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The Harm and Countermeasures of Transnational Commercial Bribery

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Abstract: In today's era of globalization, international exchanges are increasingly close, and transnational bribery cases are frequent. Therefore, combating commercial bribery by multinational corporations and strengthening the compliance system of transnational corporations are of great significance in promoting healthy economic development and social justice. At present, all countries have various legal provisions on corporate anti-bribery, but due to factors such as incomplete consistency of regulations in various economies, the governance effect is limited and it is challenging to fully credit the law's deterrence effect. Meanwhile, as the largest importer of foreign capital, commercial bribery in China is even more rampant, but due to the lack of domestic attention and the dispersion and ambiguity of the relevant laws and regulations, the bribe-takers are seldom sanctioned by the law.Through the analysis of the concept, causes and related cases of commercial bribery, as well as the comparative analysis of the relevant laws of Britain and the United States, this paper seeks to solve the problem of transnational bribery in China.

Keywords: Commercial bribery, Transnational corruption, FCPA, GSK, Cooperation.

1. Introduction

With the acceleration of the process of globalization, multinational companies (MNCs) continue to expand their markets to different countries and regions. These new markets often have different legal, cultural and business environments, which provide a breeding ground for commercial bribery. In some emerging markets and developing countries, multinational companies face fierce market competition. In order to obtain commercial contracts, licenses, or other commercial benefits, bribery is a tactic that certain businesses may utilize to obtain a competitive edge.

The commercial bribery of transnational corporations is a complicated problem, which involves many factors. Governance of such behavior requires global cooperation, strengthening legal supervision, enhancing corporate compliance awareness and internal control to maintain a fair and competitive market environment and promote healthy economic development.

In order to further provide effective strategies for China's governance of commercial bribery by transnational corporations, based on the study of relevant literature, this paper introduces the classic domestic case--bribery by GlaxoSmithKline in China, briefs the situation of bribery by transnational corporations in China, analyzes the negative impact of such behaviors and the coping strategies and challenges faced by China in recent years, and applies the comparative research method. This paper

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probes into the Foreign Corrupt Practices Act of the United States and the Bribery Act of the United Kingdom in order to seek solutions to the legal regulation of commercial bribery in China.

2. Overview of Commercial Bribery Behavior

2.1. Concepts and Characteristics

Countries and international organizations have slightly different definitions for “Commercial bribery”.

An important law of the United States concerning commercial bribery is the Foreign Corrupt Practices Act (FCPA), promulgated in 1977, which provides specific provisions on the definition of commercial bribery and holds that the components of commercial bribery include the following aspects: The subject, the general subject, can be a natural person or a legal person, and the law is mainly concerned with jurisdiction, while applying the principle of personal and territorial;

In the subjective aspect, the doer should have the intention to bribe, so that the briber abuses his public power and makes profits for himself or others. Objective aspects, including the express payment of funds or the assurance of funds, as well as any other valuable item.The law also has more specific provisions on legal liability, including administrative liability, civil liability and criminal liability.

French law does not make specific provisions on the concept of commercial bribery. When dealing with acts of unfair competition, including commercial bribery, France deals with them according to the relevant provisions of the French Civil Code.

Among the existing laws in China, the Anti-Unfair Competition Law implemented in 1993 is recognized as the first law to make clear provisions on commercial bribery, and is also one of the most important bases for combating commercial bribery. Article 8 (1) of the Law states that it is forbidden for business owners to bribe with cash or other resources in order to sell or buy goods.Any unit or individual of the opposing party who covertly takes kickbacks outside the accounts will be judged to have accepted bribes and will face consequences. Anyone caught giving kickbacks to other units or individuals outside the accounts may be prosecuted for soliciting bribes. In the subjective aspect, the actor must have the intention of benefiting himself or a third party, that is, subjective intent [1].

Combined with China's Anti-Unfair Competition Law and relevant laws, the author believes that commercial bribery can be defined as: Commercial bribery is an unfair competition practice whereby operators covertly provide benefits to another unit or individual in a market transaction using their property or other resources in an effort to get trading opportunities or advantageous trading circumstances. In simple terms, commercial bribery of transnational corporations refers to the commercial bribery carried out by transnational corporations and their branches or their agents and intermediaries in China. This kind of bribery is different from ordinary commercial bribery. The main body of this kind of bribery is transnational corporations, which have advantages over domestic enterprises in capital technology and management. Then through commercial bribery this kind of unfair competition behavior, the harm is particularly serious.

2.2. Reasons of Commercial Bribery Behavior

There are various reasons for the formation of commercial bribery, mainly as follows:

Cultural Differences In some countries and regions, bribery may be considered a "normal" business practice, and multinational companies may bend to local business practices when operating in these regions.

