



# **Q&A IN RELATION TO BRIBERY OFFENCES IN THE PEOPLE'S REPUBLIC OF CHINA**

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**Content Provided by DLA Piper  
Published June 2019**

## 1 Q&A In Relation to bribery offences in China

# 1. Legal Framework

### What is the legal framework governing bribery in China?

- China does not have a single comprehensive legislation/statute governing bribery offences. Rather provisions governing bribery-related offences are contained within a number of laws and regulations, which principally are the PRC Criminal Law, Anti-Unfair Competition Law (AUCL), and the Interim Provisions on Prohibiting Commercial Bribery (the Bribery Provisions). The interpretation and implementation of these bribery related provisions are complemented by various judicial interpretations by the PRC's Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) and other rules/regulations issued by the Communist Party of China, and various government ministries and authorities.

## 2. What Constitutes a Bribe?

### What constitutes a bribe?

- Under China's anti-bribery regime, a bribe is the giving of money or property with corrupt intent for the purpose of obtaining improper benefits or competitive advantage.
- Money or property includes cash, in-kind objects, or "property interest which can be measured by money" such as the provision of housing decoration, prepaid cards, travel expenses, debt relief etc.
- An improper benefit is any benefit which is obtained or granted in violation of an applicable law, regulation or administrative rule, or by requiring the bribe recipient to provide aid or an advantage in violation of an applicable law, regulation or administrative rule.

### What are the principal offences under this legal framework?

- The Chinese legal regime provides for two types of bribery offences (i) a criminal bribery offence, and (ii) an administrative law bribery offence. The latter offence does not amount to a crime and is punishable by administrative sanctions such as fines and confiscation of illegal gains.

### Criminal bribery offences under the PRC's Criminal Law

- Bribery-related offences are categorized into two types under the PRC Criminal Law: official bribery (the bribe recipient is state functionary) and commercial bribery (the bribe recipient is non-state functionary).
- The definition of state functionary is very broad and includes: officials who perform public services in state offices (such as governmental authorities) or the military; people who perform public services in state-owned enterprises (SOEs), institutions, or civil organizations or other public entities; people assigned by the government or SOEs to non-SOEs to perform public services; and those who perform public services according to law (such as political representatives). A public entity includes SOEs, public institutions, public enterprise units, etc.
- There are 11 criminal bribery related offenses:
  1. Offering of a bribe to a state functionary (Article 389 of the PRC Criminal Law)
  2. Offering of a bribe to a non-state functionary (Article 164 of the PRC Criminal Law)
  3. Offering of a bribe to a foreign (non-Chinese) public official or official of an international public organization (Article 164 of the PRC Criminal Law)
  4. Offering of a bribe to an entity (Article 391 of the PRC Criminal Law)
  5. Offering of a bribe by an entity (Article 393 of the PRC Criminal Law)

6. Offering of a bribe to a close relative of, or any person close to, a current or former state functionary (Paragraph 1, Article 390 of the PRC Criminal Law)
7. Introduction to a state functionary of an opportunity to receive a bribe (Article 392 of the PRC Criminal Law)
8. Acceptance of a bribe by a state functionary (Article 385 of the PRC Criminal Law)
9. Acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary (Article 388 of the PRC Criminal Law)
10. Acceptance of a bribe by a non-state functionary (Article 163 of the PRC Criminal Law)
11. Acceptance of a bribe by an entity (Article 387 of the PRC Criminal Law)

#### Administrative law bribery offence under the PRC's AUCL

- Business operators are prohibited from offering a bribe to three categories of recipients for the purpose of selling or purchasing goods and services: (i) any employee of the counterparty in a transaction; (ii) any entity or individual authorized by the counterparty to handle relevant affairs; and (iii) any entity or individual which can use power or influence to affect a transaction.
- This offence targets commercial bribery from an administrative law enforcement perspective. Different from the criminal offences, there is no expressly stated threshold as to what constitutes an administrative commercial bribery offence. For this administrative offence, the regulator, the State Administration for the Market Regulation (SAMR), has wide discretion in determining when an offence has been constituted.

### 3. Jurisdictional Reach

#### What is the jurisdictional reach of the legal framework?

- For criminal bribery offences under the PRC's Criminal Law, Chinese authorities shall have jurisdiction in the following scenarios:
  - a. where the bribery offence that is committed by a Chinese or foreign individual or entity takes place within the territory of China (including on board PRC ships or PRC aircraft);
  - b. where the bribery offence committed takes place outside the territory of China with the intention of obtaining improper benefits within China; or
  - c. where the bribery offence committed by a Chinese individual or entity takes place outside the territory of China.
- As to the administrative commercial bribery offence under the AUCL, any offence that is committed within China will be subject to the jurisdiction of the Chinese authorities.

