

An Analysis of China's Anti-Commercial Bribery Legal System and Suggestions for Improvement: Based on the Perspective of Comparative Law

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ABSTRACT

Commercial bribery is becoming an international issue to tackle with. In order to create a fair and well-developed trade order, international community is committed to unified the standard and regulations of private bribery. As a matter of fact, obvious deficiencies exist in current Chinese regulations on commercial law. Not only did the government neglect the great significance of anti-commercial bribery, but also corporations paid insufficient attention to the side-effect of commercial bribery. The lack of proper governmental regulation and sufficient self-discipline system make it difficult to control the offence. As China engaging more deeply in international economy, it is vital to adopt more international rules, especially in contributing to a healthy market. Based on investigating international rules and foreign practice, the article put forward the idea of enacting a unified Anti-commercial Bribery Administrative Regulation in China. Specifically, it should make specific definition to commercial bribery, which determines the responsible administration and the executive codes to prevent and punish bribery activities. Meanwhile, corporations are encouraged to develop self-discipline system to improve their credits. These results offer a guideline for China to deal with private bribery from different perspectives.

Keywords: Commercial Bribery, Anti-Unfair Competition, Legal System, Self-discipline Mechanism

1. INTRODUCTION

Contemporarily, with the expansion of China's opening-up, commercial bribery has spread in many industries and fields in China. According to A Report on China's Anti-Commercial Bribery Research^[1], at least 6% of foreign-invested enterprises, 12% of state-owned enterprises and 12% of private enterprises have been investigated for commercial bribery. Especially, the commercial bribery case of GlaxoSmithKline (GSK) in 2014 caused sensation throughout the country, because it was the first Fortune 500 company to be involved in a commercial bribery case in China. China has regulated the serious problem of commercial bribery through legislation of different legal hierarchy. The first is national legislation, e.g., *the Criminal Law* and *the Anti-Unfair Competition Law*. The second is the departmental rules, such as *the Interim Provisions on Banning Commercial Bribery (the Interim Provisions)* issued by

the State Administration for Industry and Commerce. In addition, judicial interpretation is also a part of the norms, such as *the Opinions on Issues concerning the Application of Law in the Handling of Criminal Cases of Commercial Bribery*. Meanwhile, China's ruling party has also put forward policy opinions on the issue of anti-commercial bribery, e.g., *the Opinions on Holding Policy Limits Correctly in the Special Work of Controlling Commercial Bribery (the Opinions)*, which has an important impact on China's anti-corruption law enforcement. However, the current anti-commercial bribery legislation still cannot form a perfect mechanism or system, and the situation of commercial bribery is still serious. Taking the Red Star Macalline commercial bribery case as an example, several of its managers took advantage of their positions to take bribes totalling nearly 6 million RMB, which seriously endangers fair and free competition in the market. Therefore, it is necessary to

perfect China's legislation by comparing the legislation of experienced countries and treaties.

2. EXISTING PROBLEMS OF COMMERCIAL BRIBERY IN CHINA

Commercial bribery, as a universal problem in global commerce, has common causes and characteristics, but also reflects its particularity in China's specific social environment. Essentially, commercial bribery is a kind of corrupt behavior, and the discussion on its related theories is the premise of the follow-up research. Article 7 of China's Anti-Unfair Competition Law regards commercial bribery as an improper act, but does not give it a clear definition. While, the Article 2 of the Interim Provisions defines this term as "a business operator's bribery of another entity or individual with property or by other means in order to sell or purchase commodities".

Furthermore, according to the identity of the accepting bribes, there are four kinds of commercial bribery. They are the other party to a transaction, the staff or someone entrusted by the opposite party of other party to a transaction, a third party with authority and influence over the transaction as the subjects of acceptance of bribes. In consideration of the classification of commercial bribery, with China's increasing efforts to combat corruption in recent years as well as the establishment of the Supervisory Commission, the bribery of state functionaries has been more deeply regulated and punished. Therefore, the commercial bribery in China should be defined as: seeking trading opportunities or competitive advantage by giving bribes to the staff of opposite party or the opposite party's principals or institution (even more, the officials who have the examination and approval power of business conduct), in the business field.

Commercial bribery undermines the fair order of market competition and seriously hinders the current process of optimizing the business environment in China. Thereinto, the most notable one is the case of GSK bribery. Through trials, the Intermediate People's Court of Changsha City, Hunan Province found that GSK, the defendant, offered bribes to non-state functionary of medical institutions in many places of the country through various forms. The amounts are tremendous in order to expand drug sales and seek illegitimate interests. The court heard the case in private on September 19, 2014 and pronounced a public sentence on the same day. GSK was fined 3 billion yuan, and Mark Reilly and other defendants were sentenced to 2 to 3 years' imprisonment because of offering bribes to non-state functionary and accepting bribes by a non-state functionary.