Weak supervision: In some countries, inadequate legal systems, inadequate anti-corruption legislation and inadequate enforcement make bribery more difficult to detect and punish.

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Fierce market competition: In a competitive market, multinational companies may choose bribery to quickly obtain business opportunities or exclude competitors.

Insufficient internal control: The compliance control and audit systems of some multinational companies are not sound, which makes bribery difficult to be detected and contained internally.

The pursuit of profit maximization: In order to achieve the goal of profit maximization, some companies may take risks and obtain profits through illegal means.

2.3. Commercial Bribery Cases and Data Analysis

In 2013, the GlaxoSmithKline (GSK) scandal in China was exposed, and in 2023, the US pharmaceutical company Pfizer was once again involved in a bribery case in China, so that the problem of transnational commercial bribery continues to enter the public eye.

The US Securities and Exchange Commission accused Pfizer in August 2012 of bribing state officials, physicians, and healthcare professionals in eight nations, including China. Pfizer ultimately settled with the Securities and Exchange Commission and the US Department of Justice for a sum of more than $60 million, including fines. In 2023, according to information released by the U.S. Department of Justice, Pfizer was again accused of spending $168 million in China to bribe influential officials [2].

It appears that the unending corruption of global pharmaceutical corporations is turning into a "unspoken rule" necessary for foreign businesses to survive. The Cl Ministry of Commerce's statistics show that drug rebates, when used as commercial bribes, embezzled approximately 772 million yuan in national assets annually, or roughly 16% of the pharmaceutical industry's annual tax revenue. This resulted in significant economic losses for the nation and negatively impacted normal competition and market order. The transnational nature of commercial bribery has made it imperative for all nations to step up international cooperation in the investigation and prosecution of commercial bribery in the context of global trade and the economy.Only by strengthening the cooperation with foreign governments and organizations and establishing an effective cooperation mechanism can China completely and effectively curb commercial bribery [3].

After the bribery scandal was exposed in 2013, Pfizer still did not repent and continued to use bribery to open the market. Pfizer, as a world-renowned pharmaceutical company, began vaccine research and development and production at the early stage of the epidemic. However, in the Chinese market, Pfizer faces a number of challenges, including government relations, media coverage, public trust and so on. In order to better address these challenges, Pfizer adopted a massive public relations strategy to try to influence the outbreak response and decision-making by "buying off a key minority."

Pfizer's bribery is not unique. In recent years, business giants such as BASF of Germany, Carrefour of France and General Electric of the United States have been frequently exposed to bribery scandals. Its actions not only cost the nation enormous financial losses, but they also had a negative impact on the market's typical competitiveness and order. At the same time, it also reflects the compliance challenges faced by transnational enterprises in emerging markets, and sounds the alarm for China's commercial bribery governance of transnational corporations.

3. Commercial Bribery Laws and Governance Countermeasures of Different Countries

In order to maintain a fair competitive environment and social order, and protect the interests of enterprises and consumers, all countries have formulated strict commercial bribery legal systems, and established corresponding enforcement and punishment mechanisms. This paragraph will deeply analyze the legal framework of commercial bribery in several representative countries such as the United States, the United Kingdom and China,examine how their legal systems are really put to use, and then contrast the parallels and discrepancies between the legal frameworks for commercial

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bribery in other nations. It seeks to shed light on the legal approaches and real-world encounters that different nations have had with commercial bribery.

3.1. Foreign Bribery Practices Act of the United States

3.1.1. Brief Content of the Act

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977 and is a special law in the United States. It is sometimes referred to as "the overseas corruption law" and was repeated three times in 1988, 1994, and 1998. The most important law to limit U.S. company bribery is this one, which forbids U.S. companies from bribing public officials of foreign governments. It also restricts the use of individuals by U.S. companies to bribe foreign government officials and includes pertinent provisions on the accounting system of U.S.-listed companies.

Paying a foreign government official to win or keep business is prohibited by the FCPA. The next five conditions have to be fulfilled in order for this to be considered a violation.

Crime Subject: Any individual, business, officer, director, worker, corporate agent, or shareholder acting on the company's behalf may be subject to the FCPA.

An individual or organization will face consequences if they direct, approve, or help someone else break anti-bribery laws.

The intention behind bribery is twofold: the person paying the bribe, or authorizing someone else to pay one, must do so with the intention of causing the briber or any other individual to abuse their position for financial gain. It's crucial to remember that the FCPA makes offering or threatening to offer a bribe illegal; it does not need the bribery act to achieve its goal.Any attempt to bribe is prohibited by the FCPA, regardless of the purpose: to obtain an improper advantage, to induce a foreign official to use their influence to influence any act or decision, to induce an official to do or refrain from doing anything contrary to their statutory obligations, or to use their official capacity to influence an act or decision [4].

