

Perfection of Commercial Bribery Legal System from the Perspective of Anti-unfair Competition



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Abstract

Commercial bribery is so harmful that it has seriously damaged the normal economic order of our country and eroded the ranks of cadres. Therefore, effective management of commercial bribery is the focus of the current construction of a clean and honest government, anti-corruption work and judicial work, which is imperative. At present, there is no perfect legal system to regulate, regulate and prevent commercial bribery in China. Commercial bribery is so harmful that it has seriously damaged the normal economic order of our country and eroded the ranks of cadres. Therefore, the effective governance of commercial bribery is the focus of the current construction of a clean and honest government, anti-corruption work and judicial work, which is imperative. At present, China has no perfect legal system to regulate, regulate, prevent and punish commercial bribery. The provisions on the crime of commercial bribery are scattered in the Criminal Law, the Law against Unfair Competition and some administrative regulations. In these laws and regulations, there are also problems such as vague definition, narrow coverage and insufficient connection with international legislation. This paper focuses on the analysis of the harmful consequences of commercial bribery in the political, economic and social fields from the perspective of anti unfair competition. I hope to redefine the concept of commercial bribery, improve the civil compensation system, and make contributions to improving the legal system of commercial bribery.

Keywords

Anti-unfair competition, commercial bribery, legal system, improvement

1. Accurate definition of commercial bribery

China regulates commercial bribery through the trinity legal system of "civil law (commercial law) - economic law (competition law) - criminal law". Civil law (commercial law) mainly establishes the principle of honesty and trustworthiness, the rules of business conduct under normal circumstances and tort compensation. The Economic Law (Competition Law) and relevant supporting regulations regulate the trading activities under the socialist market economy system with Chinese characteristics. As the final guarantee, criminal law punishes commercial bribery to a certain extent. This paper focuses on the analysis of commercial bribery in the sense of economic law.

On September 2, 1993, Article 8 of the Anti Unfair Competition Law of the People's Republic of China, which was deliberated and passed by the Standing Committee of the Eighth National People's Congress, made prohibitive

provisions on commercial bribery in the field of purchase and sale. This provision is a preliminary attempt to make provisions on the prohibition of commercial bribery in the form of law. For the first time, "commercial bribery" appeared as a professional term in the Interim Provisions on the Prohibition of Commercial Bribery. Paragraph 1 of Article 2 of the Interim Provisions stipulates that "operators shall not sell or purchase goods by means of commercial bribery in violation of Article 8 of the Anti Unfair Competition Law." The second paragraph stipulates: "The commercial bribery referred to in these Provisions refers to the acts of business operators who use property or other means to bribe the other party's units or individuals in order to sell or purchase goods."

There are at least three deficiencies in the definition of commercial bribery in China. First of all, there is no detailed regulation on the subject of commercial bribery in China, and the operators and their opposite units and individuals specified in Article 8 of the Anti Unfair Competition Law can hardly cover the complicated subject of commercial bribery in today's society. Secondly, China's regulations on the behavior of commercial bribery are relatively weak. Referring to Article 8, bribery means are simply summarized as "property" and "other means". The last but not the least is the lack of legal liability. Our current law has built a legal liability system including civil liability, administrative liability and criminal liability, but the punishment is weak. As a direct result, some people would rather touch the red line of the law than give up the rich profits that may be brought by bribery (Hart E. Posen, Jeho Lee, & Sangyoon Yi, 2018).

Further explain the definition of commercial bribery. First, the definition of commercial bribery should include bribery and accepting bribes. Like the criminal law, if the person who pays bribes actively reports the person who accepts bribes, the punishment can be reduced accordingly. Second, we should distinguish between commercial bribery and public service bribery. The author believes that it is necessary to distinguish them, but they are essentially bribery crimes, so they can be stipulated in a legal norm. Third, commercial bribery is an unfair competition behavior, which occurs in the process of market transactions. Fourth, the purpose of commercial bribery is to obtain trading opportunities or corresponding preferential opportunities, which are not given by the other party after fair evaluation through normal competitive channels. Fifth, the means of commercial bribery can be to give material benefits, including other forms of non economic benefits. Finally, bear the responsibility for commercial bribery (People's Daily, 2019).

2. Analysis of Commercial Bribery in the New Anti Unfair Competition Law

The concept of commercial bribery is based on the market environment that just started in the early 1990s in China. At that time, in order to gain trading opportunities, operators often used to influence the counterparty's units and individuals simply and roughly by secretly giving rebates outside the account. The law defines such acts as commercial bribery and punishes those who offer or accept bribes. However, the way and scope of punishment for such acts are easily confused with commercial interest temptation. With the diversified development and deep interweaving of the market economy, there has been confusion on both sides: on the one hand, law enforcers are confused by the lack of identification boundary between commercial interest temptation and commercial bribery, and many administrative disputes occur. On the other hand, operators are also confused about how to implement commercial interest temptation in compliance, especially the long-term business model of commercial interest exchange faces risks and innovation falters.

