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China's New Export Control Law: Ten Highlights

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On October 17, 2020, Chinese President Xi Jinping signed the Presidential Decree No. 58 to promulgate the Export Control Law of the People's Republic of China (the "Export Control Law"), which will be effective from December 1, 2020. This is a law to which the State attaches great importance, as reflected in the fact that it took less than a year for the law to pass through three readings in the National People's Congress and to be officially adopted.

The main purpose of the Export Control Law is to safeguard China's national security and national interests. It makes a series of major adjustments to China's existing export control regime, including expanding the scope of controlled items and controlled activities, establishing a temporary control system and entity control list, strengthening entities' compliance obligations on export control, increasing punishment for violations, and specifying its extraterritorial effect.

Among the questions that exporters will be asking are: What are the changes to the scope of controlled items? What impact will the newly-established "deemed export" and "re-export" systems have on the flow of personnel and technology within multinationals? How does a company establish an internal compliance system to meet the requirements of the Export Control Law? What are the consequences if the law is broken? These questions are answered in the following 10 key points that we interpret from the Export Control Law.

1. Scope of Export Controlled Activities Expanded

The Export Control Law applies to "deemed export" and "re-export" activities. "Deemed export" refers to "the provision of controlled items by citizens, legal persons and other organizations of the People's Republic of China to foreign organizations and individuals" (Article 2, paragraph 2 of the Export Control Law). For what is meant by "controlled items", see **2.** below.

It is worth noting that the concept of "deemed export" under the Export Control Law is broader than that under U.S. law. Under U.S. law, deemed export generally refers to releasing or otherwise transferring technology or source code to a foreign person in the United States. However, under the Export Control Law, deemed export not only applies to technology and software, but to all controlled items. Moreover, the provision of controlled items by Chinese entities to foreign entities outside China falls into the scope of deemed export (similar to the "deemed re-export" under the U.S. laws).

As for re-export, the Export Control Law puts forward this concept but does not provide any definition, which is left to be clarified by implementation regulations of the Export Control Law, as and when they are published.

2. Expanding the Scope of Controlled Items

Article 2 of the Export Control Law provides that the law applies to the export control of dual-use items, military products, nuclear and other goods, technologies and services that relate to the preservation of China's national security and national interests, and the fulfillment of China's international obligations, such as non-proliferation (collectively referred to as "controlled items").

Compared with current legislation, the Export Control Law has made three major adjustments to the scope of controlled items.

Firstly, services are also included in controlled items, as well as goods and technologies. We understand that this classification is consistent with the Foreign Trade Law, which divides foreign trade items into goods, technologies and international services.

Secondly, in addition to the existing three types of controlled items, namely, dual-use items, nuclear and military products, the law makes clear that “other goods, technologies and services related to the maintenance of national security and interests, and the fulfillment of international obligations such as non-proliferation” will also fall under controlled items. Compared with the previous draft of the Export Control Law, “national interests” is added as a reason for control, further expanding the scope of the controlled items.

Thirdly, the law specifies that data such as technical documents/information relating to the controlled items will also be included as controlled items.

3. Encouraging Export Operators to Establish Internal Compliance Processes

The Export Control Law encourages export operators to establish internal compliance policies and procedures. Export operators who have instituted well-operated internal compliance systems may obtain a general license from the competent authority or enjoy other licensing benefits.¹

The Export Control Law clearly links the establishment and implementation of internal compliance systems by export operators with the granting of general licensing and other licensing benefits. We regard this as a significant step of which companies should be aware.

In order to help export operators to establish and improve their internal compliance systems for export control, the Export Control Law indicates that a number of public bodies will be available to provide guidance. These include: (1) The national export control authority, which is required to issue guidelines expeditiously; (2) An advisory mechanism for export control should be set up. If an export operator is unable to determine whether the goods, technologies or services to be exported fall under the scope of the controlled items, and makes an inquiry to the national export control authority, the authority should reply promptly; and (3) Chambers of commerce, associations, and industry self-regulatory organizations should provide export control-related services to their members.

