

Governance Dilemma of Commercial Bribery by Multinational Corporations in China

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Abstract: With the deepening development of globalisation, multinational corporations (MNCs) have been operating more and more frequently in China, but the accompanying problem of commercial bribery has gradually emerged. The purpose of this paper is to explore the dilemmas encountered by China in punishing commercial bribery by multinational corporations in China. Through the research method of literature review, this paper finds that the causes of commercial bribery by multinational corporations in China are complex and diverse, including regulatory deficiencies, imperfections in the legal system, differences in business ethics, and insufficient internal control, etc. Such behaviour not only undermines fair competition, but also leads to the emergence of the problem of commercial bribery. Such behaviours not only damage the market environment of fair competition, but also erode the moral foundation of the society and affect China's international image. Therefore, possible solutions are proposed, including strengthening legislation and law enforcement, expanding jurisdiction, and improving the monitoring system, in order to more effectively curb commercial bribery by multinational corporations in China.

Keywords: Multinational corporations, Bribery, The new UK Bribery Act, FCPA.

1. Introduction

In terms of the investigations and prosecutions of the United States of America on overseas commercial bribery, the cases in which measures were taken against the companies were not many each year, but according to the number of cases in the investigations each year, there were 109 cases in 2013, and there were a total of 96 cases in 2013, and measures taken were taken in respectively 9 and 10 cases [1]. It is also evident from the cases under investigation that it generally takes several years from discovery to closure. This reflects the heavy task, difficulty and long cycle of investigation and handling of such cases [2].

A similar trend was observed with regard to the time span between the initial commission of the offence and its detection (latency period) for entrepreneurial offences detected and prosecuted in China. Those who committed the offence of misappropriation of funds generally had a relatively short time span of the offence, with the majority being investigated and punished within three years, while entrepreneurs who committed the offences of passive bribery and active bribery had a longer latent period of the offence, with the majority being investigated and punished within five to ten years after the initial offence [3]. Therefore, based on the above data, it can be seen that transnational commercial bribery cases have the phenomenon of difficult discovery and long latent time, and there is also the

phenomenon of lengthening the time of case closure. Therefore, the handling of transnational commercial cases reflects the status quo that the situation is more severe, the cases are more complicated, and it is more difficult to investigate and deal with them.

2. Summary and Evaluation of China and Extraterritorial Relevant Legislation

2.1. Basic Extraterritorial Legislation

This paper mainly focuses on the relevant legislation of the United Kingdom and the United States as the object of study, and explores them separately.

2.1.1. General Description of the Current Legislative Situation

Firstly, the FCPA rules in the U.S. The FCPA consists of two types of legal rules: firstly, the anti-commercial bribery provisions, i.e. the provisions prohibiting bribery of foreign public officials; and secondly, the accounting and bookkeeping provisions. The two are not separate, but rather echo each other in that it is illegal to bribe a foreign official for the purpose of obtaining the maintenance of a business, or any undue advantage. This is echoed by the fact that, in order to avoid disguising such illegal conduct, companies are required to establish and maintain accounting records and books of account that give a true and fair view of the company's transactions and assets (i.e., to ensure that there are no false accounts), and they are required to establish an internal accounting system that ensures that no transactions are carried out without proper authorisation. In short, bribery of foreign public officials and false accounting (No Record, No Defence.) are both violations of the FCPA [4].

Secondly, the new UK Bribery Act, which is a typical example of a law that follows and exceeds the FCPA, has revolutionised the UK's anti-bribery regime with the enactment and entry into force of the Bribery Act 2011, which contains a separate offence of bribery of foreign public officials to regulate commercial bribery of multinational corporations from a home country perspective. The UK Bribery Act has inherited a number of provisions from the FCPA, including the subject matter and five elements of the FCPA's anti-bribery provisions, although some of the provisions are stricter than the FCPA [5].

