

Does Paying for a Meal With a Potential
Customer Constitute Commercial Bribery?
为潜在客户支付餐费是否构成商业贿赂？

In 2018, the Shanghai Market Supervision Bureau (MSB) penalized two medical device companies on the grounds of committing “commercial bribery” under China’s Anti-Unfair Competition Law because they had paid for meals and/or entertainment with treating doctors.

In one case, Shanghai Qingpu District MSB imposed a fine of RMB 20,000 (US\$3,000) on Shanghai Gaozhan Medical Devices Sales Center for inviting a doctor from a hospital (name undisclosed) to a meal that cost around RMB 600 in total (US\$90). The company’s objective appears to have been to promoting the sale of certain medical devices to the hospital, although no actual sales were realized thereafter. In a later case, the Shanghai city level MSB imposed a fine of RMB 150,000 (US\$ 23,000) on Shanghai Shuangyi Medical Devices Co., Ltd. for inviting a doctor from another hospital and paying the doctor’s dining and entertainment expenses as appreciation for helping with the sales of Shuangyi’s products. The amount and nature of these dining and entertainment expenses was not disclosed.

In the second case, Shanghai MSB explained that such conduct constituted the bribing of the personnel of the counterparty “with the intention to create business opportunity”, and had “a de facto consequence of excluding other competitors and impaired fair competition in the business environment.”

These cases deserve attention because paying for the meal and entertainment expenses of a customer is a customary business practice and not regarded as “bribery” as long as the expense is in line with reasonable business practice or custom. Most multinational companies allow paying for such expenses within certain budgetary limits, which typically vary from US\$50 to \$150 per person. This has been deemed customary and in compliance with most applicable antibribery laws and business ethnics.

The two MSB cases, however, seem to overturn that accepted practice. In both decisions, the MSBs do not appear to have analyzed the value of the meal and entertainment expenses, or even given weight to such expenses, as a factor in determining whether bribery had been committed. Instead, the MSBs seem to have interpreted the activity itself (i.e., paying the meal and entertainment expense of a customer or potential customer) as commercial bribery. In fact, in the first case, the total cost of the meal was only US\$90 for two or more persons, less than the threshold of many multinational companies.

2018年上海市场监督管理局以构成中国《反不正当竞争法》下的“商业贿赂”为由对两家医疗器械公司予以行政处罚，原因是该两家公司为医生支付了餐饮和/或娱乐费用。

在第一个案例中，上海高瞻医疗器械销售中心为了向医院推销医疗器械产品（但并未最终实现销售），宴请了一名医院的医生（未披露姓名），共花费约600元人民币（约合90美元），上海青浦区市场监督管理局对其处以2万元人民币（约合3,000美元）的罚款。在另一起案例中，上海市场监督管理局对上海双益医疗设备有限公司处以150,000元人民币（约合23,000美元）的罚款，原因是该公司为感谢另一家医院的一名医生在其产品销售过程提供的帮助，邀请其进行餐饮和娱乐并支付费用。该案中餐饮和娱乐费用的金额及性质并未被披露。

在第二个案例中，上海市场监督管理局认为，该案行为具有“争取交易机会的行为故意”，并在“客观上排挤了同行的其他竞争者，影响了市场公平竞争的环境”，构成了对交易相对方工作人员的贿赂。

上述案例值得引起关注，因为通常认为，为客户支付餐费和娱乐是商业惯例，只要符合合理的商业惯例或习惯，即不被视为“贿赂”。大多数跨国公司允许在一定的预算限额内支付此类费用，一般从人均50美元至150美元不等。这一习惯性做法被认为符合大多数适用的反腐败法律和商业道德。

然而，市场监督管理局的两起案例似乎推翻了这一公认的做法。在这两个处罚决定中，市场监督管理局似乎并未考虑餐费和娱乐费用的金额，甚至没有将金额作为判断是否存在贿赂行为的一个衡量因素，而是把这一行为本身（即为客户或潜在客户支付餐费和娱乐费用）解释为商业贿赂。事实上，在第一个案例中，两人（或以上）的用餐总费用仅为90美元，这一花费低于多数跨国公司的相关标准。

因此，现在的关键问题是这两起案件究竟是孤立的事件，还是为确定商业贿赂树立了更普遍的原则。关于这两起案件的背景存在多种不同的解释。一种解释认为国家市场监督管理总局在2018年5月开展了《反不正当竞争法》执法重点行动，其中“查处医药领域的商业贿赂行为”是一大重点，所以目前的决定可能只适用于医药行业。另一种解释是上海市场监督管理局与其他地区市场监督管理局相比，执法更严格。但无论如何，有了此类先例，企业（尤其是在上海开展业务的企业或医药行业的企业）应当密切关注这一领域的发展，并准备好在必要时对餐饮和娱乐政策做出相应调整。

A key question now is whether the two cases are isolated incidents or whether they establish a more general principle in determining commercial bribery, both in terms of industries and locations. There are different interpretations of the backgrounds of the two cases. One reason could be because, in May 2018, the state MSB launched a campaign regarding the enforcement of Anti-Unfair Competition Law, in which one of the focuses is "investigation of commercial bribery in the medical industry," so the present determination may be applicable only to the medical industry. Another explanation is that Shanghai MSBs are simply more aggressive in enforcing the law than other local MSBs. Nevertheless, with such precedent, companies (especially companies doing business in Shanghai or in the pharmaceutical industry) should keep an eye on developments in this area and prepare to adjust their meal and entertainment policies accordingly.

About Us

With a practice involving China business since 1980 and a presence in Beijing since 1994, when our predecessor firms was one of the first international law firms to be granted a license by the Chinese Ministry of Justice. Our three China offices (opened in Beijing in 1994, Hong Kong in 1998, and Shanghai in 2004) are home to professionals who have been born and raised in China, as well as lawyers who have been involved actively in cross-border China activities (including transactions, regulatory and compliance, dispute resolution and public policy work) for more than 30 years. As a part of our global network, the China team provides a seamless and full range of legal service to our global clients.

Contact



Lindsay Zhu
Partner, Shanghai
T +86 21 6103 6303
E Lindsay.zhu@squirepb.com



关于我们

翰宇国际于1980年开展涉及中国的业务，于1994年正式设立北京办公室，是当时获得中国司法部许可的第一批国际律师事务所之一。翰宇国际在中国的三家办公室(设立于1994年的北京办公室，设立于1998年的香港办公室，以及设立于2004年的上海办公室)拥有在中国土生土长的专业律师以及三十年如一日专注从事跨境中国业务(包括跨境交易、合规与监管、争议解决和公共政策业务)的律师。作为我们全球网络的一部分,中国的律师能够随时随地根据客户要求提供全方位的无缝式服务。

联系人



朱桔
合伙人，上海
电话: 021-61036303
邮件: lindsay.zhu@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.

All Rights Reserved 2019