

China Enacted the Export Control Law

The Ministry of Commerce of the People's Republic of China started the multiyear process of enacting a new comprehensive Export Control Law by releasing an initial draft for comment in 2017. Subsequently, following input from stakeholders and the public, two further drafts were released in December 2019 and June 2020, respectively. Ultimately, the Standing Committee of the National People's Congress approved the new Export Control Law in final form on October 17, 2020, and it became effective on December 1, 2020.

For decades China operated without a comprehensive export control law, relying instead on various administrative regulations to regulate export activities involving sensitive items, including nuclear items, biological items, chemicals, missiles, and military products. Chinese government policymakers determined that the lack of a comprehensive export control law made it difficult to protect China's national security and interests, especially against the backdrop of U.S. sanctions imposed in recent years on major Chinese technology companies, such as Huawei, Tencent, and ByteDance. As a strategy to address the concerns of protecting its "national security and interests," China promulgated its comprehensive Export Control Law with various export control mechanisms, including a process for imposing reciprocal measures against instances that China views as an abuse of export control measures by foreign governments.

Highlights of the new Export Control Law include the following:

Expansive Scope of the Export Control Law

The Export Control Law regulates the export of dual-use items, military products, nuclear items and other goods, technologies, and services related to national security and interests as well as performance of non-proliferation obligations.[1] Furthermore, according to the Export Control Law, the foregoing items shall also include relevant data, such as technical materials.[2] It is noteworthy that the Export Control Law expands the scope of controlled items in the previous drafts to include not only items related to national security but also items related to China's "national interest." Moreover, the term "national security and interests" is consistently used throughout the Export Control Law. The addition of "national interests" along with "national security" may provide more leeway to the Chinese government to adopt export control measures that are not strictly related to national defense and security.

The Export Control Law also grants the government jurisdiction over organizations or individuals outside the territory of the People's Republic of China (PRC) for activities that endanger the national security and interests of PRC or obstruct the performance of non-proliferation or other international obligations. However, the types of activities that will fall under this extraterritorial jurisdiction, as well as the applicable penalties, are not made clear in the law and will need to be further clarified in subsequent supporting regulations.

Export Control System Under the New Law

The export control system under the Export Control Law includes implementation of relevant export control lists and a licensing system. More specifically, Article 9 of the Export Control Law grants the export control

authority power to make or revise the export control lists for controlled items in accordance with the Export Control Law, other relevant laws and regulations, and export control policies. On this aspect, current export control lists include the Catalogue of Import and Export Licenses for Dual-Use Items and Technologies and the Export Control List for Military Products.[3] It is unclear whether the authorities will integrate the current export control lists as-is or promulgate new lists.

For items not covered by the export control lists, the export control authority may initiate a temporary control for a period of not exceeding two years upon the approval of the State Council and/or the Central Military Commission. The temporary control may be cancelled, prolonged, or the items under the temporary control may be listed on an export control list depending on the assessment made prior to the expiry of such temporary control.

In addition, licenses must be obtained for exporting any item on the export control lists as well as the items under a temporary control. Also, licenses must be obtained for other items if the exporter knows, should know, or receives notice from the government, that the export may endanger national security, could be used for design, development, manufacture, or use of weapons of mass destruction and their means of delivery, or could be used for terrorism purposes. It is expected that this requirement imposes obligations on the exporters to independently make the determination, although they may consult with the export control authority when necessary.

Obligations Regarding End User and End Use

Exporters are required to submit certificates of end users and end use issued by the end users or by the government authority of the country where such end users are located. In addition, the end users are obligated to make a commitment that they will not change the end use of the product or transfer the product to any third party without permission from the export control authority. Also, the exporter is required to report to the relevant government authority immediately once it discovers that the end user or end use could change. Notwithstanding the foregoing, to reinforce the management of the end user and end use, the export control authority may conduct an assessment and verification of the end users and end use related to the controlled items.

Importer/End User Control List

The Export Control Law authorizes the export control authority to establish a control list for importers and the end users that (1) violate the end user and end use requirements; (2) might endanger national security and interests; or (3) use the controlled items for terrorism. Specifically, corresponding measures include but are not limited to the prohibition, restriction or suspension of transactions involving the controlled items by the importer or end user on the list. Further, the exporters are not permitted to engage in transactions with the importers or end users on the list unless they apply to the export control authority showing that the transactions with such importers or end users are necessary due to special circumstances. The importers or end users on the control list may apply for removal from the list when they have ceased engaging in the above-mentioned activities. Unfortunately, the relationship between the importer/end user control list under the new Export Control Law and the "unreliable entity list" under the recently issued separate Provisions on the Unreliable Entity List remains unclear.[4] However, it is noteworthy that "national security and interests" is explicitly a factor to be taken into consideration in determining the companies to be listed on these two lists.

