



# Bribery & Corruption

# 2018

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# China

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## Introduction

China has had strong anti-corruption laws for many years. On 1 January 1980, the *Criminal Law of the People's Republic of China* (the “**PRC Criminal Law**”), containing the criminal offences of bribery and corruption, came into effect. The *PRC Criminal Law* later underwent a sea change to modernise and rejuvenate the laws in 1997, with enhanced provisions on bribery and corruption offences.

The laws have now become even more vigorous, with sustained enforcement following the coming to power of President Xi Jinping in 2013. President Xi has made the curbing and elimination of corruption one of his main goals. This has kick-started the beginning of a new era, which has brought a new focus on and appreciation of the strength and breadth of the Chinese anti-corruption laws.

The actions taken by President Xi have been felt even at the highest echelons of power. According to the statistics provided in a report<sup>1</sup> by the Procurator-General of the Supreme People's Procuratorate (“**SPP**”), Cao Jianming, to the National People's Congress in March 2017, there were 47,650 persons charged for corruption or dereliction of duty. Indicative of the seriousness of the anti-corruption campaign, 2,882 state functionaries above the county level, including 446 state functionaries at the bureau level and 48 state functionaries at the provincial/ministerial level, were investigated in these cases. In total, 10,472 state functionaries were investigated and punished for taking bribes and 7,375 persons were investigated and punished for giving bribes to state functionaries.<sup>2</sup>

As another example, banquets for representatives of the National People's Congress have given way to self-serve and alcohol-free buffets. This focus is also evidenced by the issuance of the Administrative Measures on Conferences of Central and State Departments (the “**Measures**”) and the Provisions on Administration of Domestic Official Reception by Party and Government Organs (the “**Provisions**”) in September and December 2013 respectively. The Measures aim at cutting expenditure on official meetings by central government departments. The Provisions contain strict and more detailed requirements and standards on where a business meal may take place and what must be excluded from a business meal. These developments are part of President Xi's overall efforts to eliminate opportunities for corruption and extravagance in connection with official meetings and receptions.

It is also noteworthy that the Chinese government invited the State Parties under the United Nations Convention Against Corruption to inspect China's compliance with the treaty for the first review period from 2010 to 2015.<sup>3</sup> This is indicative of the seriousness of the Chinese government's efforts in its anti-corruption campaign.

In November 2014, the Chinese government announced that a new anti-corruption bureau is to be established. It is anticipated that this new bureau will act as an anti-graft bureau and will investigate officials suspected of corruption. The bureau will be combined with three existing bodies – the Anti-Corruption and Anti-Bribery Bureau, the Prevention of Duty-Related Crimes Department and the Investigation of Dereliction of Duty and Power Abuse Department. It will be established at vice-ministerial level, higher than a regular bureau.<sup>4</sup>

Foreign entities operating in China face the potential of being investigated and charged in connection with this sustained anti-corruption campaign. In the summer of 2013, GlaxoSmithKline (“GSK”), a British pharmaceutical company listed on both the London and New York stock exchanges, became the focus of the biggest corruption scandal in China involving a foreign company. The GSK chain of events was set in motion by two chains of e-mails accusing GSK of bribing doctors in order to promote GSK’s medical products.<sup>5</sup> In September 2014, GSK was found by the Changsha Intermediate People’s Court in Hunan Province, China to have offered money or property to non-government personnel in order to obtain improper commercial gains, and was found guilty of bribing non-government personnel. As a result of the Court’s verdict, GSK was ordered to pay a fine of RMB 3bn (£297m) to the Chinese government.<sup>6</sup> Five former GSK senior executives were sentenced to suspended imprisonment of two to three years.<sup>7</sup>

Following the GSK bribery investigation, the State Administration of Industry and Commerce stated that local Administrations of Industry and Commerce should pay more attention to industries affecting the public interest (including the pharmaceutical industry), strengthen their supervision over the bidding activities carried out by industry players, and conduct thorough investigations against any commercial bribery arising from the bidding process.<sup>8</sup> A number of foreign drug manufacturers – UCB, Novartis, AstraZeneca PLC, Pfizer, Bayer AG, and Roche Holding AG – were subsequently visited by the Chinese authorities.<sup>9</sup> There were also news articles reporting that Sanofi SA and Eli Lilly were visited by the Chinese authorities as well.<sup>10</sup>

Currently, the primary pieces of anti-bribery and anti-corruption legislation in China are: (i) the *PRC Criminal Law*; and (ii) the *PRC Anti-unfair Competition Law* (the “**AUCL**”). The *PRC Criminal Law* applies to both “official bribery” (where government officials and state functionaries are involved) and “commercial bribery” (where private enterprises and/or their staff are involved), whereas the *AUCL* prohibits “commercial bribery”.

