Some of the unfair competition behaviour (e.g. false or misleading online business promotion) are more like an online version of the traditional acts of unfair competition. Other Internet-related unfair competition behaviour is unique in the digital age driven by information technical means.

This article mainly focuses on the latter, i.e. unique unfair completion in the digital world, and endeavors to illustrate some precedents and interpretations of Article 12 of the AUCL and analyze how Article 12 will be applied and enforced in practice.

Codification of existing case law

Article 12 is one of the most debated topics of this overhaul on the AUCL. Although some argue that this 'Specialised Internet Clause' has provided sufficient protection for fair competition in the Internet sector, it may remain difficult to cover all types of unfair competition in the changing digital age.

Article 12 clarifies the standards in determining the Internet-related unfair competition and codifies existing case practice by courts. Though there is no specific Internet unfair competition regulation in the existing AUCL, courts have developed a series of well-formulated legal principles on analysis of Internet unfair competition based on Article

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2 of the AUCL, i.e. a general definition of unfair competition that prohibits the activities of disrupting market competition order and undermining legitimate rights and interests of other business operators or consumers.

Article 12 of the amended AUCL prohibits certain types of conduct by Internet players which are deemed to constitute unfair competition. The key idea behind the conduct listed is that an Internet company is prohibited from obstructing legitimate activities of competitors or confining consumers' right of choice.

It clearly states that a business operator shall comply with the AUCL when engaging in production and business activities by using the Internet. Further, it states that a business operator shall not use technical means to carry out four kinds of activities (three particular type of behaviour and one miscellaneous provision) that obstruct or disrupt the normal operations of the online products or services lawfully provided by other business operators by way of affecting users' choices or otherwise.

The first type of prohibited unfair competition behavior is inserting links or forcing the redirection of targets in the online products or services offered by another operator without consent of such operator. For example, in the case of *Baidu v. Aoshang Co., Ltd.*[2], the court found that Aoshang, without permission, forcefully popped up particular advertising contents that closely relate to Baidu's general search results by using technical means, and induced Baidu search users click on the advertising page, thereby undermining the legitimate commercial interests of Baidu. The court held that the acts of Aoshang violated the principle of good faith and recognised commercial ethics and prevented other operators from operating properly and undermined their legitimate interests.

The second type of prohibited behavior is misleading or compelling users to modify, close or uninstall the online products or services that are lawfully provided by other business operators, or deceiving users to modify, close or uninstall such products or services. In *Tencent v. Sogou*[3], Sogou Pinyin input method popped up 'input method repairment' window to guide users to delete the shortcut of QQ pinyin input software (operated by Tencent) in the language bar, resulting in the outcome that users cannot use QQ pinyin input software. Such behaviour was condemned by the court as unfair competition.

The third type of unfair completion, which might be the most controversial, refers to malicious implementation of technology that undermines the compatibility of legal network products or services offered by other business operators. However, the new AUCL does not provide any explanation of "malicious incompatibility". Such controversial

[2] Beijing Baidu Netcom Science Technology Co., Ltd. v. Qingdao Aoshang Network Technology Co. Ltd., China Unicom (Qingdao) Limited, China Unicom (Shandong) Limited, available at: http://ipr.court.gov.cn/sdjdws/201104/t20110422_141618.html.

[3] Tencent Technology (Shenzhen) Co., Ltd. v. Beijing Sogou Technology Development Co., Ltd., Beijing Sogou Information Services Ltd, available at: http://www.pkulaw.cn/case/pfnl_117816331.html?match=Exact.

incompatibility issue can be tracked back to *Qihoo 360 v. Tencent*[4], in which Tencent compelled its users to choose only one out of two platforms (Tencent's Instant Messaging Software QQ or Qihoo's 360 anti-virus software), and users who chose to use QQ were not allowed to use 360 anti-virus software. The Supreme Court ruled that such forceful incompatibility behaviour did not constitute abuse of dominant position. Some experts claim that while the provision aims to promote resource sharing, it may – despite the legislative intent – have the unintended consequence of restricting competition and innovation. Generally speaking, a business operator is free to adopt an intentional incompatible strategy to compete with other competitors. Apple is a vivid example of adopting a unique closed ecosystem of "incompatible" nature. Clarifications on the boundary between malicious incompatibility and justified incompatibility are needed either by the enforcement agent or the courts in future.

Taking into account the challenges arising from the fast-growing and changing internet sector, the revised AUCL provides a miscellaneous (catch-all) provision on unfair competitive conduct in the fourth paragraph of Article 12. Under this catch-all provision, an operator is prohibited from impeding or destructing the normal operation of the online products or services legitimately provided by other business operators.

In conclusion, the revision of AUCL reflects the current technological advancements, and absorbs the Courts' contribution on past judicial practice.

Inherent limitation of Article 12 and future developments

However, given the quick upgrade of technology advancement and fierce competition in the digital world, it appears that the three types of explicitly prohibited unfair competition behavior that can be caught by Article 12 are becoming 'old fashioned' Internet unfair competition behaviour, as there are more new and novel types of infringement behaviour which are not clearly defined in Article 12 of the AUCL.

This is partly because Article 12 has its inherent limit that it over-emphasizes technological interference from its literal expression. The end results of whether links insertion/redirection or unlawful modification/uninstallment is direct losses of one business operator. In other words, one business operator will gain profits by directly infringing other business operators' products/services. Nevertheless, in practice certain unfair competition behaviour (e.g. data crabbing) might not directly negatively affect other business operators' products/services.

