

# Bribing foreign public officials – a new offence in China

## Eighth amendment to the Criminal Law

The Standing Committee of the National People's Congress promulgated the Eighth Amendment to the Criminal Law of the People's Republic of China on 25 February 2011, which will take effect on 1 May 2011 (**Amendment**). Among others, this Amendment adds a second paragraph into Article 164 of the PRC Criminal Law creating a new offence of bribery of foreign public officials or officials of international public organizations.

### Text of the amendment

Article 29 of the Amendment adds a second paragraph to Article 164 of the PRC Criminal Law which reads as follows:

*"Providing property to any foreign public official or official of an international public organization for the purpose of seeking improper commercial benefit shall be subject to the penalty provided by the preceding paragraph." (Amended Provision)*

### Definition of foreign public officials

The term "foreign public official" is not defined under the PRC Criminal Law. In a recent interview on the Amendment, the officials in the Congress responsible for the drafting of this Amendment confirmed that it was adopted to implement the United Nations Convention Against Corruption ratified by China in 2005. According to this Convention, "foreign public official" refers to any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected, and any person performing a public function, including for a public agency or public enterprise or providing a public service under the law of a foreign country.

Similarly, the term "official of an international public organization" is not defined by the Amendment. Under Article 2 of the United Nations Convention Against Corruption, this term refers to any international civil servant or any person who is authorized by such an organization to act on behalf of that organization.

### Improper commercial benefits

The Amended Provision does not define what an "improper commercial benefit" is but one may refer to the opinions provided by the Supreme People's Court and the Supreme People's Procuratorate on the provisions relating to the commercial bribery for guidance. However, it is noteworthy that the pre-existing Article 164 prohibits bribery of non-State officials in order to seek "improper benefits" while the Amended Provision is limited to bribery seeking "improper commercial benefits." The specific reasons for this difference is unclear.

## Key Issues

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Another point worth attention is that the extortion exception applicable to the crime of bribing State officials under Article 389 is not mentioned in the Amended Provision. Under Article 389, if any property is provided to a State official under extortion and no improper benefit is provided in return, it does not constitute a bribery crime. It is unclear at this stage whether this exception will be added to the Amended Provision in the future.

### Property

Again, the Amended Provision does not define the notion of property. However, this notion, which is also used in the definition of commercial bribery and bribery of domestic public officials, should most probably be understood to include any cash, physical assets or financial benefits that can be calculated in monetary terms, such as house renovation, membership cards or gift cards in which a cash amount is deposited or expenses of tours, etc.

### Extraterritorial jurisdiction

The PRC Criminal Law applies to any crime (i) committed within the Chinese territory (a crime is deemed to have been committed within Chinese territory when either its act or result – e.g., receiving an improper commercial benefit – takes place in China) or (ii) committed anywhere by a Chinese citizen or entity. In the latter case, however, if the value of the bribe is "relatively large" but not "significant", and therefore subject to penalties less than three years of imprisonment, the bribery may be exempted from prosecution.

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