In addition to this primary legislation, various government departments’ administrative rules (such as the *Interim Regulations on Prohibiting Commercial Bribery*) and judicial interpretations issued by the Supreme People’s Court (“**SPC**”) and the SPP (such as the *Opinion on Issues concerning the Application of Law in the Handling of Criminal Cases of Commercial Bribery* (the “**2008 Commercial Bribery Opinion**”) and, most recently, *Interpretations of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery* (the “**2016 Judicial Interpretation**”)) also contain anti-bribery provisions.

The Communist Party of China (“**CPC**”) and the State Council have also issued internal disciplinary rules governing corruption or bribery of Communist Party members and Chinese government officials.

### The PRC Criminal Law

The *PRC Criminal Law* prohibits: (a) “official bribery”, which applies to a “state functionary” or an “entity”; and (b) “commercial bribery”, which applies to a “non-state functionary”.

The term “state functionary” is broadly defined, and includes civil servants who hold office in state organs, persons who perform public duties in state-owned entities or semi-government bodies, persons who are assigned to non-state-owned entities by state organs or state-owned entities to perform public duties, and persons who otherwise perform public duties according to the law.<sup>11</sup> The term “entity” includes state organs, state-owned companies, enterprises, institutions, and people’s organisations.<sup>12</sup>

The term “non-state functionary” means any person or entity that is not a “state functionary” or an “entity” as defined in the *PRC Criminal Law*. Generally speaking, the criminal sanctions for bribery offences involving state functionaries are more severe than those involving non-state functionaries.

Under the *PRC Criminal Law*, both the offering and receiving of bribes constitute serious criminal offences in China. The offences are usually categorised as “bribe-giving” or “bribe-accepting” offences. The statutory offences are:

- (i) offering of a bribe to a state functionary;<sup>13</sup>
- (ii) offering of a bribe to a non-state functionary;<sup>14</sup>
- (iii) offering of a bribe to a foreign official or an officer of a public international organisation;<sup>15</sup>
- (iv) offering of a bribe to an entity;<sup>16</sup>
- (v) offering of a bribe by an entity;<sup>17</sup>
- (vi) offering of a bribe to a close relative of, or any person close to, a current or former state functionary;<sup>18</sup>
- (vii) introduction to a state functionary of an opportunity to receive a bribe;<sup>19</sup>
- (viii) acceptance of a bribe by a state functionary;<sup>20</sup>
- (ix) acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary;<sup>21</sup>
- (x) acceptance of a bribe by a non-state functionary;<sup>22</sup> and
- (xi) acceptance of a bribe by an entity.<sup>23</sup>

The Ninth Amendment to the *PRC Criminal Law* (“**the Ninth Amendment**”), which was promulgated by the National People’s Congress on 29 August 2015 and came into effect on 1 November 2015, focuses on empowering judicial organs to more effectively combat corruption. In addition to introducing a new offence of “offering a bribe to a close relative of, or any person close to, a current or former state functionary”, these amendments:

- (i) expand the scope of monetary penalties as punishment for bribery offences (see the table setting out the penalties for various offences under the heading *Penalties under the PRC Criminal Law* below);
- (ii) add monetary fines to almost all corruption/bribe-related offences;
- (iii) replace specific monetary thresholds for sentencing considerations with more general standards, such as “relatively large”, “huge” and “especially huge”; and
- (iv) raise the bar for mitigating circumstances to apply for reduced sentencing.

On 18 April 2016, the SPC and SPP jointly issued the 2016 Judicial Interpretation on bribery, corruption, and misappropriation of official funds. It became effective immediately. The 2016 Judicial Interpretation provides further clarification to the Ninth Amendment regarding corruption and bribery crimes. In principle, the 2016 Judicial Interpretation:

- (i) expands the definition of bribes to include certain intangible benefits;
- (ii) adjusts monetary thresholds for bribery prosecutions and sentencing, including raising the thresholds for bribes involving government officials and non-government officials;

- (iii) clarifies that a thank-you gift after improper benefits are sought still constitutes bribery; and
- (iv) clarifies when leniency may be given and provides additional details on the requirements and benefits of voluntary disclosure.

#### Jurisdiction of the PRC Courts

Foreigners or foreign entities are subject to the same legislation when doing business in China.<sup>24</sup> Chinese criminal laws apply to crimes that take place within the territory of China, whether committed by Chinese nationals or foreigners.

Accordingly, the PRC courts would have jurisdiction over:

- (i) bribery and other crimes that are committed by PRC or foreign individuals or entities within China;
- (ii) bribery and other crimes that are committed by PRC or foreign individuals or entities on board PRC ships or PRC aircraft;
- (iii) bribery and other crimes that are committed outside China with the intention of obtaining improper benefits within China;
- (iv) bribery by PRC individuals of foreign officials or officers of a public international organisation outside China;
- (v) bribery and other crimes committed by PRC nationals outside China which are punishable under the *PRC Criminal Law* by a fixed term imprisonment of three years or longer; and
- (vi) bribery and other crimes committed outside China by PRC state functionaries or military personnel.