In reality, commercial bribery works as a kind of unfair mean for business entities to seek economic benefits. Under the unification of global economy, the subjects of the commercial bribery are not only restricted

in domestic enterprises, but also expanded to the multinational enterprises which means that the problems about the commercial bribery are more complicated to tackle. As for China, the commercial bribery brings about a large number of problems that reflect in the business dealing, social order, legal authority etc.

First, commercial bribery disrupts the reasonable allocation of market resources. The diversification of the bribery forms makes it seems to have a certain degree of deception and hard to recognize, resulting in the disorder of the society and market.

Second, more commercial bribery may lead to the price inflation and increasing the burden of the citizens. This phenomenon particularly floods in medical industry. At present, the prices of medicine in China are relatively high since a part of the fees are paid to the officials who are in charge of the medical procurement as the high rebate. The final victims of the problem are the patients.

Third, commercial bribery causes tax loss. In order to cover up the illegal acts, the operator who conduct commercial bribery would make false account, while the bribee would conceal income. The briber offset the property and the bribee refuse to pay tax. Both behaviors cause the tax loss.

Except for the problems mentioned above, the commercial bribery may pose more bad impacts on the construction of a clean and honest administration and reducing the trust of the citizens in the government. Moreover, it may also weaken the effectiveness of government public expenditure. Besides, the quality of products cannot be guaranteed because the commercial bribery may put risks on it.

3. LEGAL REASONS OF COMMERCIAL BRIBERY

Commercial bribery usually leads to unfair competition and the increase of illicit cost to start business, which will hinder a healthy market order and cause negative effects on development. The lack of proper legal regulation is the primary factors attributed to the current bribery in China, while other facts (e.g., historical background and social perceptions) also make sense.

3.1. Pursuit of High Profit in An Improper Way

The driving purpose for multinational enterprises to enter China is to pursue the high profits in the huge Chinese market. However, in the meantime, complying with the moral rules maintaining the benign market order sometimes somehow requires a higher consuming. It's not rare for enterprises to bribe those who control the entrance of the market in order to earn extra benefits. And commercial bribery is regarded as a kind of useful illegality.[2]By means of commercial bribery,

intermediate links in service can be reduced. In most cases, to accelerate the speed of entering the market, enterprises may offer services fees or expedited fee to those officials who can give approval for operation. Though these behaviors seem to be compelling choices, they are actually indirect ways of commercial bribery. In addition, the market competition mechanism has defects which leads the enterprises to chase the extra profits regardless of the commercial or ethic rules. In other words, improper pursuit of economic profits triggers unfair competition. Especially In the monopoly industry and those with strict governmental regulation ones, the scarcity of the power also results in the scarcity of the resources. In addition, facts indicate that in China commercial bribery crimes mostly occur in the six fields including engineering construction, land transfer, property rights transactions, government procurement, pharmaceutical purchases and sales and resource development.[3] These fields have the same features that all of them are conducted under the strict governmental regulations. If the enterprises want to be able to access these fields, they have to acquire approval, yet those who have the power to give approvals are in the minority.

3.2. Lack of Specific Law

As mentioned above, there are provisions on commercial bribery in different levels of authority and even in the opinions of political parties in China. Nevertheless, they are very scattered, which are not conducive to fully prevent and effectively crack down on commercial bribery.

Only *the Criminal law* and *the Anti-Unfair Competition Law*, which are issued by the nation legislative branch, has higher level of authority, stricter requirements in the formulation process and more authority and universality in the application of laws.^[4] The administrative regulations are issued by the State Council, formulated in accordance with the legal procedures of the exercise of administrative power, to perform administrative duties of the general term of normative documents. However, there is no specific administrative regulation against commercial bribery in China. The level of authority of the administrative regulations is higher than the current departmental rules and the opinions of political parties. Nevertheless, both *the Interim Provisions* and *the Opinions* cannot be the legal basis, and even the latter cannot be the formal source of the law. Although the judicial interpretation issued by the Supreme Court can be used as the basis for the court's judgment, the normative document is only the interpretation of the application of law, which can only work for the judicial organs, i.e., has weakened binding effect on other organizations.

In addition, in China's current legal norms, there are no powerful and clear provisions on how to define the premise of commercial bribery. As a consequence, this will cause confusion in law enforcement and judicial

identification of commercial bribery. Unintegrated legal documents and non-authoritative legal definitions often lead to confusion and injustice in the judicial and law enforcement of grass-roots law enforcement and judicial personnel in China, especially in underdeveloped areas. Due to the lack of professional quality, sometimes judicial workers are even hard to comprehensively study and master the relevant norms of anti-commercial bribery.

