

## THE REGULATION OF MISLEADING ADVERTISING UNDER LAWS IN CHINA

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### **Introduction**

In the market competition of modern society, commercial publicity, mainly in the form of advertising, is an important means for business operators to open up markets and promote sales to obtain competitive advantages. Advertising provides buyers with product information, which indicates the differences among various business operators and their products and serves as the basis for buyers to make a purchase decision. Advertising can also arouse buyers' curiosity and desire to buy, induce consumption, popularize products, and project a positive image of business operators and their products. Therefore, advertising is a powerful tool for business operators to increase their competitiveness in the market, promoting competition.

However, the positive roles of advertising shall be based on its authenticity and accuracy. False or misleading advertising, instead of playing the aforementioned positive roles, will undermine fair competition, mislead consumers and harm the legitimate rights and interests of other business operators. To maintain the competition order in the market and protect the interests of consumers, advertising, especially misleading advertising, should be regulated by the government of a country.

This essay, therefore, introduces and analyzes how misleading advertising is regulated under laws in China.

### **1. Concepts Related to Misleading Advertising in Laws of China**

Misleading advertising is an internationally accepted term. In China, mainly the *Advertising Law of the People's Republic of China* (hereinafter referred to as the *Advertising Law*) and the *Anti-Unfair Competition Law of the People's Republic of China* (hereinafter referred to as the *Anti-Unfair Competition Law*) set rules against misleading advertising. As the *Advertising Law* only regulates commercial

advertising activities defined in Article 2<sup>1</sup>misleading advertising in any means beyond advertisement is managed under the *Anti-Unfair Competition Law*.

### 1.1. False advertising in the Advertising Law

Instead of the concept of ‘misleading advertising’, the *Advertising Law* adopts the concept of ‘false advertising’, which refers to advertisements that use false or misleading content to defraud or mislead consumers. However, the *Advertising Law (1994 version)* severely limited false advertising as the advertisement containing false information.<sup>2</sup> Until the *Advertising Law* was amended in 2015, advertisement with misleading content was first confirmed to be false advertising.

The purpose of the *Advertising Law* prohibiting false advertising is to set up the authentic principle in advertising activities. While in China’s relevant practice, it was found that apart from false advertisements that were absolutely against objective facts, those that were able to give most of the audience an impression of the publicized products different from the facts of the products could also defraud or mislead consumers, thus causing same social damages as false advertisements. This demonstrates that prohibiting false advertising by its literal meaning is failed to regulate some emerging problems and issues, thus being unable to meet the objective requirements for the development of the advertising industry. As Zhang Mao, then minister of the State Administration for Industry and Commerce, pointed out in the *Explanation concerning the Advertising Law of the People’s Republic of China (Amended Draft)*, ‘The criteria for determining false advertising have yet to be clearly defined, and the legal basis for effectively punishing false advertising is not sufficient.’<sup>3</sup> In response to these requirements, the *Advertising Law* adopts the criteria for false advertising in Article 28 in 2015 version, which includes misleading advertisement. Consequently, an update of the understanding of advertising authenticity results in the development of the meaning of false advertising concept. In the latest *Advertising Law*, the identification of false advertising does not distinguish between false content and misleading content.

### 1.2. False or misleading commercial publicity in the Anti-Unfair Competition Law

‘False or misleading commercial publicity’, as is worded in the amended version of the *Anti-Unfair Competition Law* in 2017, is an updated description of acts of unfair competition that ‘use advertisements or any other means to make false or misleading publicity’, as is stated in the 1993 version. Unlike advertising in the *Advertising*

<sup>1</sup> See Article 2 Standing Committee of the National People’s Congress (Order No. 22 of the President) the *Advertising Law of the People’s Republic of China (2015 Revision)* [2015].

<sup>2</sup> See Article 4 Standing Committee of the National People’s Congress (Order No. 34 of the President) the *Advertising Law of the People’s Republic of China (Revised)* [1994].

