

# **GSK:** **A case study**

**GlaxoSmithKline is facing serious charges of misconduct as enforcement grows fierce. The entwining Chinese anti-bribery laws, the US FCPA and UK Bribery Act call for immediate attention to risks and compliance on both a national and global scale**



This article was first published in the July/August issue of *China Law & Practice* and can be found [here](#).

The Chinese government has substantially beefed up its anti-corruption enforcement in recent years, resulting in arrests and trials of high-level state officials and prominent executives of state-owned entities (SOEs) as well as multinational companies (MNCs).

Among the many corruption investigations that took place in China, the GlaxoSmithKline (GSK) bribery case stands out most. Prosecutors not only charged the company's Chinese and British executives, but also the corporate entity of its Chinese subsidiary. The case in China has been followed by investigations in the US and UK, which further compounds the consequences and liabilities facing GSK.

### Chinese anti-bribery laws

China has two major laws that impose administrative penalties for commercial bribes and criminal penalties for both public and commercial bribes.



### Whether criminal bribery has been committed depends largely on the cumulative bribery amounts and the intention behind the offered money or property

Martin Rogers, Davis Polk & Wardwell

### PRC Anti-Unfair Competition Law

The *PRC Anti-Unfair Competition Law* (中华人民共和国反不正当竞争法) (AUCL) was enacted in 1993 to prohibit unfair competition practices, including intellectual property infringement, abuse of dominance power and commercial bribery. Article 8 of the AUCL prohibits any business operators from “giving bribes in the form of property or other means for the purpose of selling and purchasing products and services”. Kickbacks or secret commissions not properly documented in the books and records are also prohibited. Article 22 prescribes criminal liability under the Criminal Law if the commercial bribery constitutes a crime, and administrative penalties for less serious violations.

In 1996, the State Administration for Industry and Commerce (SAIC), the enforcing regulator of the AUCL, promulgated the *Provisional Rules on Prohibition of Commercial Bribery Activities* (关于禁止商业贿赂行为的暂行规定) (SAIC Rules) to clarify the definition of commercial bribery under the AUCL and defined property as “any cash and non-cash payments, including, but not limited to, property disguised as marketing fees, publicity fees, sponsorship fees, R&D fees, labour service fees, consulting fees or commission fees, as well as reimbursement of various expenses, etc”. Offering domestic or international tours, excessive meals or entertainment may be regarded as bribes in the form of “other means”.

Local SAIC offices have investigated a number of MNCs for alleged commercial bribes, which often resulted in modest administrative fines ranging from Rmb10,000 (US\$1,610) to Rmb200,000 (US\$32,200) plus the confiscation of illegal income. In the case of GSK, local SAIC offices in Beijing and Shanghai were reported to have previously investigated GSK China for commercial bribes. *Xinhua* reported that GSK China executives also tried to bribe local SAIC officials to influence and end SAIC investigations.

### PRC Criminal Law

The *PRC Criminal Law* (中华人民共和国刑法), enacted in 1979 with eight subsequent amendments, penalises both public and commercial bribery for the purpose of securing illegitimate benefits. Historically, the Criminal Law limited bribery to a state official or state functionary. After China adopted a market-oriented economic system, commercial bribery to a non-state official (i.e., a representative of a business enterprise or institution who is not state official or state functionary) was identified

as a serious and widespread problem, and was therefore outlawed in the subsequent amendments.

Distinguishing state and commercial bribery is highly complex given the role the state plays in the private sector. A state official or state functionary is defined as “a person who performs public services in a state organ,” and the definition is further exemplified in the Criminal Law and various legal interpretations. The scope of “state official” under the Criminal Law

### The facts

**June 28 2013:** the police in Changsha City announced investigations into certain GlaxoSmithKline (China) Investment (GSK China) executives for potential economic crimes.

**July 11 2013:** the Ministry of Public Security (MPS) confirmed that it had led police departments in various cities to investigate GSK China's executives for “serious economic crimes,” including commercial bribery and embezzlement. Shortly thereafter, GSK pledged to fully cooperate with the Chinese authorities and confirmed that the general manager of GSK China, a British citizen, would return to China to cooperate with the investigations.