Bribery Method: It is illegal under the FCPA to pay, offer, promise to pay, or provide permission to a third party to pay, offer, or provide money or anything of value.

Bribery of foreign officials, political parties, party staff, or candidates for public office in any foreign country is covered by the FCPA. An employee or official of any foreign country, international organization, department, or agency operating in an official capacity is referred to as a "foreign official". The Foreign Corrupt Practices Act (FCPA) prohibits bribery against public officials of any rank or status. It places more emphasis on the intent behind the bribe than its actual contents, such as official acceptance, payment offer, or pledge.

Test of business purpose: Bribery to assist a company in acquiring, holding, or managing a business is prohibited by the FCPA. The Department of Justice uses the broad term "acquisition or retention of business" to refer to more than just giving something a contract or gaining something else. It should be mentioned that this company does not need authorization from a foreign government agency or government in order to purchase or maintain it [5].

3.1.2. Legal Liability for Violating the FCPA

Criminal liability: Businesses that violate the law may be subject to fines of up to $2 million. Natural individuals may face a fine of up to $100,000 and a five-year jail sentence.

Furthermore, the penalties under the selective penalty law may be substantially higher--in fact, it may be double the benefit of the bribe.

Civil liability: Bribers may be subject to civil lawsuits brought by the Securities and Exchange Commission (SEC) with penalties of up to $10,000. In the SEC's case, the court has the authority to impose extra fines. The entire amount of illicit revenue is the maximum amount of additional fines

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that can be imposed. In cases of significant infringement, natural people are subject to fine limits of \$5,000 to \$100,000 and others to fine limits of \$50,000 to \$500,000.

Additional sanctions: Violators may be prohibited from engaging in federal trade, have their export privileges revoked, and be prohibited from trading stocks [6].

3.2. United Kingdom Bribery Act

Britain was the first country to enact anti-bribery laws. Since the Public Bodies Corrupt Practices Act of 1889 criminalized bribery in the public domain, the United Kingdom has successively included bribery in the private sector, bribery by legal persons, and overseas bribery by domestic natural and legal persons. However, by 1997, when the United Kingdom signed the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, its bribery legislation had fallen behind the requirements of various international conventions, one of which was the legislation on corporate liability for bribery. Before the 2010 Bribery Act came into force, it was often difficult under the UK legal system to attribute bribery by corporate associates to corporations. This is mainly because under the "identification principle", it is difficult to prove that the subject of bribery is regarded as a legal person. At the same time, British law does not stipulate the responsibility of legal persons to prevent others from bribing. Article 7 of the Anti-Bribery Law establishes "Failure of commercial organisations to prevent bribery", which for the first time clarifies the responsibility of commercial organisations to prevent bribery by their associates. The British Ministry of Justice's "Anti-Bribery Law Guide" and many related studies have pointed out that the crime adopts Strict Liability, and when the relevant person constitutes bribery, the business organization will be presumed to constitute the crime. At the same time, the Act establishes in Section 7(2) an "adequate procedure" as a plea of not guilty for this offence.

Bribery in business organisation is a crime committed when an "associate" of a business organisation with a "close connection" to the United Kingdom is committed for the purpose of enabling the organisation to obtain or maintain business or to gain or maintain an advantage in an existing business (without being prosecuted or convicted of "offering bribes to others"). If a business organization cannot prove that it has "appropriate procedures" to prevent its "associated personnel" from engaging in the above acts, the organization constitutes a "crime of negligence of business organization to prevent bribery".

3.2.1. The Establishment of New Legal Liability

Article 7 of the Anti-Bribery Act, through the creation of "commercial organizations to prevent bribery dereliction of duty", makes it clear for the first time in British domestic legislation that commercial organizations have the responsibility to prevent their associates from bribery. By establishing the crime, the Anti-Bribery Act partially solves the lack of legislation on corporate liability for bribery in the United Kingdom, meets the legislative requirements of international conventions on corporate liability, and increases the feasibility of punishing commercial organizations for bribery by relevant natural persons, legal persons or unincorporated bodies in the judiciary [7].

3.2.2. Expanded Jurisdiction

The crime of Commercial Organization for the Prevention of Bribery has expanded the jurisdiction of bribery crime in the UK to apply to some foreign legal persons with relevance to the UK, and in the case that the subject of the crime is different from the subject of bribery, there are no territorial and personal provisions on the act and subject of bribery. Article 1(1) of the OECD Convention on

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Combating Bribery of Foreign Public Officials in International Commercial Transactions requires that the criminal liability of domestic personnel engaged in overseas bribery through intermediary agencies be stipulated by legislation, and the crime has a wider applicability.

