Walking a fine line in China
Distinguishing between legitimate commercial deals and commercial bribery

China in the 21st century exemplifies an atmosphere of great opportunity and intense competition. Against this backdrop, it has become increasingly common for businesses to adopt a variety of practices in order to make their products and services competitive. Such practices may include paying middle-men to promote sales and giving incentives to buyers directly. However, whilst revenue spikes are undoubtedly welcome, businesses should bear in mind the potential backlash arising out of these commercial arrangements. The risk that such arrangements may not comply with anti-bribery and corruption laws and therefore cause business significant damage in the long term should not be underestimated.

Some businesses are willing to take the risk of walking a fine line between commercial dealings and commercial bribery. Moreover, the lack of clarity in this area has left many businesses unclear about the risks in the first place. We examine incentive measures widely used in China to pin down the distinction between legitimate commercial dealings and commercial bribery. Our analysis draws on judicial practice and regulatory guidance – but given the complexity of the matter being examined, it is indisputable that each case will need to be examined on its own merits.

The legal framework
China’s Criminal Law and its Anti-Unfair Competition Law are the cornerstones of China’s anti-commercial bribery regime. Under the Criminal Law, bribe-giving refers to the giving of ‘property’ in exchange for improper benefits; bribe-taking refers to the conduct of (1) requesting property from others by taking advantage of the working position of the party making the request, or (2) accepting property from, and seeking benefits for, others in breach of applicable regulations. To constitute a criminal offence, the amount of the bribe should be relatively large.

The Anti-Unfair Competition Law prohibits bribery conducted ‘by means of giving property or other manners’ in order to sell or purchase products. Unfortunately, while the law provides for several permissible and impermissible circumstances, it fails to set out clear parameters for the offence of commercial bribery.

To put it in context, since the Anti-Unfair Competition Law is intended to curb business activities which may cause unfair competition, it is hardly unexpected that it has a broad scope which gives the Chinese enforcement agencies great discretionary powers in practice.

SAIC (the State Administration for Industry and Commerce) is one of the anti-bribery enforcement agencies in China. In 1996, it clarified the expression ‘by means of property or other manners’ in its Interim Provisions on Banning Commercial Bribery (in Chinese, «禁止商业贿赂行为的暂行规定»). The interim provisions define ‘property’ as including cash and tangible assets, promotion fees, advertising fees, sponsorship, R&D expenses, service fees, consulting fees, commissions and expense reimbursements, and ‘other manners’ as including the giving of benefits other than property, including, for instance, the opportunity or means to travel and study within China or abroad.

In 2008, the Supreme People’s Court and the Supreme People’s Procuratorate jointly released Opinions on Issues concerning the Application of Law in the Handling of Criminal Cases of Commercial Bribery (in Chinese, «关于办理商业贿赂刑事案件适用法律若干问题的意见») in an effort to guide judicial practice in this area. They define ‘property’ as cash, tangible assets, and any other benefits with a monetary value. This broad definition thus includes items such as building decoration, membership cards of...
value, debit cards and travel expenses. Moreover, ‘improper benefits’ for which bribes are given in exchange have been interpreted as referring to benefits, assistance and convenience that are in contravention of laws, regulations, rules, policies and industrial standards.

These clarifications identify a number of forms that commercial bribery may take. In practice, determining whether a commercial arrangement is legally compliant is a challenging exercise. We examine some Chinese court cases to identify trends in the judicial enforcement practice of the anti-commercial bribery regime.

**Case studies**

**Commercial bribery in the form of ‘consulting fees’**

The Construction Project Inspection Association of Yuyao City, Zhejiang Province (the Yuyao Association) sued the local Administration for Industry and Commerce for mistaking a normal commercial arrangement as commercial bribery. The Yuyao Association was established as a non-profit-making professional association; its secretary-general is an official of the local construction project quality inspection and supervision regulatory authority (the Yuyao Authority).

In 2012, the Yuyao Association entered into an agreement with six local construction project inspection companies which allowed the Yuyao Association to charge consulting fees from these companies with respect to certain inspection projects conducted by these companies. Based on this agreement, Yuyao Association received approximately RMB2 million from four of these companies as consulting fees by 28 January 2013. The local Administration for Industry and Commerce regarded this arrangement as commercial bribery and ordered the Yuyao Association to pay a fine of RMB50,000, in addition to confiscation of all consulting fees received. The Administration for Industry and Commerce gave the following reasons for its decision:

- The Yuyao Association had a close relationship with the Yuyao Authority – in addition to the secretary-general, working staff from the Yuyao Authority were seconded to the Yuyao Association and the former was even in control of the latter’s expenditure.

- The Yuyao Association had influence over the local construction market by virtue of its close connection with the Yuyao Authority and thus inspection reports with its imprimatur would...
stand a better chance of being approved by the Yuyao Authority.

- The Yuyao Association could not justify its receipt of the consulting fees since it had not provided any real consulting services and was effectively unable to do so since it did not have any qualified staff.

- The true purpose of the consultancy payments was to buy the Yuyao Association’s influence which would help the relevant companies win business opportunities and gain a competitive advantage.

The local Administration for Industry and Commerce concluded that the payment of consulting fees to Yuyao Association was disguised commercial bribery in order to gain an anti-competitive advantage. Both the court of first instance and the court of appeal upheld the decision of the local Administration for Industry and Commerce.