<sup>3</sup> See Zhang Mao the *Explanation concerning the Advertising Law of the People’s Republic of China (Amended Draft)* [2014], [http://www.npc.gov.cn/npc/lfzt/2014/2014-08/31/content\\_1876851.htm](http://www.npc.gov.cn/npc/lfzt/2014/2014-08/31/content_1876851.htm)

Law requiring specific means and forms,<sup>4</sup> commercial publicity stipulated in the *Anti-Unfair Competition Law* includes a variety of means, such as publicity in the form of words, pictures or both on commodities or their packaging, advertising of commodities on mass media, demonstration, description, explanation or other textual representation of commodities in business premises, introduction and promotion of commodities on public occasions such as product review meetings, symposiums and ceremonies, and induced sales by masquerading customers. While compared with the definition of ‘advertising’ in Directive 2006/114/EC ‘the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations’,<sup>5</sup> the concept ‘false or misleading commercial publicity’ in China is closer to misleading advertising in any form.

Given that commercial publicity is a very important promotion method in market competition, false or misleading commercial publicity, by reason of its deceptive nature, is likely to affect the economic behavior of persons to whom it is addressed or whom it reaches. On the one hand, because of misunderstanding, consumers may make wrong transaction decisions that harm their interests. On the other hand, under certain market capacity, a business operator’s competitive advantages or profits obtained by false or misleading commercial publicity are at the undue cost of other operators’ (competitors) interests. As a result, false or misleading commercial publicity leads to distortion of competition. Therefore, the *Anti-Unfair Competition Law* prohibits false or misleading commercial publicity as a typical act of unfair competition.

### 1.3. Summary

To sum up, in China, misleading advertising may constitute false advertising as is stipulated in the *Advertising Law*, or false or misleading commercial publicity as is provided in the *Anti-Unfair Competition Law*. In broad sense, misleading advertising refers to a kind of misleading commercial publicity, and be in the form of advertisements or not, it should be regulated by the *Anti-Unfair Competition Law*. In addition, with the improvement of the understanding of how misleading advertising breaks the truthfulness of advertising or fair competition order, both in the latest revised *Advertising Law* and the *Anti-Unfair Competition Law*, misleading advertising and false advertising are not distinguished between each other.

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<sup>4</sup> See Article 2 and Article 14 Standing Committee of the National People’s Congress (Order No. 22 of the President) the Advertising Law of the People’s Republic of China (2015 Revision) [2015].

<sup>5</sup> Article 2(a) Directive 2006/114/EC concerning misleading and comparative advertising [2006] OJ L376/22.

## 2. Determination of Misleading Advertising in China

### 2.1. False and misleading

A ‘false’ content refers to a content that does not correspond to facts, including both nonexistent conditions and distorted facts. While a ‘misleading’ content, however, refers to both true and false contents that can be misleading.

In China’s regulations on misleading advertising, the relationship between ‘false’ and ‘misleading’ has always been controversial. ‘False’ and ‘misleading’ were once often viewed as two different standards. For example, in the *Interpretation of the Anti-Unfair Competition Law* ‘false publicity that leads to misunderstanding’ was worded as follows, ‘the so-called false publicity that leads to misunderstanding includes two types of acts. One is false publicity and the other is misleading publicity. The former is determined on the basis of objective facts while the latter on the subjective understanding of consumers and users.’<sup>6</sup>

In fact, misleading advertising and false advertising show a kind of interrelationship. In most cases, there is overlap between them and false publicity is regarded as misleading publicity. However, in some cases, even true publicity can be misleading while false publicity may not necessarily be misleading. In this regard, the revised *Advertising Law* and the *Anti-Unfair Competition Law* are explicit in their position that there is no need to distinguish false and misleading advertising in the prohibited provisions. The emphasis of the determining criteria is shifted from whether or not the content of an advertisement is false to whether or not it is misleading, and the core of the determining criteria is whether or not the advertising misleads or defrauds consumers. Therefore, true but misleading advertising are also illegal in China.

In the course of revising the *Anti-Unfair Competition Law*, some regulators proposed to determine the legality of an advertisement only based on whether it is ‘misleading’ or not. For example, Article 8 of the *Anti-Unfair Competition Law (Revised Draft for Review)* says, ‘Business operators shall not carry out misleading commercial publicity as follows.’<sup>7</sup> However, the law makers in China finally have adopted ‘false or misleading’ to describe misleading advertising considering its legal concept and wording in relevant regulations also the more mature practices of determining and regulating false advertising in China.

<sup>6</sup> STATE ADMINISTRATION FOR INDUSTRY & COMMERCE OF THE PEOPLE’S REPUBLIC OF CHINA DEPARTMENT OF LAW: *The Interpretation of the Anti-Unfair Competition Law of the People’s Republic of China*. Hebei, Hebei People’s Publishing House, 1994. 62.

