

The Law *Prevention and Suppression of Bribery in the Private Sector*

Frequently Asked Questions

About the Law

1. What does “passive bribery” mean as prescribed by this law?

“Passive bribery” means any person in service of a private entity (e.g. employee, agent, etc.) solicits, accepts or promises to accept an undue advantage as a reward for, in violation of his functional duties or rules of conduct, performing or not performing an act.

2. What does “active bribery” mean as prescribed by this law?

“Active bribery” means giving or promising to give an undue advantage to any person in service of a private entity (e.g. employee, agent, etc.) as a reward for, in violation of his functional duties or rules of conduct, performing or not performing an act.

3. What are “functional duties” and “rules of conduct” referring to?

Mainly:

- a) Statutory norms – The law stipulates rules for various professionals (e.g. pharmacists, insurance agents, tour guides, etc.) to observe while performing their duties. These provisions constitute respective rules of conduct. Meanwhile, the *Labour Relations Law* also provides general obligations for employees (e.g. loyalty, confidentiality) which form a part of the rules of conduct.
- b) Voluntary norms – The rules of conduct agreed between parties concerned (e.g. employer and employee, principal and agent).

4. What kind of conduct is “unfair competition” as prescribed by this law referred to?

The concept of “unfair competition” is quoted from the *Commercial Code*. It refers to any act of competition that objectively reveals itself to be in breach of the norms and honest usage of economic activity.

5. Who has the right to file a complaint under this law?

Under the general provisions of the *Penal Code*, any person whose interest is protected by the respective criminal law has the right to file a complaint.

According to this law, such person who possesses legally protected interest, in principle, refers to one whose interest is infringed upon by active or passive bribery. He can be an employer, principal or one who suffers from unfair competition due to bribery.

6. What does “penal procedures shall only be instituted when there is a complaint” mean?

It means that a requirement has to be met to hold the actor criminally responsible, that is, the victim has to file a complaint with a law enforcement agency. Only when a complaint is filed can an investigation be initiated. Take ordinary theft as an example, if the victim does not file a complaint against the actor, no investigation can be initiated.

7. Is there any time limit for exercising the right of filing a complaint?

Under the general provisions of the *Penal Code*, the right to file a complaint extinguishes in 6 months, counting from the day on which the offence and the principal offenders come to the victim’s knowledge. After that period, the actor can no longer be held criminally responsible. However, even if the victim does not take any criminal action, it does not mean that he has given up the right to take a disciplinary or civil action (e.g. claim for civil damages) altogether.

8. Can non-interested parties file a complaint?

Generally they cannot, but it all depends on the actual situation. For example, if the bribery may cause damage to the health or safety of third parties, anyone can report the offence.

9. If an employee of a private entity is involved in active or passive bribery but the company decides not to exercise the right of complaint, can other people (non-interested parties) who are aware of the case report it to the CCAC?

In this case, such complaint shall not be accepted because it has to be made by the victim, unless the case is related to an acquisition of assets or services with funding coming totally or partly from public money and has induced an unfair competition, or the act of active or passive bribery is adequate to cause damage to the health or safety of third parties.

10. How long is the period of limitation of prosecution for passive and active bribery in the private sector?

The limitation period is 5 years for passive bribery, 2 and 5 years respectively for

ordinary and aggravated active bribery.

11. Does this law have any retroactive effect?

This law is not applicable to the acts performed and completed before this law came into effect (1 March 2010).

12. Is this law applicable to cases in which an employee of a private entity bribes a public servant?

No. The *Penal Code* shall apply to all cases related to passive bribery committed by public servants. The law *Prevention and Suppression of Bribery in the Private Sector* only applies to bribery in the private sector.

13. Is the procedure for reporting a case complicated?

Certain procedures are to be followed when reporting a case. It is suggested that clear and detailed information should be provided when reporting to the CCAC.

14. What are the differences between Macao and Hong Kong in relation to the laws against bribery in the private sector?

In general, the legal systems of the two regions are different. For example, in Hong Kong, an employee who accepts an advantage without his employer's consent for performing acts related to his job duties shall be guilty of an offence even if he has not violated the rules of conduct. In Macao, however, passive bribery will be constituted only when the undue advantage accepted is a reward for violating the employee's functional duties.

General Provisions

15. If either active or passive bribery has not been proven true, will conviction be possible?

Conviction depends on the result of evidence collection. An important note is that active and passive bribery are independent offences. Therefore, in certain circumstances, conviction of only either one is possible.

16. Do active or passive bribery refer only to the giving and acceptance of pecuniary advantages (for example, money or gifts)?

Advantages include not only pecuniary but also non-pecuniary advantages, such as a school place, a job offer or priority in the placement of homes. Even though these cannot be quantified monetarily, they are also advantages as stipulated by

this law.

17. Does the law stipulate any limit for the amount or value of gifts? If yes, how much?

The law *Prevention and Suppression of Bribery in the Private Sector* does not stipulate any limit in this regard, but employers can set a limit for their employees to follow.

18. If a person returns the advantage he has accepted after having acted in violation of his company's internal rules, will he be exempted from penalty?