#### “Bribe-giving” offences

The *PRC Criminal Law* generally prohibits an individual or entity from giving “money or property” to a state functionary, a close relative of, or any person close to, a current or former state functionary, a non-state functionary or an entity for the purpose of obtaining “improper benefits”.

Previously, “money or property” included cash, in-kind objects as well as various “proprietary interests that can be measured by money”, such as the provision of: home decoration; club membership; stored value cards; travel expenses; shares in, or dividends or profits from, a company without corresponding investments in the company; payment through gambling; and payment for services that have not been provided, etc.<sup>25</sup> The 2016 Judicial Interpretation reconfirms the definition of bribes to include certain intangible benefits. It defines “money and property” to include money, in-kind objects, and proprietary interests for the crime of bribery and “proprietary interests” include material benefits that can be converted into money, such as home renovation, debt relief, etc., and other benefits that need to be paid using money, such as membership service, travel, etc.<sup>26</sup> Previously, the 2008 Commercial Bribery Opinion provided that the amount of such intangible benefits should be calculated on the amount actually paid, whereas the 2016 Judicial Interpretation states that the amount concerned can also be calculated on the amount payable. This is to address situations in which services, travel or other intangible benefits may have been deliberately undervalued by bribe-givers.

In “bribe-giving” cases, a violation occurs when a party makes a bribe with the intent to seek “improper benefits”, which include: (a) seeking benefits from a state functionary, non-state functionary or entity which would be a breach of law, regulations, administrative rules, or policies for that state functionary, non-state functionary or entity to provide;

or (b) requesting a state functionary, non-state functionary or entity to breach the law, regulations, administrative rules or policies to provide assistance or facilitating conditions. For commercial activities related to bidding and government procurement, giving money or property to a relevant state functionary in violation of the principle of fairness to secure a competitive advantage is considered as giving money or property for the purpose of obtaining an “improper benefit”.<sup>27</sup> Further, where “money or property” has been offered with an intent to seek “improper benefits”, but the offence of giving a bribe is not consummated because of factors independent of the said intent, such action may nevertheless constitute a criminal attempt offence under PRC law.<sup>28</sup>

However, a person who gives money or property to a state functionary due to pressure or solicitation from that state functionary but who receives no improper benefit shall not be regarded as having committed the crime of offering a bribe.<sup>29</sup>

As interpreted by the SPP and SPC, bribery may be distinguished from a gift by reference to the following factors:<sup>30</sup>

- (i) the circumstances giving rise to the transaction, such as the relationship between the parties, the history of their relationship, and the degree of their interaction;
- (ii) the value of the property involved in the transaction;
- (iii) the reasons, timing and method of the transaction and whether the party giving money or property has made any specific request for favour; and
- (iv) whether the party receiving money or property has taken advantage of his/her/its position to obtain any benefit for the party giving money or property.

In other words, a person who gives money or property to a state functionary, non-state functionary or entity without requesting any specific favour may not be regarded as offering a bribe.

Effective from 1 May 2011, China extended the scope of commercial bribery to include illicit payments to foreign officials. The *PRC Criminal Law* now also criminalises the “giving of money or property to any foreign official or officer of a public international organisation” for the purpose of seeking “improper commercial benefits”.<sup>31</sup> The inclusion of foreign officials in the definition extends the reach of China’s anti-corruption laws beyond the country’s borders, although the distinction between “improper commercial benefits” and “improper benefits” means that the scope of punishable actions involving foreign officials is slightly narrower than those where personnel of Chinese entities, as defined in the *PRC Criminal Law*, are the recipients of bribes.

#### “Bribe-accepting” offences

State functionaries, close relatives of, or any persons close to state functionaries, non-state functionaries and entities are all prohibited from accepting money or property or making use of their position to provide improper benefits to a person seeking such improper benefits.

In general, “improper benefits” is a key to a “bribe-accepting” offence, and it must be shown that the party accepting the bribe has used its power or position to seek a benefit for the party giving the bribe, except in the following circumstances:

- (i) any person (whether a state functionary or non-state functionary) who takes advantage of his/her position to accept and keep for themselves a “kickback” or “handling fee” under any circumstances shall also be regarded as having committed the crime of accepting a bribe;<sup>32</sup>
- (ii) any state functionary who received bribes with an amount exceeding RMB 30,000 from his/her subordinate and may affect the performance of his/her duty;<sup>33</sup> or

(iii) a promise to seek benefits for others should be regarded as “seeking benefits” for others. If an official clearly knows that a person offering a bribe has in mind a specific request seeking the official’s help, the official will be considered to be “seeking benefits” for others.<sup>34</sup> This is intended to address situations in which officials accept money or property from bribers who do not request help explicitly but have some unspoken understanding with the officials regarding benefits sought.