As a pioneering text and leader in the fight against transnational commercial bribery, the value and role of the FCPA is mainly reflected in the following aspects: Firstly, legal value: the FCPA establishes a blueprint for the anti-transnational commercial bribery system, which has become the blueprint for other countries to follow, and is the basis for the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention on Combating Bribery of Foreign Public Officials). Bribery of Foreign Public Officials in International Business Transactions (hereinafter referred to as the OECD Convention) and other international conventions. Second, other values: The FCPA was created to clean up the business environment for cross-border transactions and to help revitalise business ethics and national image [6]. Like the FCPA, the new Bribery Act was born out of the crisis, and it improves the regulation of commercial bribery in the form of a specialised law, replacing the previous messy, uncertain and fragmented legislation, which is conducive to the administration of justice and law enforcement by the SFO and the courts, as well as to the compliance building of multinational corporations.

2.1.2. Evaluation

Some of the provisions of the FCPA are incoherent and have not been fundamentally improved even after amendments. There is still a lack of appropriate guidelines to point the way for business organisations such as multinational corporations as to what level of conduct may be regulated under the FCPA. The procedures tend to favour case-by-case guidance and lack universality. In judicial

practice, most cases applying the FCPA end in settlements, and few cases actually clarify some of the FCPA's ambiguous provisions.

FCPA enforcement is not as strong as envisioned [7]. Transparency International has suggested that although DOJ and the SEC have done their best to crack down on commercial bribery by multinational corporations, a large number of U.S. multinational corporations continue to pay bribes, and the new Bribery Act does not provide for an opinion procedure, which may lead to uncertainty in enforcement [8].

2.2. Basic Situation of Chinese Legislation

2.2.1. Overview of the Current Legislative Situation

Anti-Unfair Competition Law: This law makes clear provisions on commercial bribery. Commercial bribery includes bribery of state officials, employees of companies or enterprises, and persons from other entities in an attempt to obtain business benefits. The Act requires companies to establish and implement an internal control system against bribery and establishes penalties for offences.

Criminal Law: The Criminal Law contains specific provisions setting out criminal penalties for bribery, including penalties for both active and passive bribery. In recent years, China has increased its efforts to combat bribery offences by amending its criminal law.

Anti-Corruption and Bribery Regulations: These regulations further refine the anti-bribery provisions, clarifying the definition of bribery, penalties and procedures for reporting.

2.2.2. Evaluation

China already has a certain number of laws and regulations governing commercial bribery, but they are still characterised by fragmentation and lagging behind, which affects the relevant departments' punishment of commercial bribery [9].

Firstly, the laws and regulations are too fragmented and have not yet been collated and issued specifically for commercial bribery, which is easy to be biased in practical application. Secondly, the relevant provisions of laws and regulations have not kept pace with the times. With the development of the economy and society, the scope, form and means of commercial bribery will also change, while the existing laws and regulations have not been updated according to the actual situation, and the degree of scientification needs to be improved. Finally, the laws and regulations for the punishment of violations appear weak, resulting in transnational corporations of commercial bribery of the cost of the offence is reduced, punishment and deterrent effect are greatly reduced.

3. The Crux of the Dilemma of Multinational Corporations' Commercial Bribery Governance in China

3.1. Fragmentation of Laws and Regulations Leads to Difficulties in Punishment

Strict and complete laws let multinational enterprises know the huge cost of violating the law, so that multinational corporations such as Lucent and GlaxoSmithKline are always careful and cautious when they face the Chinese market, but they make a completely opposite choice when they face the Chinese market.

In the European and American markets, multinational corporations such as Lucent and GlaxoSmithKline are always careful and cautious, but when facing the Chinese market, they make a completely opposite choice. China has a certain number of laws and regulations on commercial bribery, but they are still fragmented and lagging behind, which affects the relevant departments in punishing commercial bribery. Firstly, the laws and regulations are too fragmented, and have not yet

been collated and issued laws specifically targeting commercial bribery, which is easy to be biased in practical application. Secondly, the relevant provisions of laws and regulations have not kept pace with the times. With the development of the economy and society, the scope, form and means of commercial bribery will also change, while the existing laws and regulations have not been updated according to the actual situation, and the degree of scientification needs to be improved. Finally, the laws and regulations for the punishment of violations appear weak, resulting in multinational corporations of commercial bribery, the cost of the offence is reduced, the punishment and deterrent effect are greatly reduced.