### 4. Who may be liable?

#### Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

- Private individuals, public officials and state functionaries, and legal entities concerned can be held liable for bribery offences under the PRC's Criminal Law and AUCL.
- An entity will be held liable for a bribery offence under the Criminal Law if the offence is committed under the direction of company management level (typically a senior person in the company such as a director or legal representative) and for the interest of the entity.

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- The act of an employee will be deemed to have been committed by the entity and it is the entity that commits an administrative commercial bribery offence under the AUCL.

#### Can a parent company be liable for its subsidiary's involvement in bribery?

- No.

## 5. High Risk Areas

#### Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

- Yes, provided they meet the criteria of a bribe under the PRC legal regime, facilitation payments are considered to be bribery, no matter how small the amount.

#### Does the legal framework restrict political and charitable contributions?

- There is no similar concept of political contribution under Chinese law. There is no restriction on charitable contributions.
- A political or charitable contribution could be considered a bribe if it was offered for the purpose of obtaining improper benefits or competitive advantage.

#### Does the legal framework place restrictions on corporate hospitality?

- There are no express provisions with regard to corporate hospitality under Chinese law. Therefore, whether hospitality given amounts to a bribe would be assessed on the basis of whether there was sufficient evidence to show that it was given with the intention of obtaining improper benefits or competitive advantage.
- The Bribery Provisions provide that business operators shall not offer gifts in the form of cash or in-kind objects to the counterparty in the conduct of a transaction except for marketing gifts of small value pursuant to business practices.
- The SPC and the SPP issued a 2008 interpretation on the differentiation of a bribe and a gift. Accordingly, a bribe can be distinguished from a legitimate gift by reference to the below factors:
  - a. the circumstances leading to the transaction, such as the relationship between the two parties, and the frequency of their interaction;
  - b. the values of the property concerned;
  - c. the reasons, timing and method of the transaction, and whether the giver made any request for favor from the recipient; and
  - d. whether the recipient of the property took advantage of their position to obtain any benefit for the giver.

## 6. Legal Defences

#### Are there any defenses for bribery offences?

- There is one specific statutory defense to charges for the crime of offering a bribe under the PRC's Criminal Law. It shall not be regarded as a bribe if the person is forced to give a bribe to a state functionary as a result of extortion or solicitation by such state functionary, and they receive no improper benefits in return.

## 7. Regulatory and Enforcement Bodies

### What are the key regulatory or enforcement bodies with regard to bribery?

- The People's Procuratorate at all levels is the primary agency in China for investigating and prosecuting cases of bribery under the Criminal Law.
- The National Supervision Commission, established in March 2018, is responsible for supervising and investigating bribery and other duty-related violations by public officials.
- SAMR at all levels is responsible for the investigation of administrative commercial bribery under the AUCL.

## 8. Legal Consequences

### What are the legal consequences of being found guilty of bribery offences?

- In cases of criminal bribery offences under the Criminal Law, individuals face criminal detention, or up to ten years' or life imprisonment in combination with monetary penalties and/or confiscation of property. Companies are subject to monetary fines.
- In cases of administrative commercial bribery offences under the AUCL, offending entities are subject to a fine of CNY100,000 to CNY3 million (approx. USD15,000 to USD450,000) in combination with confiscation of illegal gains, and/or revocation of the entity's business license.
- An individual convicted of a bribery offence is likely to be disqualified from holding a position as a director, supervisor or senior manager of a company for up to five years.
- Companies convicted of bribery offences may also be disclosed to the public on its credit record, and face debarment from public procurement contracts for up to three years in accordance with the PRC's Governmental Procurement Law.

## 9. Deferred Prosecution Agreements

### Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

- No, there are no deferred prosecution agreements (DPAs) under Chinese law. However, mitigation is available under Chinese law.
- For criminal offenses, a lighter punishment or mitigated punishment may be given if the person who gives or receives a bribe voluntarily confesses their crime(s) before being prosecuted. If the person who gives or receives a bribe plays a critical role in resolving a significant case or provides meritorious deeds to the investigation authority, a mitigated punishment or exemption from punishment may be granted.
- In cases of the administrative commercial bribery offence under the AUCL, if the offending entity proactively eliminates or relieves the misconduct, a lighter or mitigated administrative penalty may be given. Further, if the violation concerned is found to be minor and is corrected in a timely manner, the offending entity may be exempted from an administrative penalty.

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Cover Image: Transparency International Corruptions Perception Index 2018