The Amendment of the Anti-Unfair Competition Law of the People’s Republic of China
New definition on commercial bribery

On 14 November 2017, the Standing Committee of the National People’s Congress of the People’s Republic of China (“PRC”) promulgated amendments to the “Anti-Unfair Competition Law of the People’s Republic of China” (the “amended AUCL”), which will come into effect on 1 January 2018. The amended AUCL came 24 years after the current AUCL has been implemented.

The amended AUCL made a number of substantial changes mainly in the areas of unfair competition, investigations into suspected unfair competition, and the legal liabilities arising from unfair competition. One of the most important amendment is the redefinition of commercial bribery which had been a longstanding controversy and poses a challenge to every company operating in the PRC.

We believe that this is the first time the government makes clear its intention to create a fair competitive business environment by clarifying the historical inconsistent interpretations of commercial bribery. Though some of the amended provisions remain vague, the implementation of this ground-breaking legislation will be watched with keen interest. In this alert, we consider the potential impact brought by the significant changes to the concept of commercial bribery.

Background

The current AUCL was introduced in 1993 to regulate “bribery conducts in business” which did not reach the thresholds of criminal bribery set out in PRC criminal laws.

According to Article 8 of the current AUCL, a business operator in the PRC is prohibited from giving a bribe in the form of money or other property or means for the purpose of selling or buying goods. Giving or accepting secret kickbacks are also treated as bribes and acceptance of bribes.

To echo that, the Interim Provisions of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery (the “IPCB”) defined commercial bribery as business operators giving a bribe in the form of property or other means for the purpose of selling or purchasing goods. “Property and other means” includes promotion costs, publicity expenses, sponsorship, research costs, remuneration, consultation fees, commissions and advantages other than property.
Accordingly, a bribe recipient in commercial bribery must be the counterparty in the transaction, and legitimate payments common in everyday commerce between buyer and sellers, such as payment of consultation fees and commissions, risk being caught as acts of bribery. In practice, the State Administration for Industry and Commerce ("SAIC") also has the discretion to find benefits given to a third-party who are connected to the transaction as commercial bribery. In the absence of a consistent understanding across law enforcement agencies, different interpretations of what constitutes commercial bribery have existed over a long period.

**Observations**

**Expansion on the scope of commercial bribery**

The amended AUCL broadens the scope of bribery conduct. Rather than being limited to the giving or acceptance of bribes for the purpose of selling or buying goods, under the amended AUCL, any bribe offered to obtain a competitive advantage would be deemed commercial bribery.

**Clarification on who may be a bribe recipient**

The amended AUCL clarifies that a bribe recipient may be:

1. an employee of the counterparty to a transaction;
2. an entity or individual entrusted by the counterparty to handle the relevant affairs; or
3. any entity or individual that use authority or influence to influence a transaction.

One of the most significant amendments in the amended AUCL is to exclude the counterparty to a transaction from being a bribe recipient. However, employees of a counterparty may be a bribery recipient. Accordingly, benefits such as discounts given to a counterparty in line with the amended AUCL would not be seen as commercial bribery.

Entities or individuals authorised by counterparty to handle relevant affairs could be the bribery recipient under the amended AUCL. In the past, enforcement authorities such as the SAIC considered such entities or individuals as agents to the party to the transaction and therefore treated the party to the transaction as the recipient of the bribe, on the basis that these entities or individuals may use its authority to influence the transaction. Therefore, their acceptance of bribe from a counterparty to the transaction would damage legitimate rights and interests of others. The amended AUCL formalises this interpretation.

The amended AUCL provides that the entities or individuals with authority or influence on the transaction may be a bribe recipient. The source of such authority could be derived from the transaction counterparty, or the investor of a counterparty, according to Ms. Yang Hongcan, director of competition enforcement bureau of SAIC.
**Duty of recording accurately**

An operator may pay a discount to the counterparty or pay a commission to the middleman if the discount or commission is accurately recorded in the books of the parties involved. We believe a breach of this duty would not necessarily turn the discount or commission into a commercial bribe. However, whether SAIC would punish this on other basis remains unclear. In any event, such failure is a breach of the tax rules of the PRC.

**Defence to commercial bribery**

The IPCB and the amended AUCL both confirm that an employer is vicariously liable for acts of commercial bribery committed by an employee. In our experience, the SAIC usually would not distinguish an employee’s behaviour from his employer’s conduct even if such conduct directly breaches the employer’s internal guidelines or otherwise contradicts with the employer’s intention. As bribery is a personal action, the defence raised by the corporate employer would also be rejected for lacking legal basis. The amended AUCL helpfully exempts the employer’s liability if the employer could prove that the alleged acts of commercial bribery of its employee is not related to seeking any competitive advantage.

It is reported that Ms. Yang also said that the exemption would apply to the employer if:

1. it has implemented reasonable procedures in compliance with applicable laws and regulations;
2. it has adopted effective supervision measures to monitor employees’ conduct; and
3. it has not tolerated any employees’ bribery conduct.

It is unclear how one can prove that the bribery conduct is irrelevant and unconnected to pursuing a competitive advance, and no detailed interpretation has been published yet. We believe the most prudent approach for business operators is to set up and put in place an effective internal supervision system that is clear, practical, accessible in line with the above which can be enforced throughout the business.

**Increase of penalties**

The amended AUCL provides administrative fines between RMB 100,000 to RMB 3,000,000 for each violation. In serious cases, business licences of the operator might be revoked.

**Commentary**

The clarification on the definition of commercial bribery indicates an acceptance by the PRC government that reasonable and legitimate business arrangements should not be at risk of being found to be commercial bribery. Several other improvements such as narrowing the categories of bribery recipient, and expressly setting out the defence available to the employer would reduce the influence the PRC government has on the market behaviour. It is
also interesting to note that state owned entities accepting bribes may be caught by the amended AUCL if the entity “uses authority or influence to influence a transaction”. An employee of a state owned entity who is a counterparty in a transaction accepting a bribe may also be caught by the amended AUCL. Moreover, although the offering of benefits to a counterparty who is owned by a state would not be commercial bribery, such action is still a violation of criminal law. However, there are still some uncertainties opening the door to the different interpretations of the amended AUCL, and we expect further implementation guidelines to be issued in due course.

The amended AUCL demonstrates the determination of PRC government to create a fair market. Every business operator should take into account the principals set out in it in setting up and maintaining its own internal risk control procedures. Whether the amended AUCL will create a more attractive business environment remains to be seen.
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