3.2. Ineffective Fulfilment of Responsibilities by Government Regulators

All industries have the possibility of commercial bribery, and the supervision and investigation of commercial bribery requires the cooperation of various administrative and regulatory departments in their respective areas of work. The governance of commercial bribery in multinational corporations requires closer cooperation among various government departments due to its international nature, hidden nature and complexity.

In the process of investigating and handling cases of commercial bribery of multinational corporations in China, various government departments sometimes shirk their responsibilities for the handling of cases out of local or departmental interests. Should have become the elimination of commercial bribery departments such as public security, industry and commerce, taxation, etc. but choose to avoid, often to not in the scope of responsibility, no authority to deal with, no conclusive evidence and other reasons to take the "can not care about it, regardless of the" attitude, so that the transnational corporations of commercial bribery is only increasing, more and more rampant, which is a clear contrast with the foreign investigation and handling of commercial bribery in a timely, accurate and efficient manner. This is in marked contrast to the timely, accurate and efficient investigation and handling of commercial bribery in foreign countries.

3.3. There are Obvious System Defects in the Governance of Commercial Bribery

As shown in the administrative management system, excessive interference of administrative power in specific economic activities, there are opportunities for rent-seeking power.

The lack of constraints on the administrative examination and approval, registration and filing, law enforcement and certification and other administrative rights, which is easy to produce monopoly. The lack of protection system for commercial bribery whistleblowers; in the market regulatory system, the key sectors of the real power of the staff of the supervision mechanism is not perfect, the regulatory bodies and responsibilities are not clear.

Meanwhile, unclear regulatory bodies and responsibilities; the credit management system in the financial regulatory system is not yet sound, and the accounting regulatory system plays a limited regulatory role for large companies, corporate accounting staff and intermediaries.

4. Possible Response Options

4.1. Strengthen Cross-Jurisdictional Legal Framework and International Cooperation

4.1.1. Expand Jurisdiction

Firstly, China should draw on the principle of extraterritoriality in the UK's Bribery Act, and make its own anti-commercial bribery laws extraterritorial by adopting legislation to provide unilateral public regulation of international bribery [10].

Furthermore, there is often a conflict between the territorial jurisdiction of the host country over a multinational corporation engaging in criminal conduct, the personal jurisdiction over a multinational corporation's subsidiary in China, and the personal jurisdiction of the home country over the multinational corporation. At this point, considering the complexity of commercial bribery of multinational corporations, jurisdiction cannot be asserted directly based solely on the principle of priority of territorial jurisdiction, but should be coordinated, and there should be a hierarchy between the priority of territorial jurisdiction, complementary jurisdiction *ratione personae*, judicial fairness and the strengthening of international cooperation, so as to ensure that the exercise of jurisdiction is conducive to the clarification of the facts, and to investigate and deal with the criminal acts in a timely and effective manner.

4.1.2. Strengthen International Cooperation

In establishing close cooperation with major economies and international organisations through signing bilateral or multilateral agreements, it is possible to effectively combat transnational commercial bribery in China and maintain fair competition order in the international market.

Specifically, strengthening international co-operation needs to start from several aspects. Firstly, establishing an information sharing mechanism is the key. An efficient information exchange platform should be established between countries to share clues, evidence and investigation progress of commercial bribery cases in a timely manner, so as to jointly track and combat transnational bribery networks. Such information sharing not only helps to enhance the investigative capacity of law enforcement agencies in various countries, but also effectively curbs the cross-border flow of corruption funds.

Secondly, it is also essential to strengthen coordination and cooperation in transnational cases. Law enforcement agencies of various countries should establish a regular communication mechanism to jointly study the characteristics and trends of transnational commercial bribery cases and formulate targeted combating strategies. In the process of case investigation, law enforcement agencies of various countries should support each other, closely co-operate, and jointly carry out investigation and evidence collection to ensure that the cases can be successfully solved. In terms of jointly combating corruption networks, China should strengthen cooperation with Interpol and other agencies. These international organisations have rich experience and resources in combating transnational crime and can provide strong support and assistance to countries.

