

A New Start for Non-Government Organisations in China

Until recently, overseas Non-Government Organisations operating in the PRC (ONGO) faced an unclear and uncertain legal environment. A number of ONGOs have set up offices by registering with the Ministry of Civil Affairs based on specific rules (for example, those relating to the establishment of foreign chambers of commerce). Others were able to establish a non-profitable entity by registering with the Ministry of Civil Affairs based on some very old temporary regulations in respect of “non-enterprise entities” (being organisations that are not formed as a company or partnership and are established as non-profit making bodies intended to benefit society) issued in 1998, approvals in respect of which were difficult to obtain in practice. Perhaps the most common method of establishing a presence in China was to form a wholly foreign-owned enterprise under the laws developed for the purposes of the commercial businesses, which give ONGOs the advantage of being able to establish a formal presence, enter into lawful employment arrangements but also with the disadvantage of needing to operate within a legal entity subject to a body of legislation designed for commercial enterprises.

This has all changed with the introduction of new regulations, issued in 2016, establishing a new legal environment pursuant to which ONGOs will be subject to going forward. These regulations come into effect on 1 January 2017.

Regulations Issued

The ONGO Laws comprise the following:

- *Laws on Administration of Activities of ONGOs in China*, issued on 28 April 2016 (Administrative Law);
- *Implemental Guidelines for Registration of Representative Offices of ONGOs and Filing of*

Temporary Activities of ONGOs, issued on 28 November 2016 (Guidelines);

- *List of the Fields which ONGO Activities and Projects fall in and the Names of Authorities Supervising ONGOs in respective Fields* (List of Fields and PSAs), both at the state level issued on 20 December 2016, and at the provincial level.

What Organisations are Covered?

ONGOs are defined as the non-profitable and non-government social organisations legally established offshore, including foundations, groups, think tanks and similar organisations, engaging in the public interest activities in various areas, including those with objectives focused on education, technology, hygiene, sports, environmental protection, disaster relief, assisting poor households or regions and similar ‘public good’ type causes.

“Dual Layer” of Supervisory Authorities

The ONGO Laws set out a “dual layer” of supervision over ONGOs’ activities.

The Ministry of Public Security and its branches at provincial level will act as the main registration and administrative authority, responsible to handle the registration, annual reporting and daily supervision of an ONGOs’ China presence and related activities.

In addition, other relevant government authorities (“Professional Supervisory Authority” or “PSA”) governing particular fields in which the ONGOs operate will also act as the administrative authority. Before the ONGOs can attend to the registration or annual reporting formalities involving the Ministry of Public Security, they will need to first seek approvals from the relevant PSAs. The PSAs will also provide guidance to the ONGOs in respect of their activities in mainland China.

Representative Office

An ONGO is now required to set up a Representative Office to conduct its activities. Among other things, a qualified ONGO will need to demonstrate a minimum two-year track record in respect of its main offshore activities.

A Representative Office may operate in multiple provinces and each ONGO can set up more than one Representative Office although each office's geographic region of operation should not overlap.

Before applying for the registration of a Representative Office with the Ministry of Public Security an ONGO will need to first obtain approval from the PSA. Although the Ministry of Public Security has issued Guidelines setting out detailed registration procedures and application documents, required for registration, no detailed guidelines have been given in respect of applications with each PSA.

Compliance

ONGOs that have been found to have failed to comply with legal requirements may face action by the Ministry of Public Security, which has the power to investigate and impose penalties, including the right to question the chief representative, conduct inspections onsite, review and copy relevant materials, seal relevant sites and properties or to revoke the registration licence or even to detain relevant principals.

Annual Report and Inspection

The ONGO Laws require Representative Offices to submit plans to the relevant PSA in respect of each year in advance (including information regarding project implementation, the use of funds and similar matters) for approval and also to the Ministry of Public Security for filing.

The Representative Office also needs to submit a report to PSA and the Ministry of Public Security by end of January each year in respect of the work done during the prior year (including information regarding financial reports, activities conducted, changes in personnel) for the purpose of annual inspection.

Temporary Activities

ONGOs are now permitted to conduct activities on a temporary basis for periods not generally exceeding one year without registering a Representative Office.

Such arrangements, however, must be carried on jointly in cooperation with a Chinese entity (Chinese Partner), and will require the Chinese Partner to file details of such activities with the Ministry of Public Security and submit a report to the Ministry of Public Security following the period of activity.

The ONGO Laws contain a vague provision suggesting that such temporary activities are subject to approval formalities as required under "*relevant regulations*". It is unclear whether any PSA approval will be applied same as the case for the registration of Representative Office.

Prohibited Activities

ONGOs' activities may not be to the detriment of the PRC, or damage State interests, public interests or the legal rights of the Chinese citizens, legal persons and other organisations. Although the scope of these general prohibitions are open to interpretation, the law clearly prohibits the ONGOs from

- engaging in or funding, any profitable activities, political or religious activities;
- raising funds; or
- extending membership (unless otherwise permitted by law).

The List of Fields and PSAs also indicates that any activity outside of the fields or projects set out in such list is not open. Thus in the same way as commercial organisations need to ensure that they do not conduct business beyond the scope of their business licence, ONGOs need to be equally careful.

Established Entities

The Ministry of Public Security have started to consult with the Ministry of Civil Affairs and the State Administration of Industry and Commerce as to what arrangements are required to move the existing agencies of ONGOs registered with other authorities over to the new Ministry of Public Security registration system.

Although the new ONGO laws are significant and establish a new legal framework for ONGOs, much remains to be confirmed. It is unclear as to the way in which the PSA and Ministry of Public Security will work together. Guidelines are required as to the process and application papers that will be required in respect of application to PSAs. In respect of entities that have been established, there is doubt as to whether a simple handover process can be

established involving the Ministry of Public Security, the Ministry of Civil Affairs and the State Administration of Industry and Commerce, or whether other procedures or papers will be required. There are further concerns from some charities which have set up wholly foreign-owned enterprises in China running certain revenue generating business (for example, some may organise professional conferences in China and may charge fees not for profit but for recovering expenses). It is unclear as to whether such wholly foreign-owned enterprises will be deemed as engaging in profitable activities and be requested to cease such activities. Thus although ONGOs need to be ready for change, we are not yet at the end of the reform process – but perhaps only at the end of the beginning.

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