2.1 Counterparty of transaction is not a qualified subject of bribery and administrative punishment

Article 7 of the Anti Unfair Competition Law of 2017 stipulates that "operators shall not bribe the following units or individuals by means of property or other means to seek trading opportunities or competitive advantages: 1. the staff of the counterparty to the transaction; 2. the units or individuals entrusted by the counterparty to handle relevant affairs; 3. the units or individuals who use their power or influence to influence the transaction." However, Article 8 of the Anti Unfair Competition Law of 1993 stipulates that "business operators shall not use property or other means to bribe to sell or purchase goods. Those who secretly give rebates to the other unit or individual outside the account shall be punished as bribery; those who secretly receive rebates from the other unit or individual outside the account shall be punished as bribery."

The difference between the acceptance of bribes in the new and old laws and the eligible subjects of administrative punishment is obvious. The former refers to: 1. the staff of the unit. 2. Client. 3. Influencers. The latter refers to the "opposite party", that is, the unit and individual of the opposite party of the transaction. This difference is from the Law of the People's Republic of China on Anti Unfair Competition (revised draft for review) published by the Legislative Affairs Office of the State Council in February 2016, which states that "commercial bribery refers to that an operator pays or promises to pay economic benefits to the counterparty or a third party that may affect the transaction to induce it to seek trading opportunities or competitive advantages for the operator (Wu Shoupeng, 2019)." It can also be seen that

the "counterparty", an independent subject in China, has not been finally adopted by the National People's Congress. The new law not only deleted the "counterparty" as the subject in the revised draft for review, but also stipulated in the legal liability that only "bribing others" should be punished. The unit involved in the bribery party and even the related persons (staff, clients and influencers of the unit) involved in the bribery are completely excluded from the administrative punishment. The "commercial bribery" stated in the Anti Unfair Competition Law of the People's Republic of China (revised draft for review) did not appear in the final draft.

To the party who accepts bribes is not to exempt it from legal liability, but the administrative handling of commercial bribery is not completely the same as the punishment of bribery in the criminal law. The bribery related persons suspected of committing crimes in commercial bribery shall be punished according to Article 163 of the Criminal Law, That is, "Any employee of a company, enterprise or other unit who, taking advantage of his position, extorts money or property from others or illegally accepts money or property from others in order to seek benefits for others, if the amount involved is relatively large, shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention of a huge amount, shall be sentenced to fixed-term imprisonment of not less than five years and may also be sentenced to confiscation of property." Criminal punishment can not only make more efforts to stop the brokers of commercial bribery, but also make the commercial bribery clear and accurate: only for the briber. Excluding the relevant persons (staff members, clients and influences of the unit) who accept bribes from the administrative punishment can more clearly isolate the commercial interest temptation and commercial bribery.

2.2 Difference between commercial interest temptation and commercial bribery

Operators seek trading opportunities and strive for competitive advantage, which is the connotation of market rule of law to explore competition, and even the advantage of market economy. For this reason, it is not allowed to use the negative vocabulary of anti unfair competition as seeking trading opportunities and striving for competitive advantage. On the contrary, it should be greatly encouraged.

From an economic point of view, the market is a mechanism in which buyers and sellers interact to jointly determine the price and transaction volume of goods or services. In this mechanism, both parties will gain benefits, that is, commercial benefits. It is precisely because of the temptation of such commercial interests (usually the average profits and excess profits obtained through commercial activities) that buyers and sellers are encouraged to come together. In the market equilibrium state, breaking the equilibrium can obtain excess profits; In the market disequilibrium, there are more opportunities, especially in the shortage economy or surplus economy market.

Competitive pressure makes operators seek for business opportunities and pursue more and higher profits as their way of survival and development. If they can use unconventional methods to implement breakthroughs, they will have great prospects. This breakthrough has three forms: innovation from the perspective of technology (introduction of new technologies such as artificial intelligence), optimization from the perspective of management (such as internal management optimization or business model optimization), and commercial bribery. Anti unfair competition is the third kind of regulation. It should be pointed out that both technical innovation and management optimization cannot be separated from the recognition of the other party. To gain the approval of the other party of the transaction, it is necessary to give them the temptation of commercial interests. The three types will be intertwined. Proper differentiation and regulation is an eternal topic of market management; How to splash the bath water and leave the children behind is a test of the wisdom of legislators and law enforcers.