3.3. Unclear Division of Government Regulatory Responsibilities

China's anti-commercial bribery legislation is scattered, and there is no uniform applicable code. In the light of Chinese practice, it is the department who drafts the regulation that conducts the supervision in this field. Therefore, China's anti-commercial bribery law enforcement jurisdiction, to some extent, is unclear. The commercial bribery case of GSK has fully proved that it is not the lack of legal basis to investigate its responsibility, but how the law functions.

According to the Anti-Unfair Competition Law, the department of administration for industry and commerce at all levels are directly responsible for anti-commercial bribery. Based on different laws and regulations, different administrative departments are responsible for the supervision in different fields. For example, the pharmaceutical industry represented by GSK, as mentioned above, is one of the six high incidence areas of commercial bribery. Besides, according to the Pharmaceutical Administration Law of China, medical products administrations should be responsible for the supervision and administration of pharmaceuticals. Furthermore, the Land Administration Law and the Urban Real Estate Administration Law of China stipulate that the administrative department in charge of construction and the land administration department shall administer the work of real estate. This will lead to the lack of law enforcement among different government departments due to unclear jurisdiction.

Meanwhile, if a commercial bribery case exists to both state functionaries and non-state functionaries, the implementation of laws and departmental rules about anti-commercial bribery laws cannot be well integrated with *the Supervision Law* and *the Criminal Procedure Law* in the current law enforcement process. The reason is that the corruption cases of state functionaries should be under the jurisdiction of the Supervisory commissions at all levels. Therefore, for the enforcement of anti-commercial bribery, the division of department functions is not clear, and even the connection with other laws is not smooth.

4. SOLUTION TO THE PROBLEM

It's necessary to solve the commercial bribery as it becoming more common and urgent in China.

Corporations are protagonists in modern commercial society whose behaviors can make profound effects on market activities. It is of great significance to encourage the enterprises to build up the internal constraint regulations. Then, framing and improving the legal system can help to regulate the bribery. Finally, determining jurisdiction and performing the law in proper way also play an important role in combating commercial bribery.

4.1. Encouraging Self-discipline Mechanism of Anti-Commercial Bribery

The idea of commercial bribery was initiated by American multinational enterprises in their oversea market expansion. In order to eliminate unfair competition caused by illicit benefits exchange, the United States promulgated the Federal Sentencing Guidelines for Organizations (FSGO) which includes the requirements of internal self-discipline mechanism within corporations. The Guidelines clearly points out that corporations should draft an integrated and executable internal discipline containing rules of conduct, punishment mechanism as well as remedial measures. Internal self-discipline shall be implemented from top and employees should be trained to confront commercial bribery properly. Moreover, companies shall establish a special department to receive reports, specifically responsible for reporting violations of bribery and conduct timely notification.

As for Germany, taking Siemens' as an example, it adopts a three-pronged action strategy: prevention-monitoring-response. Prevention system whose core is compliance risk management, training and other communication methods taking policies, procedures, advice, support, integration with personnel processes and joint actions into account. Monitoring system includes compliance controls, compliance audits, and whistle blower handling. On this basis, employees can report violations they find to the company's compliance officer. After receiving a report, the company shall establish a special team to investigate and report. Meanwhile, all materials must be kept confidential and there must be no retaliation afterwards. At last, entering response phase, the employee will be first investigated and then followed up on a case-by-case basis. Overall, punishing an employee is not the real purpose, but the improvement and caution after the punishment.

Compared with such mature internal system, most Chinese companies are lack of sound internal self-discipline mechanism to prevent bribery and guide their behaviors. This management deficiency gives not only rise to domestic unfair market competes, but also the downgrade of credit worldwide which is certainly hinder the future of Chinese oversea trade. It is high time to encourage Chinese corporations to set up internal self-

discipline mechanism to combat commercial bribery and increase their trust grades.

4.2. Improving the Legal Mechanism of Anti-commercial Bribery

A clear definition of commercial bribery is the premise for the establishment and improvement of the legal mechanism of anti-commercial bribery. Only by clearly satetd which subjects and behaviors belong to the objects that should be regulated in the anti-commercial bribery, can the anti-commercial bribery law be correctly implemented.