In addition, the provision of money or property does not have to occur sequentially prior to “seeking benefits” for others.<sup>35</sup> The 2016 Judicial Interpretation clarifies that bribes include payments given after benefits are received, i.e. a thank-you gift received after benefits are sought or received still constitutes bribery. Hence, if nothing has been requested from an official in the performance of his duties but that official afterwards accepts money or property from others based on such performance, that official will be considered to be “seeking benefits for others”.

#### Monetary thresholds for enforcement

As mentioned above, the Ninth Amendment replaced the then-existing monetary thresholds for commencing an investigation into offences with more general standards such as “relatively large”, “huge”, and “especially huge”.<sup>36</sup> The 2016 Judicial Interpretation re-establishes the monetary thresholds and standards for bribery-related prosecution and sentencing.<sup>37</sup> In essence, the minimum bar for most prosecutions of offering bribes to state functionaries has been raised from RMB 5,000 to RMB 30,000, and that of offering bribes to non-state functionaries has been raised from RMB 5,000 to RMB 60,000.<sup>38</sup> A summary comparing the previous monetary thresholds and the new ones is set out as follows:

Offence	Previous Thresholds	New Threshold
<i>“Bribe-giving” cases</i>		
Offering of a bribe to a state functionary	RMB 10,000	RMB 30,000, or RMB 10,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Offering of a bribe to a non-state functionary	RMB 100,000 where the person offering the bribe is an individual, and RMB 200,000 where the person offering the bribe is an entity	RMB 60,000 where the person offering the bribe is an individual, or RMB 20,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Offering of a bribe to an entity	If an individual offers bribes to an entity, the threshold is RMB 100,000, or less than RMB 100,000 when it also has an aggregate factor specified in the SPP 2000 Opinions on Prosecution Thresholds of Bribe-giving Offences (“ <b>the SPP 2000 Prosecution Standards</b> ”) If an entity offers bribes to an entity, the threshold is RMB 200,000, or RMB 100,000 when it also has an aggregate factor specified in the SPP 2000 Prosecution Standards	N/A



Offence	Previous Thresholds	New Threshold
Offering of a bribe by an entity	RMB 200,000, or RMB 100,000 when it also has an aggregate factor specified in the SPP 2000 Prosecution Standards	RMB 200,000 if the offer is made to an individual who can wield influence over others
Offering of a bribe to a foreign official or an officer of a public international organisation	N/A	RMB 60,000 where the person offering the bribe is an individual, or RMB 20,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Offering of a bribe to a close relative of, or any person close to, a current or former state functionary	N/A	RMB 30,000, or RMB 10,000 if it also has an aggregate factor specified in Art. 7 of the 2016 Judicial Interpretation
Introduction to a state functionary of the opportunity to receive a bribe	RMB 20,000 where the introducer is an individual or RMB 200,000 where the introducer is an entity	N/A
<i>"Bribe-accepting" cases</i>		
Acceptance of a bribe by a state functionary	RMB 5,000	RMB 30,000, or RMB 10,000, if it also has an aggregate factor specified in Art. 1 of the 2016 Judicial Interpretation
Acceptance of a bribe by a non-state functionary	RMB 5,000	RMB 60,000, or RMB 20,000 if it also has an aggregate factor specified in Art. 1 of the 2016 Judicial Interpretation
Acceptance of a bribe by an entity	RMB 100,000, or less than RMB 100,000 when it also has an aggregate factor specified in the SPC 1999 Interpretation on Prosecution Thresholds for Cases Directly Handled and Initiated by the Procuratorate	N/A
Acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary	N/A	RMB 30,000, or RMB 10,000 if it also has an aggregate factor specified in Art. 1 of the 2016 Judicial Interpretation

### Penalties under the PRC Criminal Law

Criminal penalties vary depending on whether the party offering or accepting a bribe is an individual or an entity and, if the party is an individual, whether he is a state functionary or non-state functionary. As explained above, the criminal sanctions for bribery offences involving state functionaries are generally more severe than those involving non-state functionaries.

Where the individual has received more than one bribe, the amount of each bribe will be aggregated for the purpose of determining the appropriate penalty. The table below sets out the factors taken into consideration and the corresponding penalties for the relevant offences under the legislation.