<sup>7</sup> See Article 8 State Administration for Industry & Commerce of the People’s Republic of China the *Anti-Unfair Competition Law (Revised Draft for Review)* [2016], <http://www.mofcom.gov.cn/article/b/g/201604/20160401288300.shtml>

## 2.2. Determination of misleading advertising in the Advertising Law

The *Advertising Law* lists four common situations in which an advertisement is determined as misleading advertising and provides for a miscellaneous provision which covers other conditions of defrauding or misleading consumers with false or misleading content. The core of this determining criterion is whether or not the content of an advertisement is true, explicit and clear.

Article 28 of the *Advertising Law (2015 Revision)* stipulates, 'Any advertisement that defrauds or misleads consumers with any false or misleading content constitutes a false advertisement.' An advertisement that falls under any of the following categories shall be a false advertisement '(1) The advertised goods or service does not exist; (2) Regarding the goods' performance, functions, place of production, uses, quality, specification, ingredient, price, producer, term of validity, sales condition, and honors received, among others, or the service's contents, provider, form, quality, price, sales condition, and honors received, among others, or any commitments, among others, made on the goods or service, there is inconsistency with the actual conditions and has a substantial impact on purchases; (3) Using fabricated or forged or invalid scientific research result, statistics, investigation result, excerpt, quotation, or other information as a certification material; (4) Fabricating effects of the goods or service; (5) Defrauding or misleading consumers with any false or misleading content in other forms.'<sup>8</sup> In addition, Article 3 of the *Regulation on the Administration of Advertisements* also stipulates, 'The content of an advertisement must be true, sound, clear and understandable and must not defraud users and consumers in any way.'<sup>9</sup>

## 2.3. Determination of misleading advertising in the Anti-Unfair Competition Law

Article 8 of the *Anti-Unfair Competition Law (2017 Revision)* stipulates, 'a business shall not conduct any false or misleading commercial publicity in respect of the performance, functions, quality, sales, user reviews, and honors received of its commodities, in order to defraud or mislead consumers.'<sup>10</sup> Compared with the prohibitions of misleading advertising in the *Anti-Unfair Competition Law (1993)*, current definition of misleading advertising gives a clear illustrate of the relationship of false allegation and misleading allegation as mentioned above.<sup>11</sup> That is to say, the important point of the revision in misleading advertising lays on the requirement

<sup>8</sup> Article 28 Standing Committee of the National People's Congress (Order No. 22 of the President) the Advertising Law of the People's Republic of China (2015 Revision) [2015].

<sup>9</sup> Article 3 State Council ([1987] No. 94) the Regulation on the Administration of Advertisements [1987].

<sup>10</sup> Article 8 Standing Committee of the National People's Congress (Order No. 77 of the President) the Anti-Unfair Competition Law of the People's Republic of China (2017 Revision) [2017].

<sup>11</sup> According to Article 9, some hold the view that the provision forbid false or misleading publicity, while others think that it only forbid false propaganda. See Standing Committee of the National People's Congress (Order No. 10 of the President) the Anti-Unfair Competition Law of the People's Republic of China (Revised) [1993].

of results element.<sup>12</sup> The *Anti-Unfair Competition Law (2017 revision)* provides the principle for determining misleading advertising is whether it can defraud or mislead consumers.

To supplement this, the relevant judicial interpretations set out rules that in determining whether advertising is misleading, account shall be taken of all its features are sufficient to lead to misunderstanding of the public concerned. Further, whether or not such advertising are sufficient to lead to misunderstanding of the public concerned is based on factors like people's daily life experiences, the general attention of the public concerned, the fact misunderstood, as well as the reality of the promoted objects. In addition, the *Anti-Unfair Competition Law* expressly stipulates that an over-exaggerated advertisement does not constitute false or misleading advertising if it is insufficient to cause public misunderstanding. Besides, several classic habits which highly likely to constitute misleading advertising are also listed in the judicial interpretations. That includes: 1. implementing biased promotion or comparison of commodities; 2. implementing the promotion of commodities by adopting controversial scientific viewpoints or phenomena as the facts; 3. using vague language or other deceptive methods to promote commodities.<sup>13</sup>