According to the Black Law Dictionary, commercial bribery is a form of bribery, the act of bribing an agent or employee of a potential buyer in order to gain an advantage in business competition. Furthermore, the scope of application of *the Foreign Corrupt Practices Act* (FCPA) of the U.S. is quite broad. Generally, almost as long as there is trade business with the United States, there is a great possibility of applying the FCPA. As for *the Bribery Act* of the U.K., commercial bribery refers to "a kind of behavior, that is, any individual associated with an organization such as a company that conducts business in the U.K. pays bribes in order to obtain a certain business or gain an advantage in its business operation". According to *the Anti-unfair Competition Act*, which is the main regulation of anti-commercial bribery, sees commercial bribery as unfair market competition and provides for a number of features of the commercial bribery offense^[5]. Therefore, it is necessary and urgent to issue a unified and comprehensive administrative regulation on anti-commercial bribery under the circumstance of scattered and unsystematic provisions in China.

First, as mentioned above, the levels of authority of administrative regulations are below the law but above the departmental rules. The State Council is the highest administrative organization of the country. In this case, although the administrative regulations promulgated by the State Council are not as authoritative as the laws, they must be registered with the Standing Committee of the National People's Congress for the record. Afterward, it can be used as the legal basis for the court to judge cases. Therefore, it is necessary and feasible to regulate anti-commercial bribery in the form of administrative regulations.

Secondly, although the anti-commercial bribery laws are scattered, commercial bribery is only a form of unfair competition, i.e., there is no need to legislate alone. The law should adhere to the principle of modesty instead of larger quantities.

Finally, the administrative regulations should be based on *the Constitution* and the *Anti-Unfair Competition Law*. They ought to clarify the meaning of commercial bribery, the scope of bribers, the

responsibilities of administrative organs and how to connect with the public security organs as well as supervision organs in terms of procedures if crimes are involved, etc.

4.3. Founding Preventive Mechanism of Anti-Commercial Bribery

Preventive mechanism plays a significant part in anti-commercial bribery action, but it has been a blank area in China for a long time. From the state's point of view, current regulations overemphasize the criminal punishment. It indicates that Chinese government intends to stop bribery by severe sentence and stress the misuse of privileges in bribery. However, the value of anti-bribery also reflects in maintaining a healthy market order and advocating a decent enterprise culture.

Shenzhen District has already realized the core issues and adopted ISO 37001 International Norm. The *Shenzhen Standard* introduces international criteria into China and broadens the scope of bribery. This Standard can apply to commercial entities in all industries and non-commercial organizations. As for the definition and forms of bribery, the *Shenzhen Standard* adopt broad criteria. Bribery refers to all kinds of behaviors that induce individuals to misuse their job convenience and gain illicit monetary or non-monetary benefits. By this definition, improper disclosure of business information can also be regulated by related rules and all parties relating to bribery can be bound by the rules.

Besides, the *Shenzhen Standard* put forward a comprehensive system, from preventive measure to risk response to curb the bribery. Particularly, it proposes the whole process of establishing and implementing the anti-bribery management system from government's side. Specifically, it includes understanding the background of corporations, clarifying their management responsibilities, carrying out risk assessment, providing resource support, evaluating their compliance and updating the anti-bribery system in time. This standard also requires corporations to carry out eight self-control measures, including due diligence, financial and non-financial control, entertainment and similar treatment or gifts, as well as requiring business partners to implement control measures, reporting procedures and taking counter measures.

In general, the *Shenzhen Standard* fills in the blanks in rules relating to bribery and builds an integrated system to implement anti-bribery measures. It particularly points out the importance of corporations' responsibilities in this area and the benign interaction with state regulations. In addition, the main value of anti-bribery that ensures corporations to start business without paying illicit cost can be popularized to other regions in China. By encouraging more corporations and local governments to adopt this standard, international norms

will be accepted and understood by more Chinese enterprises, i.e., will help China to better participate in global trade activities.

5. CONCLUSION

China has served as a vital part in global transaction and cross-border trade will happen ever more frequent in the future, i.e., it is avoidable in confront of worldwide challenges properly. Commercial bribery damages benign market order and increases illicit trade cost in whole, which will be undertook by entire society, especially the ordinary consumers. Although Chinese market suffered the loss caused by commercial bribery, several issues exist in current regulation mechanism, in order to deal with the problems. On this occasion, specific criteria and measures should be implemented. First, the unified administrative regulation should be enacted to guide government supervision and punishment by providing specific definition and responsibility assignment. Second, anti-commercial bribery action should be a dynamic process rather than the simple punishment. During this process, internal corporation regulation also needs to be included. Even ordinary employees are necessary to be educated to response commercial bribery properly. Last, the aim of anti-commercial bribery is worthwhile to take social welfare into consideration. Trust is the footstone of modern commercial community, a complete anti-commercial bribery framework will take benefits to every member in society. These results shed light the core value of anti-bribery in commercial society and put forward persuadable measure to curb private bribery, which will contribute to creating an active and transparent market order.

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