Offence	Relevant Factors	Penalty
<i>"Bribe-giving" cases</i>		
Natural person offering a bribe to a state functionary	Where the total bribes exceed RMB 30,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Criminal detention, or up to five years' imprisonment, and monetary penalties
	Where the total bribes range between RMB 1,000,000 to RMB 5,000,000, or the total bribes range between RMB 500,000 and RMB 1,000,000 if it also has an aggravating factor	Five to 10 years' imprisonment and monetary penalties
	Where the total bribes exceed RMB 5,000,000, or the total bribes range between RMB 2,500,000 and RMB 5,000,000 if it also has an aggravating factor	10 years' to life imprisonment, in combination with monetary penalties, or confiscation of property
	Where the offender volunteers information on the bribery before prosecution	A punishment may be waived, or lessened from the stipulated range, or a lighter punishment within the stipulated range may be imposed
Natural person offering a bribe to a close relative of, or any person close to, a current or former state functionary	Where the total bribes exceed RMB 60,000, or the total bribes range between RMB 20,000 and RMB 60,000 if it also has an aggravating factor	Criminal detention, or up to three years' imprisonment, and monetary penalties
	Where the total bribes range between RMB 1,000,000 and RMB 5,000,000, or the total bribes range between RMB 500,000 and RMB 1,000,000 if it also has an aggravating factor	Three to seven years' imprisonment, and monetary penalties
	Where the total bribes exceed RMB 30,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Seven to 10 years' imprisonment, and monetary penalties
Natural person offering a bribe to a non-state functionary or to a foreign functionary or to an official of an international public organisation	Where the total bribes exceed RMB 60,000, or the total bribes range between RMB 20,000 and RMB 60,000 if it also has an aggravating factor	Criminal detention, or up to three years' imprisonment, and monetary penalties
	Where the total bribes ranges between RMB 2,000,000 to RMB 10,000,000, or the total bribes range between RMB 1,000,000 and RMB 2,000,000 if it also has an aggravating factor	Three to 10 years' imprisonment and monetary penalties
Natural person offering a bribe to an entity	N/A	Criminal detention or up to three years' imprisonment, plus monetary penalties

Offence	Relevant Factors	Penalty
Entity offering a bribe to a state functionary	In respect of such entity	Imposition of a fine
	In respect of the employees of such entity who are directly in charge of the matter in question and the employees who are directly responsible for the crime (collectively, "Responsible Personnel")	Criminal detention or up to five years' imprisonment, plus monetary penalties
Entity offering a bribe to a non-state functionary	In respect of such entity	Imposition of a fine
	In respect of its Responsible Personnel	Refer to the sentence guidance regarding the offence of a "natural person offering a bribe to a non-state functionary or to a foreign functionary or to an official of an international public organisation"
Entity offering a bribe to another entity	In respect of such entity	Imposition of a fine
	In respect of its Responsible Personnel	Refer to the sentence guidance regarding the offence of a "natural person offering a bribe to an entity"
Introducing an opportunity to a state functionary to receive bribe	Where the offender volunteers information on the bribery before prosecution	Criminal detention, or up to three years' imprisonment, and monetary penalties
		A punishment may be waived, or reduced from the stipulated range
<i>"Bribe-accepting" cases</i>		
State functionary accepting a bribe	Where the total bribes range between RMB 30,000 and RMB 200,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Criminal detention or up to three years' imprisonment and monetary penalties
	Where the total bribes range between RMB 200,000 and RMB 3,000,000, or the total bribes range between RMB 100,000 and RMB 200,000 if it also has an aggravating factor	Imprisonment for between three and 10 years, monetary penalties or confiscation of property
	Where the total bribes exceed RMB 3,000,000, or the total bribes range between RMB 1,500,000 and RMB 3,000,000 if it also has an aggravating factor	10 years' to life imprisonment or the death penalty, and monetary penalties or confiscation of property
	A bribe involving an extremely large monetary amount and serious damage to the interests of the state and the people	Life imprisonment or the death penalty and confiscation of property

Offence	Relevant Factors	Penalty
Non-state functionary accepting a bribe	Where the total bribes range between RMB 60,000 to RMB 400,000, or the total bribes range between RMB 20,000 and RMB 60,000 if it also has an aggravating factor	Criminal detention, or a fixed-term imprisonment of up to five years depending on the amount involved
	Where the total bribes range between RMB 400,000 to RMB 6,000,000, or the total bribes range between RMB 100,000 and RMB 200,000 if it also has an aggravating factor	Fixed-term imprisonment of more than five years, and/or confiscation of property
Entity accepting a bribe	In respect of such entity	Imposition of a fine
	In respect of its Responsible Personnel	Criminal detention, or up to five years of fixed-term imprisonment
A close relative of, or any person close to, a current or former state functionary accepting a bribe	Where the total bribes range between RMB 30,000 to RMB 200,000, or the total bribes range between RMB 10,000 and RMB 30,000 if it also has an aggravating factor	Criminal detention or up to three years' imprisonment and monetary penalties
	Where the total bribes range between RMB 200,000 and RMB 3,000,000, or the total bribes range between RMB 100,000 and RMB 200,000 if it also has an aggravating factor	Imprisonment for between three and seven years, and monetary penalties
	Where the total bribes exceed RMB 3,000,000, or the total bribes range between RMB 1,500,000 and RMB 3,000,000 if it also has an aggravating factor	Imprisonment for between seven and 10 years, monetary penalties or confiscation of property