3.2.3. The Establishment of a "Due Process" Plea of Not Guilty

Section 7(2) of the Anti-Bribery Act provides that if the business organization can prove that it implemented "proper procedures" to prevent bribery by associated persons, then this proof can be used as a not guilty defence to the crime of negligence by the business organization to prevent bribery.

Through the establishment of this not guilty plea, the Act establishes a legal mechanism for business organizations to overturn the original presumption of liability and not bear specific criminal liability because of the establishment of a compliance system. The Law Commission, in its consultation Report No. 185 (para. 9.61), states that this mechanism has two main purposes, one is to incentivize companies to improve their anti-bribery compliance systems, and the other is to provide a degree of certainty to companies. Expands corporate liability for bribery and enables companies to play a role in reducing and eliminating commercial bribery without fear of excessive accountability.

4. Suggestions on the Countermeasures of Commercial Bribery in China

4.1. Improve Legislation

At present, the constitution and mode of transnational commercial bribery are not clearly defined in Chinese law, and the enumeration of transnational commercial bribery means is not comprehensive. For example, the way multinational companies pay bribes through "middlemen", and the constantly innovative and innovative ways of bribery by multinational companies, require further improvement of the relevant law. From the legal point of view, although China's Anti-Unfair Competition Law and Criminal Law contain provisions on commercial bribery, the content is scattered. The problems involved in transnational commercial bribery are numerous and complex, and special laws need to be formulated.

4.2. Extension and Application of Jurisdiction

First of all, China should learn from the extraterritorial jurisdiction principle of British anti-bribery law, and make its domestic anti-commercial bribery law have extraterritorial effect through legislation, so as to provide unilateral public supervision for international bribery.

Moreover, there are often conflicts between the territorial jurisdiction of the host country and the personal jurisdiction of the MNC's subsidiaries in China when the host country engages in criminal acts and the personal jurisdiction of the home country over the MNC. At this time, considering the complexity of commercial bribery of transnational corporations, jurisdiction should not be directly asserted according to the principle of territorial jurisdiction priority, but should be coordinated jurisdiction, and there should be hierarchy among territorial jurisdiction priority, personal jurisdiction supplement, judicial justice and strengthening international cooperation, so as to ensure that the exercise of jurisdiction is conducive to the investigation of facts and timely and effective investigation of criminal acts.

4.3. Introduce Compliance Incentive Mechanism

China's criminal law does not establish a mechanism for enterprises to avoid criminal responsibility or be subject to reduced criminal penalties because they have a compliance system. Therefore, China could also consider introducing a similar compliance incentive mechanism to encourage companies to take proactive measures to prevent bribery. By rewarding compliance measures, enterprises are

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encouraged to actively establish compliance mechanisms and improve compliance awareness, so as to effectively reduce the occurrence of bribery. It can be used as a direct basis for the acquittal of the enterprises involved in the current judicial reform of compliance leniency in China, and can also be used as a legal basis for the procuratorial organ to make a decision not to approve arrest, not to prosecute, or to propose a lighter sentence, and for the court to reduce criminal punishment [8].

4.4. Strengthen International Cooperation

By signing bilateral or multilateral agreements and establishing close cooperative relations with major economies and international organizations, China's transnational commercial bribery can be effectively combated and fair competition order in the international market can be maintained.

To be specific, strengthening international cooperation requires multiple approaches. First of all, establishing information sharing mechanism is the key. Countries should establish an efficient information exchange platform 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 improve the investigative capacity of national law enforcement agencies, but also effectively inhibits the cross-border flow of corrupt funds.

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

However, in the process of strengthening international cooperation, we must also face up to conflicts of interest and jurisdictional issues among States. Due to the differences of legal systems, judicial systems and interest demands of different countries, the jurisdictional issues of transnational commercial bribery cases often become difficult for cooperation. In order to overcome this problem, countries should strengthen consultation and communication, strengthen cooperation through extradition procedures, judicial assistance, recognition and enforcement and other systems, and jointly combat international crimes. At the same time, countries should respect each other's sovereignty and interests and ensure fairness and justice in the process of cooperation.

5. Conclusion

Transnational bribery has had a serious adverse impact on the political stability and economic growth of every nation on the planet. Chinese government should pay attention to this problem and take various measures together with the international community to combat corruption. Although there is a long way to go, with the full cooperation of peoples and governments of all countries, the just cause of combating transnational bribery is bound to achieve final success.

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