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From a Case of a Multinational Pharmaceutical Company: A View of Commercial Bribery Laws in China

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On July 11, 2013, Chinese Ministry of Public Security (MPS) stated on its official website that the case had been put on file, that some senior executives of the Chinese division of a multinational pharmaceutical company ("G") are under investigation for serious economic crimes. It is reported that G has offered large bribes through travel agencies to certain government officials, medical industry associations and foundations, hospitals and doctors, directly or under the guise of "project sponsorships", in order to expand the company's market and raise the price of its medicine. Four Chinese senior officers including vice president and chief of legal department were reported to be investigated on Jun 27, 2013.

The case has raised a significant impact on the society and this article will review the commercial bribery law in China and give a primary understanding hereof.

1. Why was the G company investigated?

Many comments given on the Internet said that commercial bribery is a widespread phenomenon in the pharmaceutical industry and under the circumstance like this, a company cannot survive without bribery in China. Compared with domestic companies, multinational corporations have done much better. So doubts raised like the following: why was G investigated instead of another company? As

a multinational companies, was it “chosen” by the authorities?

To respond to the questions above, we may take the document “Specific Guidance on Handling Commercial Bribery from General Office of the CPC Central Committee and State Council” (as “the Specific Guidance”) issued on Feb 8th, 2006 for reference.

- (a) CPC Central Committee pointed on the Specific Guidance that the government shall make more efforts to resolve the problem with public interests and closely related to the vital interests of the masses that seriously undermined the market order, shall focus governance on commercial bribery in construction, land transfers, property transactions, drug sale, and government procurement etc. G Company belongs to pharmaceutical industry that is exactly on the flag list.
- (b) The Specific Guidance also pointed that serious and large-scale commercial bribery cases need to be paid more attention and cases with offence of vicious, serious nature and large impact shall be severely punished in accordance with laws. In the pharmaceutical industry, comparing with domestic pharmaceutical companies, the multinational pharmaceutical companies own high fame, large impact and they are generally working better in compliance than domestic enterprises. Therefore, it is not surprising that multinational pharmaceutical companies are “chosen” as a typical case.
- (c) Meanwhile, the Specific Guidance pointed that the government shall not only punish commercial bribery but also maintain regular production and operation to promote economic development, maintain social stability and promote reform and opening-up; and shall adhere to the policy of combining punishment with leniency. It can be figured out that when it comes to deciding the kind of case to choose, enforcement authorities consider both political, economic and social effect as long as with requirement of maintenance of stability.

Whereas, under the society background of China, laws cannot be fully achieved. Some people comment it is like survival from a non-institutionalized rule, which foreign institutional feel lack of certainty and when facing problems, they cannot rely on a clear and stable legal system but in a case by case situation which the results depend on each specific game. In spite of this, each multinational company should study this case and learn how to avoid violating the rules and regulations.

2. What is commercial bribery crime?

Commercial bribery is a legal term which is not directly used in Criminal Law or Anti-Unfair

Competition Law in China. Article 1 of “Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery” provides that commercial bribery involves following eight counts of criminal law: (1) crime of accepting bribes by non-State functionary (Article 163); (2) crime of offering bribes to non-State functionary (Article 164); (3) crime of accepting bribes (Article 385); (4) crime of accepting bribes by units (Article 387); (5) crime of offering bribes (Article 389); (6) crime of offering bribes to units (Article 391); (7) crime of introducing bribes (Article 392); (8) Crime of offering bribes by units (Article 393).

2.1 Briber and Bribee of commercial bribery

The following table may help understand the subject and the object criteria of those crimes

Name of Crime	Briber	Bribee
Non- State functionaries bribery Offering bribes to non- State functionaries	Individual or units	non- State functionaries
Acceptance of bribes	Individual or units	State functionaries
Acceptance of bribes by units		State organs
Offering bribes	Individual	State functionaries
Offering bribes to units	Individual or units	State organs
Introducing bribes	Individual or units	State functionaries
Offering bribes by units	Entity	State functionaries

In accordance with Article 93 of Criminal Law, the above item "State functionaries" as mentioned refers to persons who perform public service in State organs. Persons who perform public service in State-owned companies or, enterprises, institutions or people's organizations, persons who are assigned by State organs, State-owned companies, enterprises or institutions to companies, enterprises or institutions that are not owned by the State or people's organizations to perform public service and the other persons who perform public service according to law shall all be regarded as State functionaries.