### “Aggravating factors” affecting prosecution and sentence

In the last decade, the SPC and SPP, either jointly or individually, published several judicial interpretations to give further clarification and more concrete guidance for lower courts and procurators to follow when they prosecute and adjudicate on bribery and corruption-related crimes. The 2016 Judicial Interpretation, which is the latest judicial interpretation from the SPC and SPP, enumerates the “aggregating factors” that shall be taken into account in connection with the prosecution and sentencing of individuals offering or accepting bribes. The “aggregating factors” specified in Art. 7 of the 2016 Judicial Interpretation apply to individuals who committed the offences of offering bribes by:

- (i) offering bribes to three or more persons;
- (ii) using illegal gains to offer bribes;
- (iii) seeking promotion or adjustment of positions through offering bribes;
- (iv) offering bribes to any state functionary who has supervisory and administrative responsibilities in terms of food, drug, safe production, environment protection, etc. to conduct illegal activities;
- (v) offering bribes to any judicial functionary to influence judicial justice; and/or

(vi) causing economic losses in the amount of no less than RMB 500,000 and less than RMB 1m.

Whereas the “aggregating factors” specified in Art. 1 of the 2016 Judicial Interpretation apply to individuals who committed the offences of accepting bribes by:

- (i) having received party or administrative disciplinary sections due to graft, taking bribes, or misappropriating public funds;
- (ii) having been subject to criminal prosecution for international crimes;
- (iii) using grafted (i.e., embezzled) funds and goods for illegal activities;
- (iv) refusing to explain the whereabouts of grafted (i.e., embezzled) funds and goods or to cooperate with recovery work, resulting in the funds and goods being unable to be recovered;
- (v) causing adverse effects or other serious consequences;
- (vi) asking for bribes multiple times;
- (vii) seeking illegitimate benefits for others, resulting in loss to public property, the interests of the state and the people; and/or
- (viii) seeking promotion or adjustment of positions for others.

With respect to bribes accepted or offered, the SPP in 2000 issued its opinion which specifies the prosecution thresholds. The threshold of prosecuting entities for accepting or offering bribes would be lowered from RMB 200,000 to RMB 100,000, if there is one of the following enumerated “aggregative factors”:<sup>39</sup>

- (i) to gain unlawful benefits through bribery;
- (ii) the bribery of more than three persons;
- (iii) the bribery of Party or government leaders, judicial officers, and administrative enforcement officers; or
- (iv) to cause significant damage to the state or the people.

#### Mitigating factors

Pursuant to the Ninth Amendment and the 2016 Judicial Interpretation, a person who offers or pays a bribe who voluntarily confesses to his or her crime(s) before being prosecuted may receive a mitigated sentence or a lighter sentence within the stipulated range. Further, a person who offers or pays a bribe may be exempted from prosecution or receive a mitigated sentence if he/she plays a key role in resolving a significant case or performs meritorious deeds.<sup>40</sup>

#### Statute of limitations

The limitation periods for the prosecution of a crime are:<sup>41</sup>

- (i) five years if the maximum penalty for that crime is a term of imprisonment of less than five years;
- (ii) 10 years if the maximum penalty for that crime is a term of imprisonment of between five and 10 years;
- (iii) 15 years if the maximum penalty for that crime is a term of imprisonment of no less than 10 years; and
- (iv) 20 years (and may be extended on approval by the SPP) if the maximum penalty for that crime is life imprisonment or death.

### **The PRC Anti-unfair Competition Law**

#### The prohibition of commercial bribery

The *AUCL* is intended to regulate business activities which may cause unfair competition.

It prohibits, *inter alia*, “commercial bribery”, which is defined as follows:<sup>42</sup>

- (i) the use by a business operator;
- (ii) of the means of giving money, property or other benefits;
- (iii) to another person; and/or
- (iv) in order to sell or buy goods or to obtain business transactions or other economic benefits.

Whilst not expressly set out in the relevant legislation, this offence appears to require an element of dishonesty. However, the threshold for dishonesty is not defined.

#### The broad scope of prohibition

The term “business operators” is broadly defined as legal persons, or other economic organisations and individuals who deal with commercial businesses or profitable services.

Pursuant to the *Interim Provisions on Prohibition of Commercial Bribery issued by the State Administration for Industry and Commerce* (“Anti-Commercial Bribery Provisions”), “property” means cash and tangible assets, and includes promotional fees, advertising fees, sponsorship, research and development fees, consultancy fees, commissions and expense reimbursements paid in order to see or buy goods.<sup>43</sup> The term “other benefits” can include things such as the provision of tours and travel within China or abroad.<sup>44</sup>

#### Kickbacks and rebates

In particular, Article 8 of the *AUCL* expressly provides that any “off-the-book” kickback which is secretly provided to any individual or entity shall be treated as an offer of a bribe, and any acceptance of such kickbacks by any individual or entity shall be treated as the acceptance of a bribe.