However, in the process of strengthening international cooperation, we must also face up to the conflicts of interest and jurisdictional problems among countries. Due to the differences in the legal systems, judicial systems and interests of various countries, the issue of jurisdiction in transnational commercial bribery cases often becomes a difficult point of cooperation. In order to overcome this difficulty, countries should strengthen consultation and communication, enhance cooperation through extradition procedures, mutual legal assistance, recognition and enforcement and other systems, and jointly combat international crimes. At the same time, countries should also respect each other's sovereignty and interests and ensure fairness and justice in the process of cooperation.

4.2. Improve Enforcement Mechanisms

Strengthen regulation and enforcement: Enhance the enforcement capacity and efficiency of regulatory authorities and increase the frequency and depth of inspections of commercial bribery. Ensure that regulators have sufficient resources and powers to effectively enforce the law [9].

Establish reporting and evidence mechanisms: Establish reporting channels and protect the rights and interests of whistleblowers to encourage people to report commercial bribery. At the same time,

establish an effective evidentiary mechanism to ensure that sufficient evidence can be collected to support the handling of cases.

Strengthen the construction of legal system: Improve relevant laws and regulations, clarify the definition of commercial bribery and punishment standards, to ensure the rigour and applicability of the law. At the same time, strengthen the repair of loopholes in the implementation of laws and timely update of legal interpretations.

Strengthen international co-operation: International commercial bribery usually involves multinational corporations and international transactions. Strengthen international co-operation and information exchange to jointly combat cross-border commercial bribery.

Enhance education and publicity: Strengthen education for enterprises and the public to raise their awareness of the dangers of commercial bribery, and cultivate good business ethics and compliance awareness.

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4.4. Improve the Regulatory System

In order to effectively supervise and control the occurrence of commercial bribery cases, many countries and regions provide guarantees in institutional settings. For example, Sweden, in addition to the regular prosecuting authorities, courts and other judicial institutions, has also set up a special National Anti-Corruption Office and the Economic Crime Agency. The United Kingdom set up the Serious Fraud Office (Serious Fraud Office) in 2004. Finland has implemented the system of independent investigative officers. Singapore has set up the Corrupt Practices Investigation Bureau; and Hong Kong has set up the Independent Commission Against Corruption (ICAC).

At present, China's judicial body to combat commercial bribery is mainly the Anti-Corruption and Bribery Bureau, with staff under the civil service system and funding paid by the local authorities, and its effective coverage is relatively limited. Therefore, on the basis of foreign experience, China can implement judicial reform to give more independence to the judicial machinery to combat commercial bribery. Specifically manifested in: personnel management, should be given to the judiciary with full personnel rights, to avoid the interests of civil servants and the establishment of independent of the executive branch of the cadres management system; financial funding, the central financial departments and the highest judicial organs to take the amount of funding jointly approved or to be independent of the financial allocation of the way, so that the judicial organs of the process of work is not subject to the constraints of the local financial sector; In the administration of justice, the judiciary is guaranteed independence of authority and the ability to investigate and collect evidence in cases without interference from the executive branch. It should be noted that the implementation of judicial independence should also emphasise judicial control, and in the process of granting full independence to the judiciary, it is necessary to improve the judicial supervision mechanism in order to prevent judicial corruption.

5. Conclusion

The issue of commercial bribery by multinational corporations in China is a complex and urgent problem. This paper reveals the dilemma and the multiple reasons behind it through analyses, and highlights the need to strengthen regulations, improve regulatory mechanisms and raise the ethical standards of companies themselves. In the future, only through the joint efforts of the international community and the self-restraint of multinational corporations themselves can the problem of commercial bribery be effectively solved and the construction of a healthy and fair business environment be promoted. As a host country, China needs to continuously optimise the business legal environment and intensify its efforts to combat bribery, and at the same time it needs to cooperate with the international community to jointly promote the formation of a cleaner international business atmosphere.

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