This is not stipulated as a case of remission of punishment. If a person voluntarily rejects the offer, or returns the advantage he has accepted before acting in violation of the rules of conduct, penalty may not be imposed according to law.

It is important to note that acceptance of (or a promise to accept) an advantage as a reward for acting in violation of one's functional duties constitutes an offence, even if the actor returns the advantage afterwards. "Remission of penalty" does not mean that the actor has not committed an offence. Only the Court has the power to make decisions regarding remission of penalties.

Procurement and Commission

19. It is a usual practice that suppliers offer advantages (e.g. rebates, discounts, etc.) to their clients. Does it violate this law?

In principle, no. However, it should not be simply regarded as lawful. It is essential to verify whether the purpose of advantage offering is to make employees or agents act in violation of their functional duties.

20. An employee has accepted advantages given by a supplier who is already the best among all candidates, that is, the company has suffered no loss. Is the act illegal?

In general, merely accepting an advantage without violating any functional duty does not constitute passive bribery. However, such advantage may eventually become a sweetening process which may one day lead to unlawful requests that are difficult to refuse.

On the other hand, though such act does not constitute passive bribery, the employer or principal can still take a civil or disciplinary action against the employee or agent who has accepted the advantage.

- 21. An employee, though having breached the rules of conduct (for example, doing a favour for his relative or friend), has not accepted any kind of advantages. Can he be held criminally responsible?**

Although the employee has not committed passive bribery, he may be liable to other sanctions due to breach of the company's internal rules.

- 22. In the catering sector, it is common for suppliers to give rebates to different sections in restaurants (e.g. kitchen, Dim Sum section, etc.) in the middle and at the end of the year for festive purposes. Does this tradition violate the law?**

It depends on whether the advantages given are used as rewards to recipients for violating their functional duties.

If the money given by the suppliers serves as rewards to employees for violating their functional duties, such as enabling a predetermined supplier to win a call for tender, accepting substandard goods, overstating the quantity or prices of the goods purchased, etc., not only active and passive bribery but also other criminal offences may be constituted.

- 23. A company purchases goods from a preferred supplier through an intermediary (who is not an employee of the company). The intermediary asks for a commission in return. Has he violated the law?**

In principle, no. It is normal for an intermediary to receive a commission in a purchasing process.

- 24. Is it legal for a company to offer commission-based pays to its salesmen?**

As this law came into effect, commissions are still allowed as long as it conforms to normal business practices. Since salesmen are entitled to such commission-based income, there is no problem with it.

- 25. Shops use all sorts of methods to attract business such as offering special discounts. Have they violated the law?**

Pure commercial competitions do not constitute violation of this law.

- 26. Some shops raise their commissions to tour guides so that they bring in more tourists for shopping. Does this constitute “unfair competition” as prescribed by this law?**

This law is not applicable to cases not related to active and passive bribery. This

law is not specifically against unfair competition but aggravates punishment for acts of active and passive bribery which induce “unfair competition”.

Daily Life and Consumption

27. Does giving “red packets” to clients’ employees during Chinese New Year constitute active bribery?

No, as long as they are given and received as a part of traditional Chinese customs.

28. Is it alright to give red packets to security guards or cleaners of residential buildings?

If they are given only as a part of traditional Chinese customs, with no intention to request the recipient to violate his functional duties, it does not constitute an offence. However, if the purpose of the red packet is to make the security guard allow the offeror an unauthorized entry into the parking lot inside the building, such act may violate the law and the parties involved may be liable to criminal responsibilities.

29. Restaurant waiters often provide better service to frequent customers (for example, bigger food portion, exemption from charge for tea or free appetizers, etc.). If they receive tips from their customers, will it be considered an “exchange of advantage” or “bribery”?

It is normal for restaurants to provide more privileges to their frequent customers. If such extra service is not against the rules of conduct (for example, they are authorized to exempt customers from charge for tea), receiving a tip does not constitute passive bribery. In fact, if the tip is not intended for extra service against the rules of conduct, giving it does not constitute active bribery.

30. If a person gives money to a restaurant receptionist in order to jump the queue for a table, does it constitute bribery?

Private entities often have their own business strategies. For example, some restaurants pay more attention to frequent customers, and allow their employees to serve their frequent customers first. If the receptionist has not violated the code of practice, he shall not be guilty of passive bribery, and the customer shall not be guilty of active bribery.

On the contrary, if the restaurant has a rule that customers should be seated on a first-come, first-served basis, but the receptionist allows a certain customer to

jump the queue in exchange for an advantage, the customer and the receptionist may have committed active and passive bribery respectively.

- 31. An employee of a lighting shop delivers a lamp to a customer's apartment. The customer asks the employee to repair a switch in the apartment and promises to give him a tip in return. Will this extra service cause any problem?**

This may constitute an offence because the tip is paid as a return for asking the employee to do something not ordered by his employer during his working hour. In this case, the worker will have violated his functional duties and the employer may suffer from loss if the worker accepts the tip and does the job. The customer is advised to communicate directly with the shop about the extra service.