#### 2.4. Summary

In terms of the criteria for determining misleading advertising, the *Advertising Law* focuses on whether or not the advertising content is true, clear and understandable while the *Anti-Unfair Competition Law* emphasizes on whether or not the commercial publicity defrauds or misleads consumers. However, the difference only shows that misleading advertising can be determined from two perspectives, thus the *Advertising Law* and the *Anti-Unfair Competition Law* are able to formulate different provisions to act together. This is also reflected in Article 20(2) of the *Anti-Unfair Competition Law (2017 revision)*, which affirms that false or misleading commercial publicity may constitute the releasing of a false advertisement, 'if a business operator violates the provisions of Article 8 of this Law and constitutes the releasing of a false advertisement, it shall be punished in accordance with the regulations of the *Advertising Law*.'

<sup>12</sup> See KONG Xiangjun: The Spirit of the Times of the New Anti-Unfair Competition Law of China. *Oriental Law*, 1 (2018) 64–80.

<sup>13</sup> See Article 28 Supreme People's Court (Judicial Interpretation [2007] No. 2) the Interpretation of the Supreme People's Court on Some Matters about the Application of Law in the Trial of Civil Cases Involving Unfair Competition [2007].

### 3. Manifestations of Misleading Advertising in China

#### 3.1. Advertising with seriously untrue content

Seriously, untrue advertising refers to the act of defrauding the other party in a transaction or consumers by using totally or largely untrue information in publicity, which leads to a cognitive misunderstanding of the other party or consumers concerned, who make their purchase decisions thereof. For example, an advertisement is ascertained as false advertising should product quality mark, ingredients, manufacturing methods, shelf life, place of production, discount or product effects be false or over-exaggerated. However, there is one exception. An obviously exaggerated advertisement does not constitute misleading advertising if it be insufficient to cause public misunderstanding.

#### 3.2. Advertising with true but misleading content

It refers to advertisements that are not false but offer incomplete information for untrue publicity. Although the content of such misleading advertisements is true, they may still be determined as misleading advertising.

#### 3.3. Induced and fraudulent advertising

This kind of advertisements often use ambiguous language to describe a product or service so that consumers may misinterpret the function and quality and the like of the product or service. Alternatively, they seduce consumers with true but partial facts of the product or service and then provide consumers with false information after their interest is aroused or their trust is obtained to influence their purchase decisions.

#### 3.4. Derogatory advertising

Derogatory advertising refers to the act of disparaging or defaming a business rival by fabricating facts or spreading unfavorable information of the rival to undermine its reputation or the reputation of its commodities so as to obtain competitive advantages in the market. This situation is more prominent in comparative advertisements. Comparative advertisements influence consumers' purchase decisions by making a biased or false comparison between their own products or services and those of their rivals' so as to induce consumers to have a biased understanding of the products or services concerned.

Such advertisements may constitute false advertising in the *Advertising Law* or illegal derogatory advertising. According to the *Anti-Unfair Competition Law*, there may be a concurrence of false advertising and derogatory advertising.

## 4. Comparative Advertising in China

### 4.1. Controversies and regulations on comparative advertising in China

Since the *Advertising Law* was drafted in the early 1990s, the definition of legitimate comparative advertising has always been controversial in China. The Legislative Affairs Commission under the Standing Committee of the National People's Congress has expressly stated its basic position on comparative advertising as 'Unlike some countries that prohibit comparative advertising, China allows the use of comparative advertising with a strict requirement, i.e., a comparative advertisement shall not disparage the goods or services of other producers or traders.'<sup>14</sup>

The *Standards for Reviewing Advertisements* (now ineffective) developed by the State Administration for Industry and Commerce in 1993 once provided the principle for determining comparative advertising.<sup>15</sup> According to Article 31, comparative advertising shall be in accordance with fair and just competition. It is worth noting that direct comparative advertising is not wholly prohibited in China although Article 32 prohibits direct comparison with specific products or services but only allows indirect comparison with generic products or services in the same category. The main reason of Article 32 is that direct comparison involves the use of logos of other specific products or business operators, which may constitute trademark infringement or unfair competition through unauthorized use of business logos of others. Further, the criteria for a legitimate comparative advertisement are as follows: First, the objects to be compared are comparable, and the comparison method is comprehensive, objective and fair, as is stipulated in Article 34.<sup>16</sup> Second, the content of a comparative advertisement shall be true, accurate and non-ambiguous, and shall not mislead consumers, as is stipulated in Article 33, Article 35 and Article 36.<sup>17</sup>

Prior to the revision of the *Advertising Law* in 2015, there had been a suggestion that special regulations be made for comparative advertising. However, this suggestion was not adopted in the *Advertisement Law*, which only provides for a general requirement for comparative advertising in Article 13, i.e., 'advertisements shall not disparage the goods or services of any other producers or traders.' In addition,

<sup>14</sup> Bian YAOWU: *The Interpretation of the Advertising Law of the People's Republic of China and Relevant Laws and Regulations*. Beijing, Fang Zheng Press of China, 1995. 7.