Retaliation for "Abuse" of Export Control Measures

The new law provides that reciprocal measures can be taken in response to the "abuse" of export control measures by other countries that endangers the national security and interests of the PRC. This provision arose out of the increase in tensions involving trade controls between China and some of its major trading partners. The United States and other governments—such as those in Japan, Taiwan, and Europe—have tightened China's access to sensitive technology through strengthened export control authorities and licensing practices over the past two years. There has also been a marked increase in the number of countries that have sought to ban or impose conditions on the participation of China's telecommunications firm Huawei in their 5G networks, particularly in Europe. The scope, standards, and exercise by China of this new retaliation provision remain unclear and have the potential to create further tensions and complications between China and its major trading partners.

Other Requirements

The Export Control Law allows for the establishment of an internal compliance mechanism by exporters which can potentially provide convenience for the exporters in streamlining their export of controlled items. The export control authority is responsible for setting forth the specific measures or guidelines as to such internal compliance mechanism. Even though an internal compliance mechanism is not a mandatory requirement under the Export Control Law, it can play an important role in companies' compliance with the Export Control Law and other export control regulations. The government thus strongly recommends that exporters establish such a compliance mechanism based on guidelines that will be released at a later time.

Penalties

The Export Control Law adopts a more stringent penalty system compared with the previous administrative regulations. An exporter found to have violated the Export Control Law will be subject to fines of up to RMB5,000,000 (approximately \$770,000) for each violation. In addition, any penalty imposed on an exporter will be included in China's credit information system, which can affect the company's commercial standing. In addition, the export control authority will deny export licenses for such exporter for a period of five years from the date that the export violation penalty is imposed. Notably, the responsible person in charge and other responsible persons will be prohibited from engaging in export activities within five years, and these can be made lifetime prohibitions if the individuals have also received criminal penalties.

The Export Control Law also prohibits any organizations or individuals from knowingly providing agency, freight, shipping, customs clearance, third-party e-commerce trading platforms, financing, and other services to exporters engaged in illegal export activities. Violation of such provision will result in fines of three to five times the illegal business revenue of more than RMB100,000, or fines of RMB100,000 to RMB500,000 if there is no illegal business revenue or the illegal business revenue is under RMB100,000.

Going forward, Chinese domestic companies and foreign-invested companies in China should take care to formulate implementing measures, control lists, and other supporting procedures to ensure compliance with the new Export Control Law. In that regard, it is advisable that such companies should start to:

- Assess their export control risks related to their products, services, and technologies at each stage of development, purchase, sales, logistics, and after-sales service
- Establish/improve their internal compliance mechanisms with respect to an effective due diligence procedure, a standard internal procedure for the application of required licenses and permits, and an effective end user/end use management system

- Conduct regular internal training of employees on relevant export control requirements

In addition, U.S. companies that import from China or otherwise deal in Chinese-made products should screen the goods, services, and technologies they obtain, as well as their suppliers and business partners in China, to ensure that such products and entities are not subject to restrictions newly imposed under the Export Control Law.

Endnotes

[1] According to Article 2 of the Export Control Law, "dual-use items" refer to items with both civil and military applications, or with the potential to improve the military capacities, especially, the goods, technologies, services, and items that may be used for the design, development, production, or use of weapons of mass destruction and the means for delivery.

[2] This is consistent with the requirement of China's Draft Data Security Law (promulgated on July 3, 2020) that the data considered as controlled items shall be subject to export control requirements.

[3] The Catalogue of Import and Export Licenses for Dual-Use Items and Technologies includes nuclear items, nuclear dual-use items, biological dual-use items, monitored chemicals, relevant chemicals, missiles, precursor chemicals, partial dual-use items, and special civil-use items. The Export Control List for Military Products includes light weapons, launching equipment, explosives, military vehicles, engineering equipment, vessels, aircraft, electronics, training devices, rockets, missiles and satellites, propellant, protective devices against nuclear, biological and chemical weapons, and logistics equipment.

[4] The Ministry of Commerce of the People's Republic of China released the Provisions on the Unreliable Entity List on September 19, 2020, which provides the legal basis for the establishment of an unreliable entity list.

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