

Revised commercial bribery law increases liabilities while recognising remediation efforts

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China adopted revisions to its Anti-Unfair Competition Law earlier this month. This follows numerous opinions from various stakeholders over the past decade, and multiple draft amendments on proposed revisions to this fundamental legislation, which regulates the business operations of all companies in China. The changes made in relation to commercial bribery are undoubtedly a key focus. Overall, these changes make the commercial bribery provisions more sophisticated by: clarifying various uncertainties under the current law, introducing more obligations on both companies and authorities in the context of an investigation, and imposing harsher penalties while also providing for some leeway.

Background

After four rounds of draft amendments (see our previous In Context articles [here](#), [here](#), and [here](#)) and heated discussions, China's Standing Committee of the National People's Congress finally adopted revisions to the Anti-Unfair Competition Law (AUCL) on 4 November 2017. This will bring about fundamental changes to the commercial bribery regime in China. The revised AUCL will come into force on 1 January 2018.

Scope of commercial bribery clarified

Under the current AUCL, giving bribes to sell or buy goods are prohibited. Under the revisions, this prohibition has been extended to cover situations in which business operators give bribes in exchange for competitive advantages. As a result, the threshold for the Administration for Industry and Commerce (AIC), the enforcement authority for the AUCL, to bring a commercial bribery case seems to be lowered, as paying bribes to gain competitive advantages would by itself be sufficient, regardless of whether the contemplated transactions actually take place or not. As this change effectively gives local AICs more discretionary power, we expect enforcement to vary between different regions to an even greater extent than under the current AUCL.

The revised AUCL largely keeps the modified definition of a "recipient" of commercial bribery that we saw in recent drafts, by identifying those recipients as staff of the counterparty, units or individuals delegated by the counterparty, and other units or individuals that may influence transactions by taking advantage of power or influence. On the one hand, this change expands the commercial bribery recipients to include third parties with power or influence, while on the other hand, it excludes transaction counterparties, regardless of whether they are privately owned or state owned. To be clear: this change does not legitimise improper

payments to legal entities in China. In contrast, paying bribes to a state-owned enterprise, for example, can be a criminal offence. However, following this change, companies will likely have more room to carry out promotional or cooperative arrangements with counterparties, provided that those arrangements are truthfully and accurately reflected in both parties' books and records.

Investigative measures supplemented and due process required

With regard to what investigative measures the AICs can take, the revised AUCL grants AICs the power to: (i) enter the business premises for inspection, (ii) seal or seize property, and (iii) inquire into the bank account of a business operator, in addition to other existing investigative measures. These revisions equip AICs with important measures in conducting investigations and also require companies to fully cooperate.

In the meantime, the revised AUCL requires that, before taking any investigative measures, a competent AIC must submit a written application to, and obtain approval from, the responsible persons of that AIC. For the sealing or seizing of property, or to look at bank account information, a written report to and approval from the responsible AIC person at relevant municipal level is required. These changes seem to be aimed at tackling the selective or arbitrary investigations by some local AICs, by putting due process requirements in place.

We strongly recommend that companies formulate or revisit their dawn raid guidelines in light of both the expanded investigative power of AICs and the due process required in exercising this power. It is also noteworthy that the revised AUCL, for the first time, provides for fines and other administrative penalties against individuals or companies impeding or obstructing an AIC's investigations. Proper training to employees will be essential to avoid – as far as possible – potential liabilities for both companies and individuals.

Mitigating factors recognised

Companies are vicariously liable for their employees' conduct in terms of paying commercial bribes under the current rules of prohibition on commercial bribery adopted by the state AIC, and no exception is explicitly provided. Under the revised AUCL, however, a company is exempted if it can prove that the bribes paid by an employee are not related to the company's efforts to seek a transaction opportunity or competitive advantage. The revised AUCL also explicitly recognises the value of the measures actively taken by a company to correct or mitigate the consequences of violations. Penalties can also be mitigated or even exempted in cases of minor violations without harmful consequences.

Even though these new provisions do not provide great details and how they will come into play remains to be tested, it is a clear sign that AICs aim to reduce enforcement costs and improve enforcement efficiency. Companies with robust compliance programmes, and which actively investigate potential wrongdoings and take proper remedial measures will undoubtedly benefit from these changes.

Harsher penalties

In line with the draft amendments, the revised AUCL increases the fine for violations to a maximum of RMB 3 million. In addition,

a company will be subject to revocation of its business licence if there are serious violations; this penalty was formerly only possible for serious violations in certain highly regulated industries. Confiscation of illegal gains, previously removed from one of the draft versions, has been reinstated in the revised AUCL. It is not uncommon that in an enforcement case, the amount that a company has to pay in the form of confiscation of illegal gains is significantly more than the sum of a fine. Negotiations with the competent AIC on what qualifies as illegal gains can make a substantial difference in those cases.

In light of these fundamental changes to the AUCL and their significant impact, we recommend that companies review and update their internal policies and roll out training programmes. It is also advisable to get ready sooner rather than later, given the short period (less than two months) between the promulgation and enforcement of the revised AUCL. How AICs will enforce these changes, and how other existing rules on commercial bribery are to be changed, remains to be seen. We will update our readers on any major developments.