There is no clear definition of “perform public service” in laws. Taking "Minutes of the Symposium on Trial of Economic Crime Cases by Courts Nationwide" issued by the Supreme People's Court on

Nov 13th, 2003 into consideration, "Official business" mainly includes public affairs relevant to power of office and professional activities involving the supervision and administration of State-owned funds and properties. Activities in which staff members of State organs perform their official duties according to the law or in which directors, managers, supervisors, accountants and cashiers of State-owned companies manage and/or supervise State-owned funds and properties shall be classified as official business.

2.2 The scope of commercial bribes

The scope of bribes is limited to money and property in Criminal Law. However, with the changing of bribery methods, some people offer bribes other than money, goods in order to make circumvention of the law. "Opinions on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery" issued on Nov 20th, 2008 Article 7 extends the scope of bribes to property interests, which provides that money and property in commercial bribery include not only money and kind, but also interest on property that can be counted by money, such as providing house renovation, membership card containing money, token card (coupon), traveling expenses, etc. The specific amount is subject to the actual charges paid. Apart from this, non-property interests are not included in the scope of bribes yet.

Especially talking about sexual bribery, the following case may give you a criteria on conviction. Where the briber himself/herself offered sexual service or offered through other people without payment of money or property, the person shall not be convicted of offering bribery. Where the briber offered sexual service with payment of money or property, the person shall be convicted of offering bribery and the person who accepts sexual service shall be convicted of taking bribery. In January 2007, the first case that prostitution fees were included in the amount of bribery was exposed. Ding Wen, the deputy general manager of Construction Development Co., Ltd. in Lishui, Zhejiang Province, received a total bribes of 34,000 Yuan including prostitution fees and was sentenced as accepting bribes to one year and six months, suspended for two years in result.

2.3 The objective criteria (conduct) of commercial bribery crime

The objective criteria of those kinds of commercial bribery crime can be organized into the table as follows:

Acceptance of bribes	(1)taking advantage of one's position, extorts money or property from another person; (2) illegally accepts another person's money or property in return for securing benefits for the person shall be guilty of acceptance of bribes; (3) in economic activities, violating State regulations by accepting rebates or service charges of various descriptions and taking them into one's own possession
Acceptance of bribes by non-State functionaries	(1) taking advantage of one's position, demands money or property from another person; (2)illegally accepts another person's money or property in return for the benefits he seeks for such person
Acceptance of bribes by units	demands or illegally accepts another person's money or property in return for the benefits he seeks for such person
Offering bribes	for the purpose of securing illegitimate benefits, gives money or property to a State functionary
Offering bribes to non-State functionaries	for the purpose of securing illegitimate benefits, gives money or property to a non-State functionary
Offering bribes by units	(1)for the purpose of securing illegitimate benefits, gives money or property; (2)violates State regulations by giving rebates or service charges of various descriptions to a State functionary
Offering bribes to units	(1) for the purpose of securing illegitimate benefits, gives money or property to a State organ, State-owned company, enterprise, institution or people's organization; (2) in economic activities, violates State regulations by giving rebates or service charges of various descriptions to the units mentioned above.
Introducing bribes	introduces a bribe to a State functionary

As what can be figured out from the table above, there is no significant difference in the objective criteria of commercial bribery crime between offering bribery to State functionaries and non- State functionaries such as staff in corporations. The distinctions mainly fall into the aspects of the

standards for filing criminal cases.

The following paragraphs will focus on key points of constituting commercial bribery crime.

(a) Taking advantage of one's position

Couples of judicial interpretation documents issued by the supreme people's court and the supreme people's procuratorate have explained the acceptance of bribes of State organ staff members, which the main points can be concluded as the follows:

(i) Making use of one's position and power when administering, managing and dealing with public property

(ii) Taking advantage of the power of office of other State organ staff members whose positions are subordinate to or controlled by that of him

(b) Extorting money or property from another person, or illegally accepts another person's money or property in return for securing benefits for the person

Extorting money or property from another person is some kind of initiative, irrespective of expressed or implied, whether the concerned person "secures benefits for another person" or not and such person shall be guilty of the crime of accepting bribes.

Accepting another person's money or property is some kind of passive actions and the person should secure benefits for another person at the same time then such person shall be guilty of the crime of accepting bribes. Irrespective of whether the intended benefits are properly secured and irrespective of whether the benefits secured for another person are realized, the making out of the crime of accepting bribes remains unaffected. Seeking benefits for others can be divided into three stages, namely making a promise, execution and accomplishment. Where a person commits any of the said three acts, such cases shall be deemed to have satisfied a key criterion for "seeking benefits for others.