<sup>15</sup> See State Administration for Industry and Commerce (now revoked) *The Standards for Reviewing Advertisements (Trial Use)* (Gong Shang Guang Zi [1993] No. 214) [1993].

<sup>16</sup> Article 34, 'The objects to be compared in a comparative advertisement shall be similar or comparable products.' See the footnote 15.

<sup>17</sup> Article 33, 'Data or findings used in a comparative advertisement must be grounded with proof from specialized testing institutions in China.' Article 35, 'The language used by a comparative advertisement shall be accurate and understandable to consumers. It shall not directly or indirectly vilify or defame other products.' Article 36, 'A comparative advertisement shall not mislead consumers by provoking a certain association, and shall not make consumers feel that if they do not use the advertised product, serious losses or harmful consequences might result (excluding safety or labor protection products).' See the footnote 15.



Article 9 prohibits using ‘national,’ ‘highest,’ ‘best,’ or similar superlative words in commercial advertisements. On top of these general stipulations, Articles 16 and 18 also prohibit comparing effect and safety performance of special products such as drugs, medical instruments and dietary supplements. These fully demonstrate that comparative advertising is not taken as a special offence in China’s legislation. Instead, it is allowed in China but illegal acts that may result from using comparative advertising, such as biased comparison that constitutes misleading commercial publicity, are still strictly regulated.

#### 4.2. Determination of comparative advertising in China

There are three types of comparative advertising direct derogatory comparative advertising, direct connection-seeking comparative advertising and indirect comparative advertising. Regardless of their types, the nature of comparative advertising lies in obtaining competitive advantages by comparing products meeting the same needs or intended for the same purpose. Therefore, the focus of China’s regulation on comparative advertising is shifting from the legality of the content and form of a comparative advertisement to the fairness of competition it brings about. In other words, to determine whether a comparative advertising is true and fair depends on whether it constitutes false or misleading commercial publicity according to Article 8 of the *Anti-Unfair Competition Law*, or vilification of the objects being compared according to Article 11 of the *Anti-Unfair Competition Law*.

The typical misleading advertising actions listed in Article 8 of the *Interpretation of the Supreme People’s Court on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition* mentioned above are also often applied in determining the nature of comparative advertising in China. For example, advertisements based on biased promotion or comparison such as only showing other products’ disadvantages to accentuate the advantages of the promoted products are illegal comparative advertisements. Another example as an advertisement that claims the new technology adopted by the product is ten times better than that of the earlier version can be regarded as illegal indirect comparative advertisements by adopting controversial scientific viewpoints as the facts to promote products. These examples constitute false or misleading commercial publicity and may also constitute commercial vilification.

A typical case in this regard is Colgate-Palmolive Co. (Colgate) accusing Procter & Gamble Co. (P&G) of unfair competition. The Crest WhiteStrips, P&G, the accused, uses advertising language such as ‘the quality of Crest WhiteStrips is 3 times better than teeth whitening liquids, which tend to be washed away by saliva a few minutes after application and are thus less effective’ in its commercial publicity. However, this publicity was determined as false or misleading advertising by the court. In addition, since only Colgate had teeth whitening liquid products on the market at the time, P&G’s false advertising disparaged the effect of Colgate’s products and thus constituted a commercial vilification of Colgate. Therefore, the court concerned

determined that the defendant's false comparative advertising was in essence a commercial vilification and constituted unfair competition.<sup>18</sup>

To sum up, China does not ban comparative advertising but just allows legal comparative advertising. However, comparative advertising that constitutes false or misleading publicity, commercial vilification or unfair competition are prohibited. In practice, China does not have specialized regulations on comparative advertising and mainly relies on the *Anti-Unfair Competition Law* to determine its legality.