Another reason why those old-fashioned Internet unfair competition disputes would be reduced is thanks to deterrence of court decisions and innovation of the business models in the Internet industry. Once important judicial decisions have been made, the market will soon respond promptly and adjust its corresponding behavior and business models. This

[4] Beijing Qihoo Technology Co., Ltd. v, Tencent Technology (Shenzhen) Co., Ltd, available at: http://www.court.gov.cn/wenshu/xiangqing-7973.html

also explains why after a series of unfair competition cases such as *Youku v. Jinshan*[5] and *Aiqiyi v. Juwangshi*[6], it is becoming rare to see online video advertisements filter software, because the courts ruled that such advertising filtering would constitute unfair competition practice.

This is not to say software interference that aims at gaining traffic will soon disappear. The most important thing in the Internet era, regardless of the legitimate competition or unfair competition, is still to compete for traffic. The online traffic or volume of visits is and will remain a key competitive resource of the Internet industry. Also, there is a trend that Internet competition is shifting from pure traffic competition to data capture/content free-riding, due to the rapidly-decreasing rate of traffic volume and rocketed increase of importance of data resource.

Recent cases exemplify such trend. In *Sina Weibo v. Maimai*[7], the court claimed that without the consent of users and authorisation by Sina Weibo, Maimai was not allowed to crawl the public information on Weibo platform and conduct technical matching to promote its own service, thereby constituting unfair competition. The court even established a controversial 'triple authorization principle'. This means that except the initial users' authorization on Weibo's data collection and Weibo's authorization on Maimai's data collection, users shall also knowingly and directly allow Maimai to collect their personal information on Weibo's platform. However, it seems questionable because a data-holding platform has no incentive to share its data resources. Such principle may over-compress the space for data sharing and subsequent development, which is not conducive to encouraging the market to form a healthy ecosystem of data interconnection.

All in all, it is vital to comprehend characteristics of the Internet sector, for determining if a particular conduct might lead to unfair competition. It is foreseeable that data competition will play a major role in future Internet unfair competition.

Application of "rule of reason" approach

Another feature of competing on the Internet field is the boundaries between unfair competition and fair competition become obscure, and protecting innovation in the Internet sector is getting increasingly important. Defining unfair competition conduct in the internet sector involves a careful balance of promoting new technology and protecting legitimate rights, which is challenging during law enforcement.

However, the revised AUCL does not state an applicable and detailed standard to identify

[5] Cheetah Browser (Beike Internet (Beijing) Security Technology Co., Ltd.) v. Youku Video (Heyi Information Technology (Beijing) Co., Ltd.), available at: http://wenshu.court.gov.cn/content/content?DocID=da622ae4-9876-47f4-939b-b00f54682c1c .

[6] Beijing Iqiyi Technology Co., Ltd. v. Shenzhen Juwangshi Technology Co., Ltd, available at: http://wenshu.court.gov.cn/content/content?DocID=a700eaa5-079a-47cc-b3c4-e18195d79531.

[7] Beijing Taou Technology Co., Ltd. v. Beijing Micro Dream Network Technology Co., Ltd, available at: http://wenshu.court.gov.cn/content/content?DocID=49854fde-619a-47d7-b772-a71d000fcf00.

whether particular conduct constitutes unfair competition behaviour, especially for those controversial competition conduct. In this sense, how to define unfair competition conduct still needs judicial elaboration. Although the court has developed several theories based on the loss of trading opportunities, it still requires more comprehensive and detailed assessment in relation to those diversified and quickly changing Internet competition status.

It can be argued that the "rule of reason" approach should be adopted, where the importance is assessing whether actual/potential harm on competition may outweigh actual/potential procompetitive effects, as usually applied in antitrust cases. When finding a specific behaviour as unfair competition, normally the following three factors shall be considered: (1) whether the legitimate rights and interests of other business operators have been infringed; (2) whether consumer welfare has been deprived of; and (3) whether competition order has been negatively affected. "Rule of reason" will further require the court to consider whether there is any positive welfare benefit attributable to the alleged behaviour.

Taking data crabbing as an example, it might be difficult to assess its legality. On one hand, data crabber may infringe upon other business operators' competitive resources, but it may bring about innovation as well. On the other hand, those business operators who refuse to share data may constitute malicious incompatibility, if such data is deemed essential to effective competition. Hence, use of the "rule of reason" approach may be critical to future anti-unfair competition cases.

Dianping.com v. Baidu[8] is a recent precedent that applies "rule of reason." In this case, Baidu map used technical means to grab a lot of review information from dianping.com, and Baidu map search will display these reviews, though it also attached the original link of those comments. The Court held that although Baidu map, to a certain extent, enriched the choice of its consumers, it was disproportionate as it did not take the measure that could be least harmful to dianping.com. Moreover, Baidu's vertical search service substantively replaced reviews generated from dianping.com, which not only undermined the interests of dianping.com, but also curbed the incentive to further invest in content providing services of dianping.com, thus hindering the order of market competition.

Conclusion

There is no doubt that Article 12 gives a relatively practical and clear guidance for business operators to legally and fairly compete in the Internet era. It also enables Internet enterprises to better safeguard their legitimate rights and interests when faced with Internet unfair competition. Even if some Internet unfair conducts are not clearly stated, competition enforcement authorities, particularly the courts, may still use Article 2 to

[8] Shanghai Hantao Information Consulting Co. Ltd. v. Beijing Baidu Netcom Science Technology Co., Ltd, available at: http://wenshu.court.gov.cn/content/content?DocID=41dbc226-7514-4738-86a6-a7f90124a13c.

determine the legality of such conduct.

On the other hand, enforcement of Internet competition cases shall be prudent in order to maintain market incentive to promote innovation. It has been widely recognised around the world that over-enforcement in the Internet sector may lead to high error costs. Thus, it is expected that more effect-based analysis will be seen in future Internet unfair competition cases.