

CHINA'S NEW ANTI-BRIBERY LAW – HAS COMMERCIAL BRIBERY BEEN REDEFINED?

A new amendment to China's Anti-Unfair Competition Law (AUCL) is the first since the law was enacted more than two decades ago. The amended AUCL draws on the lessons learned during the past two decades to make some major changes.

BACKGROUND

The Standing Committee of the National People's Congress of the PRC has taken a noteworthy step in the outlawing of commercial bribery in China by promulgating an amended anti-unfair competition law. The AUCL, which governs commercial bribery, was amended on 4 November 2017, the first change to the law since it originally came into force in 1993.

Under the 1993 version of the AUCL and its subsidiary regulations, commercial bribery was defined only vaguely, leading to inconsistent interpretation by national and local regulators. Certain types of payments between parties to a transaction were categorised as bribes, even though they did not fall within the traditional and widely accepted understanding of bribery.

"SHELF FEE"

One example is the so-called "shelf fee", where a supplier pays a sum of money to a supermarket or a retailer in exchange for a more prominent location on the shelves for its products. While accepted as usual practice in many countries, such payments have been targeted by some PRC local regulators as commercial bribery, on the basis that such payments may not have been accurately recorded in contracts, books or records. Some of these regulators have expressed an even more aggressive view, that even if such payments have been properly documented, they should still be treated as commercial bribes under the AUCL because of a concern that they are inherently anti-competitive.

REDEFINITION

The new legislation appears to suggest a departure from this position. Paragraph 1 of Article 7 re-narrows the definition of bribery recipients as including (a) employees of the transaction counterparties, (b) entities or individuals entrusted by the transaction counterparties to handle relevant matters, and (c) entities or individuals that take advantage of their positions or influence to affect the transactions.

Key issues

- The new amendment to the PRC Anti-Unfair Competition Law is the first since the law was enacted in 1993.
- Practices that are commonplace in other countries have historically been viewed as anti-competitive in the PRC.
- Additional interpretive guidance is awaited.

This could be read to exclude the direct counterparties to a transaction from being considered potential bribery recipients, an interpretation supported by some officials from PRC enforcement agencies.

However, other limbs of the legislation cast doubt on this interpretation. Paragraph 2 of Article 7 maintains the same books and records provision as contained in the 1993 version. Article 19 appears to indicate that any violation of Article 7 will be viewed as a bribery issue. Accordingly, the law may still treat as commercial bribery any direct payments between transaction counterparties if the provision or receipt of benefits is not properly documented in contracts or accurately recorded in the parties' books and records.

In addition, the transmission of certain types of benefits between parties to a transaction remains prohibited by industry-specific regulations. In the healthcare sector, for example, the current PRC Pharmaceutical Administration Law prohibits pharmaceutical manufacturers, dealers and medical institutions from offering or accepting kickbacks or other benefits off the books.

In light of the above, it may be premature to conclude that Article 7 of the amended AUCL has fundamentally changed the definition of commercial bribery. Further clarification from the State Administration for Industry and Commerce (SAIC) will be necessary if the inconsistent understandings and practices of local regulators are to be standardised.

EMPLOYEES

Another notable feature of the amended AUCL is the express provision regarding employers' vicarious liability. According to Paragraph 3 of Article 7, where an employee commits bribery, this shall be deemed to be an act undertaken by the employer, unless the employer can prove that the employee's action was irrelevant to the employer's seeking transaction opportunities or a competitive advantage.

The law is not crystal clear on the applicable test for this exception, whether the focus is on the objective impact of the employee's conduct on the employer's interests, or on the subjective intent of the employer and/or the employee. This again calls for further practical guidance from the SAIC and its local branches. In any event, with the introduction of this new provision, PRC regulators may have more incentive to pursue employers in respect of their employees' misconduct in the bribery sphere.

What is clear is that the amended AUCL could provide a greater degree of consistency in the enforcement of China's anti-corruption laws if some additional interpretive guidance is provided to the local enforcement agencies and companies seeking to comply in their business practices.

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