However, the *AUCL* does offer a degree of leeway for business operators, as they may give or accept discounts or commissions in the course of a transaction, provided that such arrangements are transparent and are clearly recorded in the books of accounts. The party receiving the commission must have the legal qualifications necessary to provide the related services, and must also record the amount in its accounts.

#### Enforcement and penalties under AUCL

If an offence of commercial bribery under the *AUCL* is sufficiently serious, the respective monetary thresholds to commence an investigation under the *AUCL* are not clearly set out in the law or in the Anti-Commercial Bribery Provisions. Whether an act of commercial bribery is considered sufficiently serious will be considered on a case-by-case basis.

Depending on the severity of the situation, acts of commercial bribery under the *AUCL* may attract fines of between RMB 10,000 and RMB 200,000.<sup>45</sup> All illegal gains will also be confiscated, and prosecution will also be sought if the offence reaches the level of criminal conduct.

#### Draft amendments to the AUCL

The current effective version of the *AUCL* was released in 1993. Over the course of the past 24 years, it has played an essential role in encouraging and protecting fair commercial competition in China. However, economic development has necessitated revisions to the *AUCL*.

At the 26<sup>th</sup> Session of the Standing Committee of the Twelfth National People’s Congress on February 22, 2017, the State Council submitted a modified draft of the *AUCL* to the Standing Committee for review. On August 8, 2017, the Law Committee of the National People’s Congress submitted a second review modified draft of the *AUCL* (“2017 Second

*Review Draft*”) to the Standing Committee for review. On September 5, 2017, the Standing Committee approved and published the *2017 Second Review Draft* seeking the views of the public. The *2017 Second Review Draft* contains considerable legal reform in the area of commercial bribery when compared against the existing *AUCL* but the proposed amendments are not as extensive as those proposed in prior draft amendments.

#### The definition of commercial bribery under the *2017 Second Review Draft*

The *2017 Second Review Draft* defines “commercial bribery” as follows:<sup>46</sup>

- (i) the use by a business operator;
- (ii) of the means of giving money, property or other benefits;
- (iii) to four categories of recipients;
- (iv) in order to obtain business transaction opportunities or other competitive advantages.

Compared with the *AUCL* in its current form, the *2017 Second Review Draft* clarifies the definition of commercial bribery by listing four categories of entities or individuals who could be the recipients of bribes; these categories include: 1) employees of the counterparty in a transaction; 2) agent entities or individuals hired by the transaction counterparty to handle matters related to the transaction; 3) state authorities, state-owned companies and enterprises, state institutions, people’s organisations and governmental officials; and 4) other entities or individuals that may affect a transaction by taking advantage of the powers and functions of a government official.<sup>47</sup>

A significant change contained within this review draft is that the transaction counterparty itself has been excluded from the categories of potential bribe recipients, which effectively narrows the scope of commercial bribery. It is particularly notable that while transaction party employees are included in the categories of potential bribe recipients, transaction counterparties themselves are excluded. On this basis, one of the potential interpretations is that beneficial payments made between the two transactional parties, such as transactional rebates may be excluded from the scope of commercial bribery.

#### Special provision for commercial bribery conducted by employees under the *2017 Second Review Draft*

The *AUCL* does not currently separate unauthorised conduct of commercial bribery by an employee from that of a business operator. In practice, however, the authorities typically regard any commercial bribery carried out by an employee as an instance of commercial bribery carried out by the individual’s employer.

The *2017 Second Review Draft* makes it clear that that any commercial bribe offered by an employee shall be seen as the conduct of the business operator.<sup>48</sup> The *2017 Second Review Draft* further provides the exception that if the business operator can prove the bribe offered by the employee is not related to the business operator’s objective of obtaining specific business transaction opportunities or other competitive advantages, it will not be liable.<sup>49</sup>

#### Safe harbour provisions for the provision of rebates and commissions

The *2017 Second Review Draft* retains the safe harbour provisions which allow business operators to provide rebates or commissions in a public manner, provided accurate accounting records are kept.

Further, under the Law of the PRC on Donations for Public Welfare (“Donation Law”), donations are to be made voluntarily and *gratis*. Any monetary or goods contributions that are made as donations but with commercial purpose of seeking economic benefits or transaction opportunities will be seen as commercial bribes.<sup>50</sup> The Anti-Commercial Bribery Provisions also provides that business operators shall not provide gifts in the form

of cash or articles to counterparties, except for small-amount advertising gifts in accordance with business practices.<sup>51</sup>

#### Penalties under 2017 Second Review Draft

There are three levels of penalties provided by the *2017 Second Review Draft*. Where an administrative offence of commercial bribery is found to have taken place but which does not constitute a criminal offence, the authorities will confiscate illegal gains resulted from the offensive conduct, and, depending on the severity of the conduct, impose a fine of between RMB 100,000 and RMB 3,000,000. Further, the authorities are empowered to revoke the business license of the business operator in question if the situation is sufficiently serious.<sup>52</sup> Whether an act of commercial bribery is considered sufficiently serious will be determined on a case-by-case basis.