Commercial bribery in the form of ‘commissions’ or ‘service fees’

In 2001, the local Administration for Industry and Commerce penalised Wuxi Radio & TV Network Centre (Wuxi) for commercial bribery. The penalty was imposed because Wuxi had been collecting insurance premiums from cable TV users together with cable maintenance fees. In return for collecting the premiums, Wuxi had reached an agreement with an insurance company which granted Wuxi a service fee of 30 per cent of the premium value. The local Administration for Industry and Commerce ruled that, since Wuxi was not a qualified insurance agent, this arrangement was in breach of insurance laws and was entered into with the intention of bribing Wuxi to promote the insurance products.

In 2010, a press release disclosed that Toyota Automobile Finance (China) (Toyota Finance) was facing administrative penalties from the local Administration for Industry and Commerce for commercial bribery – the penalty included a fine of RMB140,000 and confiscation of illegal gains of over RMB420,000. It was reported that between August 2008 and April 2010, three 4S stores in Hangzhou which distributed Toyota cars had recommended the car financing services of Toyota Finance to their customers. In return, the 4S stores had received ‘services fees’ equivalent to 4.5 per cent of the interest received by Toyota Finance under the car financing arrangements. Almost concurrently with this case, SAIC and several other regulatory authorities issued a notice which provided that the practice of automobile distributors’ charging ‘return bonus’ or ‘favour fees’ from financing/security/insurance companies while assisting the customers in handling mortgage loans or car insurances is commercial bribery.

The cases described above illustrate that regulators may take into account a variety of factors in determining whether a commercial arrangement constitutes bribery. For example, regulators have been willing to consider whether a party has breached other laws and regulations applicable to its business activities (such as licensing requirements), whether the relevant fee arrangements are justifiable and whether a party enjoys an unfair competitive advantage due to such actions.

SAIC guidance

The second SAIC internal training programme on anti-monopoly and anti-unfair competition conducted a research study on enforcement against commercial bribery and published a report based on its findings in 2012. The SAIC report does not have the force of law but the guidance it provides may be instructive.

SAIC will consider three points in determining whether commercial bribery has been constituted:

1. Has any property/inducement been given improperly in order to gain business opportunities? By ‘improper’, SAIC means any act which is not ‘reasonable, voluntary, equal, fair, in good faith or in conformity with laws and regulations’.

2. Will the giving of property/inducement affect fair competition?

3. Whose interests are affected by whatever is given in exchange by the bribe recipients? SAIC believes that it is always the third party’s interests which are affected by bribery.

In addition, the SAIC report compared commercial bribery with several common commercial arrangements. The findings are summarised as follows:

**Commercial bribery v discount**

Generally speaking, a normal discount, when compared to commercial bribery, should have two features: it should be written into the sales contract; and it should be truthfully recorded in the accounting books. Absence of either feature may turn the discount into a kickback, which is a type of commercial bribery.

**Commercial bribery v commission**

Brokers may charge agreed commissions for the introduction and facilitation of business transactions, provided that:

- the commissions are written into the contracts
- the commissions are truthfully recorded in the accounting books
- the brokers are duly qualified to conduct brokerage business
• the brokers act in good faith without compromising the principals’ interests.

Failure to meet the above conditions may turn the commissions into commercial bribery.

**Commercial bribery v gifts**
Gifts from business operators to consumers are normally not regarded as commercial bribes. However, gifts by and between business operators in order to gain business opportunities may constitute commercial bribes, except for gifts of small value given in accordance with commercial practice and normal entertainment expenses.

**Commercial bribery v sponsorship**
Sponsorship for public welfare with no economic benefits in return does not constitute commercial bribery. Commercial sponsorship as a marketing instrument to secure business transactions may be regarded as commercial bribery. According to SAIC, sponsorship fees in the commercial context should be considered for promotion or advertisement activities and therefore may constitute commercial bribery if any payment is made in the name of sponsorship fees but no promotion or advertisement is provided.

**Commercial bribery v sales bonus**
Sales bonuses usually take the form of commissions payable by principals to agents or discounts given by sellers to buyers. As long as such discounts or commissions meet the conditions described above, there is a relatively low risk that they will be regarded as commercial bribes.

The SAIC has also given written rulings from time to time differentiating between normal commercial deals and commercial bribery. For example, in an SAIC response dated 22 June 1999, SAIC clarified that a ‘headcount fee’ or ‘parking fee’ paid to travel agencies or tour guides by stores for the purpose of introducing tourists to the stores constituted commercial bribery. In a separate response on 30 December 1997, SAIC stated that payments made by beer companies to hotel or restaurant staff to re-purchase bottle caps (of the beer sold) are commercial bribes.

**Conclusion**
The diverse forms of commercial activities and commercial bribery make it difficult to clearly delineate the two. Notwithstanding the attempt of enforcement authorities to clarify the position, a grey area still exists. Ambiguity in the legislation and uncertainties in enforcement practice have added significant complexity to the compliance landscape in China. Therefore, it is advisable to take a cautious approach in doing business in China, in particular in the engagement of third party agents and offers of ‘competitive’ incentives to commercial counterparties.

Businesses should be more self-aware and put themselves in the SAIC’s position when reviewing any proposed arrangement. This method will allow businesses to question the underlying objective for a practice that does not appear to be entirely above board and, thus, to identify non-compliant acts at the outset instead of on a post hoc basis. Generally speaking, to the extent that a commercial deal is properly made, complies with all applicable laws and regulations, has a justifiable commercial substance, is transparent in its documentation and reasonable in its fee arrangements, the risks are fairly minimal.

Adopting best practice compliance norms at the outset will allow businesses to avoid the pitfalls that taking the easier route would cause them to encounter. It may seem onerous, but it will yield dividends.

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