The early anti unfair competition legislation was drafted in 1987 and completed in 1992. In 1993, the Standing Committee of the National People's Congress passed the Anti unfair Competition Law. The newly revised Anti Unfair Competition Law, implemented in 2017, repositions commercial bribery, returns to the essence of bribery, and refers to the briber rather than the unit of the counterparty. In fact, commercial interest temptation is the proper meaning of market transactions. In order to promote sales, the enterprise gives the opposite party of the transaction benefits, even additional benefits, which is the agreement of both parties after the game. This is true for large business transactions and small ones such as rebates on Alipay. No matter how much or how little interest or additional interest temptation the buyer and the seller give to the other party, there is no problem of commercial bribery. This transaction is a "win-win" transaction agreed by both parties, and its consideration may be both current and forward, rather than a private exchange by people who have influence on the opposite party of the transaction. But if the temptation of commercial interests is used as the target of commercial bribery, it is possible to throw out the children who have bathed together (Dong Huijuan & Zhou Jie, 2015). This not only highlights the briber and the person who affects the other party of the transaction, but also is conducive to promoting the innovation of the marketing model, so that they have no concerns about violating the legal bottom line of commercial bribery: both parties of the transaction can negotiate, exchange and transfer benefits as much as possible, but cannot pay the individual, client.

3. Improvement of the civil compensation system

To thoroughly curb an illegal phenomenon, a reasonable definition of the concept of commercial bribery is only the first step. If there is no perfect system to punish those who give and take bribes, it will not achieve the role of punishment and intimidation. Although the law focuses on prevention, it is necessary to increase punishment in the face of the increasingly rampant phenomenon of bribery at this stage. Improving the civil compensation system is an important aspect of forming a set of punishment mechanisms.

The Anti Unfair Competition Law mainly stipulates administrative and criminal liability for acts of unfair competition with regard to legal liability. Due to the particularity of commercial bribery, the damage caused by it is not as immediate as other tort acts, but requires a long-term process. More often, it just makes the operators lose a fair competition opportunity, or a fair victory possibility. Therefore, how to quantify is also an urgent problem to be solved.

However, facts have proved that the main purpose of commercial bribery is mostly for economic benefits. Therefore, it is an effective way to impose administrative penalties on operators and other units suspected of violating the law, impose economic sanctions such as fines and confiscating illegal income, and impose criminal sanctions on individual bribery and acceptance of bribes. At present, in the judicial practice of our country, there is only one way of civil liability for commercial bribery, which is not enough to punish the complicated and changeable commercial bribery (Stone will win People's Court News, 2020).

As a result of the above reasons, it is suggested that the relevant provisions on the punishment of commercial bribery in the Anti Unfair Competition Law of China can be reformed. First of all, we can appropriately increase the fixed amount of fines, and impose punitive fines on commercial bribery with particularly serious consequences. Of course, we need to be very careful in determining whether this behavior has caused serious consequences, to prevent the abuse of judicial power, which will lead to social instability. In addition, the amount of fines stipulated in the Anti Unfair Competition Law of China is limited, and the enforcement of illegal income is difficult in practice because it is difficult to calculate. Therefore, it is suggested to adopt more flexible and diverse ways to punish commercial bribery, learn from the advanced practices of Japan, Germany, Switzerland and Taiwan, make specific case analysis, comprehensively consider the amount of bribery, the circumstances of bribery, the harmful consequences and other factors, and take various means such as fines, ordering to suspend production and business, revoking business licenses to combat various commercial bribery behaviors in all aspects. It is worth noting that the increased punishment for commercial bribery does not mean that all commercial bribery will be strictly punished. Education should be given priority to the behaviors that are occasionally implemented, small in amount and scope, and that cause little damage to the interests of other operators. The punishment measures that need to be strictly implemented are those behaviors that are incorrigible, huge in amount, widespread in scope and harmful to the interests of a large part of the community.

4. Conclusion

Commercial bribery makes the competition between enterprises unfair or even deformed. Enterprises will no longer simply improve their strength to gain market competitiveness, which will inevitably affect the normal operation of the market economy. Through the unfair survival of the fittest, consumers will ultimately bear the adverse consequences and directly infringe on the interests of the public. Just by analyzing the definition of commercial bribery in China and abroad, we can find that the legal system of commercial bribery in China is not perfect, and there is no perfect punishment mechanism, which makes commercial bribery in the operation of the market economy more and more prohibited. There is no clear and unified definition of commercial bribery in China, and the concept, connotation and extension of commercial bribery currently used are also very vague, which directly leads to difficulties in law enforcement in China's judicial practice.

References

- China's Anti-corruption 30 years Memorabilia Source. People's Daily. 2019.
- Dong Huijuan, Zhou Jie. Examining the nature of browser filtering advertising behavior from the perspective of users' interests -- and commenting on the first case of browser filtering video advertising in China [A]. Proceedings of the 2015 Annual Meeting of China Intellectual Property Law Research Society [C]. Two thousand and fifteen.
- Hart E. Posen, Jeho Lee, Sangyoon Yi. The power of imperfect imitation [J]. *Strat. Mgmt. J.* 2018 (2).
- Internet competition should follow the principle of non public welfare and non interference [N]. Stone will win People's Court News 2020 (005).
- Wu Shoupeng trans. POLITICS [M]. ARISTOTLE. The Commercial Press. 2019.