Furthermore, according to Article 26 of the *2017 Second Review Draft*, where business operators receive an administrative penalty for engaging in commercial bribery, the supervision and inspection authority will record the penalty in the business operator's credit record as a matter of public record.

Where the violation in question is minor, the business operator will not face administrative penalties if it corrects such misconduct in a prompt and timely fashion. This change, introduced in the *2017 Second Review Draft*, appears to address concerns from the business community that the current version of the *AUCL* does not credit business operators for maintaining effective compliance programmes and/or taking steps to discover and rectify misconduct.

The *2017 Review Draft* additionally provides that business operators which carry out commercial bribery and cause damage to third parties are liable to pay compensation. Article 17 of the *2017 Second Review Draft* clarifies that the amount of compensation payable is determined with reference to the actual loss suffered by third parties, or the illegal gains received by the business operators when such loss is difficult to determine, and shall include compensation for reasonable expenses incurred by damaged parties seeking to cease the illegal conduct.

### **Prevention and remediation**

The problems discussed above are global, and companies operating in China and in the global environment should implement policies and procedures to help prevent violations and remediate them as soon as any potential issue surfaces. Such policies and procedures should include elements of prevention, investigation and remediation.

#### Prevention – effective compliance programme

An effective compliance programme, which incorporates tough anti-bribery policies and comprehensive internal control measures reflecting a strong stance against corruption from the board of directors and senior management, can lead to early identification of corruption risks. Such a programme should focus on the company's policies and procedures with respect to gifts, entertainment and other hospitality, and on dealings with third-party representatives and business partners, who should undergo due diligence to ensure compliance, sign anti-corruption representations and be subject to anti-corruption training as appropriate.

A compliance or audit function that periodically reviews company practices for corruption risk, and a group that oversees the implementation and maintenance of the anti-corruption programme, are both critical to early detection and prevention. Confidential reporting channels – for example, a private hotline, through which employees can feel safe to report



issues – has also proven effective in detecting risks. Such reporting avenues need to be accompanied with assurances that no retaliation will result from reporting corruption. Appropriate training for all levels of the organisation, as well as positive incentives that promote compliance with company policy and the law, should be prescribed. It is optimal that the programme be updated periodically to ensure it keeps pace with continuing developments in anti-bribery laws and regulations in China.

#### Investigation – quick and adequate response to corruption allegations

Corporations must be prepared to conduct internal investigations of corruption allegations, whether raised as a result of the compliance programme or raised by enforcement agencies, the media or whistleblowers.

It is important and prudent to carefully choose the body responsible for conducting any internal investigation. There may be instances where an independent investigation is required. Allegations involving senior management, or investigations requiring specialist skills, should ideally be handled by independent, external counsel.

The designated investigative body should be properly resourced and the scope of the investigation should be proportionate with the scope of the allegations. Any investigation in China should be conducted in accordance with Chinese privacy, labour and other local laws. Attorney-client privilege should also be maintained to provide confidentiality and protect against retaliation.

#### Remediation – appropriate corrective measures

Should an internal investigation corroborate corruption allegations, corporations must implement appropriate and adequate remedial measures with appropriate oversight by the board of directors.

Corporations should examine and correct gaps identified in the existing corporate policies and compliance programmes. It is also advisable for corporations to assess whether the identified issues affect its internal controls over financial reporting, and take appropriate remedial steps accordingly.

Consideration should also be given to whether the identified issues should be disclosed to authorities, having regard to the improper conduct and practices identified, the company's legal obligations, and disclosure obligations under local and/or foreign laws.

### **Conclusion**

Anti-corruption enforcement is increasingly global in scope. As summarised above, China has been aggressively enforcing its own anti-corruption laws on a sustained basis. This has and will continue to mean vigorous multinational anti-corruption enforcement targeting domestic and foreign companies and individuals.

With adequate preparation and resources, companies can effectively avoid costly risks. Corporations with business in China should have appropriate preventative measures, well-functioning investigation procedures and, if necessary, remediation measures so as to mitigate any potential financial and reputational risks. Those measures will help to minimise, if not eliminate, the risks that employees run afoul of as a result of China's anti-corruption measures, as well as anti-corruption laws of other jurisdictions. These risks will not go away without the right corporate attitude, resources and attention, and vigilance is key to protecting companies and individuals in this increasing enforcement environment.

\* \* \*

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