(c) Securing illegitimate benefits

The meaning of "securing illegitimate benefits" has been regulated and explained in many issued judicial interpretation in the past. In accordance with the newly published "Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery" on Nov 20th, 2008, its article 9 describes as: "in crimes of offering bribes, "securing illegitimate benefits" means the person giving bribe secures benefits which are contrary to laws, regulations, rules or policies, or

asks the other to violate provisions of laws, regulations, rules, policies or industry codes to provide help or convenience.”

3. The criteria of constituting commercial bribery in medical and medicine industry

The nature of the state-owned hospital doctors taking advantage of their power of prescription decision to collect kickbacks or other interests from Medicines companies raised massive controversies both in theory and practice in the past. Article 4 of “Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery” issued on Nov 20th, 2008 provided that Where any State functionary in medical institutions, are involved in the activities of purchasing medical products such as medicines, medical equipments, medical health materials, etc., and take advantage of his/her position to extort money or property from the seller, or illegally accept the seller's money or property in return for benefits to the seller, which constitutes a crime, he or she shall be convicted of accepting bribes in accordance with the provisions of Article 385 of the Criminal Law and punished accordingly. Where any non-State functionary in medical institutions conducts any of the acts of the preceding paragraph with the amount being relatively large, he or she shall be convicted of accepting bribes by non-State functionary in accordance with the provisions of Article 163 of the Criminal Law and punished accordingly. Where any of the medical staff takes advantage of his position of prescribing under various names, and illegally accepts money or property from the seller of medicines, medical equipments, medical health materials, or other medical products in return for securing benefits for the seller of medical products, with the amount being relatively large, he or she shall be convicted of accepting bribes by non-State functionary in accordance with the provisions of Article 163 of the Criminal Law and punished accordingly.

Furthermore, there is still no clear conclusion in theory on whether it is guilty or not if the doctors accept money or property from patients in the clinical diagnosis and treatment activities. And the judicial interpretation issued on 2008 does not give out a specific provision on this matter.

4. How to distinguish common gifting and hosting from commercial bribery crime?

At present, relevant laws and regulations in China are not very clear yet meanwhile in China, a state where there is a traditional custom in highly respect for etiquette so-called "relationship" in society

is popular. So how we act in a neither rude nor illegal way is a problem that all foreign corporations are facing and should find some proper means to deal with. The boundary between them probably is not that clear but we still can take the following criteria for reference:

4.1 Provisions in judicial interpretation

The article 10 of “Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery” issued on Nov 20th, 2008 provided that Bribery and donation shall be differentiated when handling criminal cases of commercial bribery. The following factors shall be mainly taken into consideration to make overall analysis and comprehensive judgment: (1) the source of money or property transaction, such as whether the two parties are relatives or friends, the communication, circumstances and degree in history; (2) the value of the money or property transacted; (3) the cause, time and manner of money or property transaction, whether the person offering money or property has brought forward official request towards the recipient or not; (4) whether the recipient secures benefits for the provider by taking advantage of his position or not.

In accordance with the judicial interpretation mentioned above, the last two criteria which are “whether the person offering money or property has brought forward official request towards the recipient or not” and “whether the recipient secures benefits for the provider by taking advantage of his position or not” could be considered as useful tool to check out.

4.2 “Business Principles for Countering Bribery” published by transparency international

Transparency international—a noted global coalition against corruption, published “Business Principles for Countering Bribery”, which offers another useful tool. It gives out ten basic principles in gift and hospitality as follows:

(a) For justice reasons

Gifts or hospitality should be considered as a clear act of gratitude.

(b) No obligations attached

Gifts and hospitality do not create any obligations to the recipient.

(c) No expectations for returns

Offeror or people related should neither create any expectations nor attach too much importance on the gifting over the recipient's acceptance.

(d) Publicity

Where gifting is conducted in private, the purpose should be questioned.

(e) Record and report

Gift and hospitality should be recorded and reported to the management.

(f) Reasonable value

Gift should be small and the expense of hospitality should comply with general business practices.

(g) Proper equivalent

The property of gift and hospitality should be corresponded to the mutual relationship and general business practice.

(h) Legal

To comply with the laws of the current state.

(i) To comply with the rules of the recipient.

Gift and hospitality should comply with the rules and conduct regulations of the receiving organization.

(j) Proportionality

The occurrence of giving and receiving is not quite often between the offeror and recipient.

Ultimately, although the criteria above have been more detailed and specific, the real life is ever changing and when it comes to actual problems, doubts still occur. In those cases, we should timely confirm with the company's legal affairs and compliance department in advance or consult with external professional lawyers. We could also ask the following questions ourselves: is there any attempt in gifting and hospitality to attach any improper influence to the existing business relationship? If my behavior is disclosed to the public, will the company or our staff members be set into embarrassment? If the answer is yes, we should avoid doing this.

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