## 5. Law Enforcement Agencies Targeting Misleading Advertising in China

In China, misleading advertising is subject to both investigation for civil and criminal liability by courts and regulation of specialized administrative law enforcement agencies. These agencies are respectively specified in the *Advertising Law* and the *Anti-Unfair Competition Law*.

### 5.1. Law enforcement agencies stipulated in the Advertising Law

According to Article 6 of the *Advertising Law (2015 revision)*, the administrative department for industry and commerce of the State Council shall take charge of advertising supervision and administration nationwide, and the relevant departments of the State Council shall be responsible for work related to advertising administration within their respective functions. Local administrative departments for industry and commerce at and above the county level shall take charge of advertising supervision and administration within their respective administrative regions, and the relevant departments of local people's governments at and above the county level shall be responsible for work related to advertising administration within their respective functions.

In recent years, China has abolished the administrative departments for industry and commerce in some local governments and, after integrating other competent department on the basis of this, re-established local market regulation authorities responsible for advertising supervision and management within their jurisdiction.

According to the *Institutional Restructuring Plan of the State Council* adopted at the first meeting of the 13th National People's Congress of China in March 2018, the State Administration for Market Regulation was established directly under the State Council to carry out the responsibilities of the former State Administration for Industry and Commerce, General Administration of Quality Supervision, Inspection and Quarantine, China Food and Drug Administration, and price supervision and anti-monopoly responsibilities of the National Development and Reform Commission, the responsibilities of the Ministry of Commerce on regulating the anti-monopoly examination of undertaking concentration as well as the responsibilities of the Office of Anti-Monopoly Commission of the State Council'. It is mainly

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<sup>18</sup> See *Colgate-Palmolive (China) Co., Ltd. v P&G (China) Co., Ltd.* [2005] Hu Gao Ming San (Zhi) Zhong Zi No. 32.

responsible for comprehensive supervision and regulation of the market, registering market entities and establishing information publicizing and sharing mechanism, organizing comprehensive law enforcement of market regulation, undertaking anti-monopoly law enforcement, standardizing and maintaining the market order, organizing and implementing the strategy for making China strong through quality enhancement, regulating quality and safety of industrial products, food and special equipment, and managing measurement standards, inspection and authentication. According to the *Provisions of the State Administration for Market Regulation on its Functional Configuration, Internal Organization and Staffing* (hereinafter referred to as the *Provisions*) issued in July 2018, there are 27 organizations within the State Administration for Market Regulation, including the Department of Advertising Regulation. This department has the same structure and functions as those of the Department of Advertising Regulation under the former State Administration for Industry and Commerce.

Therefore, advertising regulation in China, including the administrative enforcement on misleading advertising, is carried out at both national and local levels.

## 5.2. Law enforcement agencies stipulated in the Anti-Unfair Competition Law

Since the enactment of the *Anti-Unfair Competition Law* in 1993, false or misleading advertising has been regulated by courts and administrative law enforcement agencies in China. In other words, apart from courts, specialized administrative law enforcement agencies are set up to carry out law enforcement on advertising, including false or misleading advertising.

Article 3 of the *Anti-Unfair Competition Law (1993)* provides that, ‘People’s governments at various levels shall take measures to repress acts of unfair competition and create favorable environment and conditions for fair competition.’

‘Administrative departments for industry and commerce of the people’s governments at or above the county level shall exercise supervision over and inspection of acts of unfair competition; where laws or administrative rules and regulations provide that other departments shall exercise the supervision and inspection, those provisions shall apply.’

Article 3 of the *Anti-Unfair Competition Law (2017 revision)* provides that, ‘People’s governments at various levels shall take measures to repress acts of unfair competition and create favorable environment and conditions for fair competition.’ ‘The State Council shall establish an anti-unfair competition work coordination mechanism, study and decide on major anti-unfair competition policies, and coordinate and deal with major issues to maintain the competition order.’ Article 4 provides that ‘The department responsible for administration for industry and commerce under a people’s government at or above the county level shall investigate and deal with acts of unfair competition. Where laws or administrative regulations provide that such acts shall be investigated and handled by other departments, those

provisions shall apply.’ From the above provisions we can see that great importance has been attached to the administrative law enforcement mechanism both before and after the revision of the *Anti-Unfair Competition Law*. Moreover, after the revision, a coordinating mechanism on anti-unfair competition at the level of the State Council has been established to strengthen the administrative law enforcement.