**May 14 2014:** China's official *Xinhua News Agency* reported that the bribery investigation of GSK China was complete and the case had been transferred to prosecutors for official charges, after more than a 10-month probe. According to the *Xinhua* reports, the management of GSK China had expanded various sale departments, built in bribery costs in drug prices and ordered the subordinates to offer bribes to hospitals, doctors, healthcare institutions and associations in order to boost sales. It was alleged to have illegally gained billions of *renminbi*. Based on the sales through bribes, GSK China's annual revenue increased from Rmb3.9 billion (US\$626 million) in 2009 to Rmb6.9 billion (US\$1.11 billion) in 2012.

is slightly different from that under the bribery laws in other jurisdictions.

Whether criminal bribery has been committed depends largely on the cumulative bribery amounts and the intention behind the offered money or property.

The Supreme People's Court and the Supreme People's Procuratorate have promulgated many legal interpretations to supplement the Criminal Law, including the *Opinions on Several Issues Concerning the Application of the Law in Handling Criminal Commercial Bribery Cases* (关于办理商业贿赂刑事



### Aside from the severe liabilities facing GSK China and its executives, the bribery case in China has also been followed by investigations by the US and UK regulators

Bernard Chen Zhu, Davis Polk & Wardwell

案件适用法律若干问题的意见), which identified the eight different types of commercial bribery crimes.

In most criminal bribery cases, the MPS and local police departments will lead the investigation before passing it on to the prosecutors for official charges. The police may work with other regulators during the investigation. More complex cases that implicate state officials or high-level party members may also involve the party's disciplinary organs. In the end, a criminal bribery case may be put to trial in a Chinese court.

#### Liability under the Criminal Law

Since the official charging documents are not yet publically available, our preliminary analysis is largely based on the facts alleged in reports from *Xinhua*, the official state news outlet. According to the *Xinhua* reports, GSK China has been charged on suspicion of bribery to non-state officials (对非国家工作人员行贿), bribery by a unit (单位行贿) and bribery to a unit (对单位行贿). These charges are based on Article 164, Article 393

and Article 391 of the Criminal Law, respectively. One of the basic elements for all three charged crimes is to offer money or property for the purpose of securing illegitimate benefits.

One very conspicuous charge in the GSK case is the charge of the crime of bribes committed by a unit under Article 393. This is a corporate crime that requires an element of corporate intent with regard to the illegal conduct. Based on the *Xinhua* reports, the Chinese authorities allege that GSK China's management encouraged the bribes to doctors, hospitals and other institutions for the illegal benefits of the corporate entity, such as increased revenue and profit. If the alleged facts were found by the trial court, the corporate crime of bribery by a unit is warranted.

The penalties of the charged crimes for GSK China could be fines, imprisonment and/or fines for individual executives, including a British citizen and the China legal head. In order to determine the fines for the corporate entity, the Chinese court will consider the circumstance of the crime, such as illegal gain and damages caused, as well as the financial ability of the corporate entity, according to the Supreme People's Court's *Rules on the Application of Penalties Imposed on Properties* (关于适用财产刑若干问题的规定). Based on the total bribery amounts and illegal gain cited by the *Xinhua* reports, the corporate fine may be substantial. As for the individual executives, Article 164 prescribes imprisonment up to three or ten years, depending on factors such as bribery amounts. If convicted, the penalties for both GSK China and relevant executives can be severe.

#### US FCPA and UK Bribery Act

Aside from the severe liabilities facing GSK China and its executives, the bribery case in China has also been followed by investigations by the US and UK regulators.