Although the law enforcement agencies of the *Anti-Unfair Competition Law* were mainly administrative authorities for industry and commerce, where laws or administrative regulations provide that acts of unfair competition shall be investigated and handled by other departments, those provisions shall apply. For example, according to the *Product Quality Law of the People’s Republic of China*, product quality regulators shall have the right to investigate and punish a business operator should it be found to have faked the place of production, faked or used the names and addresses of other producers, faked or used quality logos such as certification marks and fine quality product marks; according to the *Pharmaceutical Administration Law of the People’s Republic of China*, pharmaceutical regulators are responsible for supervising and inspecting acts of unfair competition in the fields of drug production and operation; according to the *Securities Law of the People’s Republic of China*, the securities regulatory agency of the State Council (China Securities Regulatory Commission) shall supervise and inspect acts of unfair competition in the securities market in accordance with the law; according to the *Foreign Trade Law of the People’s Republic of China*, the authority responsible for foreign trade and economic relations under the State Council (the Ministry of Commerce) shall supervise acts undermining fair competition in the market in foreign trade, etc. Although the above-mentioned law enforcement mechanisms result from China’s administrative system, the dispersion of law enforcement power on anti-unfair competition among various law enforcement agencies has affected the establishment of a unified law enforcement system on anti-unfair competition. However, as the Chinese government reforms its institutions in 2018, many law enforcement agencies responsible for anti-unfair competition will be integrated to a greater extent.

As mentioned earlier, the State Administration for Market Regulation set up in 2018 has assumed the responsibility of the former State Administration for Industry and Commerce. Prior to this, the regulation of the industry and commerce, food and medicines inspection in several provinces and most of the municipalities and counties had already been concentrated in market regulation bureaus at the corresponding level. Therefore, after the institutional reforms at the national level is completed, the enforcement of the *Anti-unfair Competition Law* in China will also be concentrated in a market regulation authority except in several special areas. According to the aforementioned *Provisions*, there are 27 organizations within the State Administration for Market Regulation, including the Bureau of Price Supervision and Anti-Unfair Competition (the Office for Regulating Direct Selling and Combating Pyramid Selling).

Therefore, anti-unfair competition law enforcement in China, including the administrative law enforcement on misleading advertising, is carried out at both national and local levels by market supervision and regulation authorities.

## 6. Legal Liability for Misleading Advertising in China

### 6.1. Legal liability for misleading advertising in violation of the Advertising Law

#### 6.1.1. Administrative liability

According to the *Advertising Law*, an advertiser may be ordered to cease publishing a false advertisement, to eliminate adverse effects within the corresponding extent, and/or to pay for a fine. Its business license may be revoked, and the advertisement censoring authority shall revoke the advertisement censorship approval document and decline to accept the advertiser's advertisement censorship application within one year.

Where an advertisement publisher knows or should have known that an advertisement is false but still designs, produces, serves as an agent for, or publishes the advertisement, the administrative department for industry and commerce shall confiscate the advertising expenses and impose a fine. The relevant department may suspend its advertisement publishing business, revoke its business license, or revoke its advertisement publishing registration certificate.

Where a medical institution (special entity) commits a violation of law, if there is any serious circumstance, the administrative department for industry and commerce shall punish it in accordance with this Law, and the health administrative department may revoke the involved medical service item or the medical institution's practicing license.

Where an advertisement endorser knows or should have known that an advertisement is false but still provides recommendation or certification, the administrative department for industry and commerce shall confiscate its illegal income and impose a fine of not less than one time nor more than two times the illegal income on it.

In addition, where an administrative penalty is imposed on a natural person, a legal person, or any other organization for recommendation or certification in a false advertisement, if it has not been three years since the imposition of the penalty, the natural person, legal person, or other organization shall not serve as an endorser.

Where the business license of a company or enterprise is revoked for its publishing of any misleading advertisement that has seriously violated the law, if the legal representative of the company or enterprise is personally liable for the violation of law, he or she shall be prohibited from serving as a director, supervisor, or senior executive of any company or enterprise within three years of the revocation of the business license of the aforesaid company or enterprise.

Due to their lack of law-abiding consciousness, the aforementioned legal representatives shall be suspended from their duties, review themselves and enhance their law-abiding consciousness before they are able to serve as a director, supervisor, or senior executive of their company or enterprise. To prevent them from serving as a manager of their company or enterprise within a certain period of time is also a punishment.

### 6.1.2. Criminal liability

Article 222 of the *Criminal Law of the People's Republic of China* provides that an advertiser, advertisement agent or advertisement publisher who commits a crime shall be investigated for criminal liability according to law. 'Any advertiser, advertisement agent or advertisement publisher who, in violation of State regulations, takes advantage of advertisement to make false publicity of commodities or services, if the case is serious, shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention and shall also, or shall only, be fined.'

### 6.1.3. Civil liability

Where a false advertisement is published in violation of the *Advertising Law* to defraud or mislead consumers, causing any damage to the lawful rights and interests of consumers who purchase goods or receive services, the advertiser shall assume civil liability in accordance with the law. If an advertising agent or advertisement publisher is unable to provide the advertiser's true name and address or valid contact information, consumers may require the advertising agent or advertisement publisher to make compensation in advance.

Where a false advertisement on a good or service involving the life or health of consumers causes any damage to consumers, the advertising agent, advertisement publisher, and endorser of the false advertisement shall assume joint and several liability with the advertiser.

Where an advertising agent, advertisement publisher, or endorser of a false advertisement knows or should have known that the advertisement is false but still designs, produces, serves as an agent for, or publishes the advertisement or provides recommendation or certification, it shall assume joint and several liability with the advertiser.

## 6.2. Legal liability of misleading advertising in violation of the Anti-Unfair Competition Law

### 6.2.1. Administrative liability

In order to obey to the principle that special regulations shall take precedence over general ones in application, if a misleading advertising violates the *Anti-Unfair Competition Law* at the same time is in violation of the *Advertising Law*, the *Advertising Law* shall apply. The above is clarified in the revised version of *Anti-Unfair Competition Law*.

### 6.2.2. Civil liability

Misleading advertising in violation of the *Anti-Unfair Competition Law* is determined as an act of unfair competition and thus shall bear civil liability. Article 17 of the *Anti-Unfair Competition Law* revised in 2017 provides that, 'A business operator

that violates this law and thus causes damage to others shall bear civil liability for such damage in accordance with the law. A business operator whose lawful rights and interests are infringed upon by an unfair competition act may file a lawsuit to a people's court.'

### 6.3. Summary

The liabilities of misleading advertising are clearly defined in both the revised *Advertising Law* and *Anti-Unfair Competition Law*, while the former is more often applied when administrative and civil liabilities of a misleading advertisement are involved. However, when a false or misleading commercial promotion is not in the form of a generally recognized advertisement but performs the function of an advertisement, the *Anti-Unfair Competition Law* will apply and the perpetrator concerned shall assume legal liabilities, so as to prevent such commercial promotion from undermining competition order and lawful rights and interests of consumers.

### Conclusion

To sum up, in China, misleading advertising may constitute false advertising as is stipulated in the *Advertising Law*, or false or misleading commercial publicity as is regulated in the *Anti-Unfair Competition Law*. Whether an advertisement is determined as a misleading advertisement by the *Advertising Law* depends on whether or not its content is true, clear and accurate. When it comes to the *Anti-Unfair Competition Law*, it depends on whether or not the advertising has caused misunderstanding to the public concerned. In a word, the two laws determine misleading advertising from two different perspectives. As for comparative advertising in China, it is taken as neither a special offence nor a lawful behavior with explicit requirement. Instead, comparative advertising is allowed in China when it is not misleading within the meaning of regulations of the *Anti-Unfair Competition Law* and the *Advertising Law*. In addition, several clauses usually be applied to strictly prevent the unfair competition behavior result from comparative advertising such as discrediting or trademark infringement.

According to the latest amendments to both the *Advertising Law* and the *Anti-Unfair Competition Law*, the understanding of misleading advertising continues revamping. Due to the sense that misleading advertising can lead to fraud or mislead and thereby cause social damages. The *Advertising Law* and the *Anti-Unfair Competition Law* put a more comprehensive and deterrent regulation on it so that it can be effectively regulated. China is also carrying out special regulations on misleading and other illegal advertising. At the same time, the enforcement agencies targeting misleading advertising are appropriate adjusted. As well as the improvements of the legal liability of misleading advertising are taken place. These moves will without doubt usher in a new chapter for China's regulation on misleading advertising.