The US *Foreign Corrupt Practices Act* (FCPA) of 1977, as amended, was enacted to make it unlawful to make payments of money or anything of value to a foreign official for the purpose



## Surviving the new environment

**Educate your local staff.** Your local business and compliance staff should be regularly alerted of the bribery risks and educated on the development of the FCPA, the *Bribery Act* and Chinese bribery laws. For instance, in the healthcare sector, the National Health and Family Planning Commission promulgated the *Nine Prohibitions for Strengthening Ethical Conduct in the Healthcare Industry* (Nine Prohibitions) on December 26 2013. Educating your local staff to understand and cease any unlawful or unethical practices highlighted by the Nine Prohibitions is advised to improve overall compliance.

**Examine your local business practice.** The GSK bribery case is a warning call for MNCs blindly following local business practices and customs. MNCs should carefully review and analyse the relevant laws before adopting any local business practices.

**Enhance your compliance and internal investigation programmes.** While most established MNCs have compliance programmes in place, the programmes are not always tailored to the risks specific to China. It is recommended to establish a comprehensive compliance programme that takes into consideration Chinese anti-bribery laws given their differences from the

FCPA and the *Bribery Act*. Effective internal controls and investigation functions are also important in order to deter and detect violations of compliance policy.

**Elevate compliance role within your organisation.** Due to competition and business culture, compliance in China is given insufficient priority in some cases. For instance, GSK China is alleged to “emphasise sales but ignore compliance.” Ensuring that the compliance function is properly resourced and structuring its reporting lines to maintain sufficient independence from the business function are important considerations.

of obtaining or retaining business. While doctors are generally not regarded as state officials in China, the FCPA defines “foreign official” very broadly to include government officers or employees of foreign government, department, agency or instrumentality, such as SOEs and public hospitals. In addition to the anti-bribery provision, the FCPA has a set of books, records and internal control provisions applicable to issuers that have securities registered, and with shares listed, in the US. In September 2013, two months after the Chinese investigation commenced, GSK confirmed that US authorities had begun an investigation of its potential violations of the FCPA in China.

The UK *Bribery Act*, which was enacted in April 2010 and came into force on July 1 2011, prohibits bribery, being bribed, bribery of foreign public officials and the failure of a commercial organisation to prevent bribery on its behalf. The *Bribery Act* has an even broader jurisdiction than the FCPA and allows for the prosecution of an individual or company with links to the UK, regardless of where the crime occurred. Shortly after the formal charges in China, the UK Serious Fraud Office (SFO) opened a criminal investigation into GSK, according to a report by *The Telegraph* on May 27 2014. The SFO investigation will be closely monitored given the crime of failing to prevent persons associated with them from bribing on its behalf under the *Bribery Act*.

### Fierce enforcement

As the most high-profile corruption investigation conducted by Chinese regulators, the GSK case reveals significant enforcement trends in China.

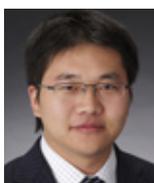
Firstly, the unprecedented scale and level of the investigation of GSK led by MPS with regulators in different regions,

along with the increase in the overall number of anti-corruption investigations, show that the Chinese regulators are no longer sitting on the sidelines and will aggressively enforce the anti-bribery laws.

Secondly, the GSK case shows that the Chinese government is now focusing on tackling commercial bribes by punishing both those who receive and offer bribes, unlike the historical emphasis on punishing only those who receive them.

Thirdly, regulators are increasingly going after the corporate entity, while most commercial bribery cases have previously been brought against individual offenders rather than the corporate entity.

Lastly, based on the actions and statements of the government, certain industries such as healthcare, food, energy,



**The GSK case shows that the Chinese government is now focusing on tackling commercial bribes by punishing both those who receive and offer bribes**

Jianwei (Jerry) Fang, Davis Polk & Wardwell

financial services and telecommunications will likely remain as the focus of enforcement in the coming years.

Most MNCs have already put in place internal control and compliance programs to comply with the FCPA and the *Bribery Act*. There are, however, still many improvements to be made to effectively address the increased regulatory risks and enforcement trends.

*Martin Rogers, Bernard Chen Zhu and Jianwei (Jerry) Fang, Davis Polk & Wardwell, Hong Kong*