1. This is in keeping with the recent trend in China to require companies to set up robust compliance systems across a wide range of industries. Those companies that have such compliance systems may benefit from “non-prosecution” by local procuratorial authorities. Another example is the Regulations of the Shanghai Municipality on Anti-Unfair Competition (Draft for Comment), which stipulates that business operators shall “establish a sound and effective anti-commercial bribery system and strictly implement it.”

4. Strengthening Control of End-user/End-use

Imposing strict control over end-user/end-use of controlled items is a key aspect in export control. Based on the current export control regime, which requires exporters to provide end-user/end-use certification documents, and end-user commitments, the Export Control Law strengthens the reporting obligations required of exporters/importers and enables the competent authority to assess and review the end-user/end-use.

Article 16, paragraph 2 of the Export Control Law stipulates that where exporters or importers are made aware that the end-user or end-use is likely to be changed, they shall report the change of situation to the competent authority immediately. Exporters and importers should establish a system for end-user/end-use verification and control, and such system should be included as an important part of their internal compliance.

Furthermore, the end-user/end-use verification of the Export Control Law should include on-site inspections (Article 17). Overseas on-site inspections are permitted to verify the authenticity of end-users and end-uses. However, since overseas on-site inspections involve issues of extraterritorial jurisdiction and law enforcement, the right to conduct overseas on-site inspections needs to be specified in bilateral agreements between countries. We understand that, in future, China's designated authorities may cooperate with other countries to conduct on-site inspections.

5. Temporary Control and Export Prohibition

Currently, China's control lists include the "Dual-use Items and Technology Export License Management List", the "Military Products Export Control List", etc.

On top of this, the Export Control Law allows regulators to impose temporary controls on the export of items that are not listed. Article 9 of the Export Control Law stipulates that, where there is a need to safeguard national security and national interests, and to ensure China fulfils its international obligations (such as non-proliferation), the national export control authority, with approval by the State Council or the Central Military Commission, may impose temporary controls over goods, technologies and services that are not included on control lists. The temporary control period is stipulated as up to two years. This provision gives the competent authority the right to adjust which items are controlled to ensure they accord with regulatory requirements.

Furthermore, the competent authority may also prohibit the export of certain items, or prohibit the export of certain items to specific countries and regions, or to specific organizations and individuals.

6. Entity Control List

The Entity Control List is an important new measure adopted by the Export Control Law, which is similar to the U.S. Entity List. Article 18 of the Export Control Law states that a control list shall be set up to include importers and end-users who: (1) violate end-users or end-uses management requirements; (2) engage in activities likely to endanger national security and national interests; or (3) use controlled items for any terrorist purpose. For importers or end-users included in the control list, the competent authority may take necessary measures such as prohibiting or restricting transactions of relevant controlled items, or suspending the export of relevant controlled items.

As set out in the Export Control Law, export operators shall not conduct transactions with listed importers and end-users; under special circumstances, export operators may apply to the national export control authority for certain transactions that are considered to be necessary. According to Article 37 of the Export Control Law, export operators who conduct transactions with listed entities in violation of the law will be liable to pay high-level fines, have their business operation suspended while being “rectified”, that is eliminating those exports that are in violation of the law, or, at the most punitive, have their export approvals for exporting controlled items cancelled.

If a listed importer or end-user successfully takes measures to ensure that it no longer falls foul of the law, it may apply to the national export control authority to be removed from the control list.

The Entity Control List is similar to the Unreliable Entity List (“UEL”) announced by the Ministry of Commerce in September 2020. For example, endangering national security and national interests is one of the situations that an entity will be included on both lists. The consequence of being listed on both lists is that the entity listed will be restricted or prohibited from carrying out designated import and export activities.

There are differences between the two lists: (1) The applicable circumstances are different. The Entity Control List mainly applies to those entities violating the end-user/end-use management requirements, while the UEL on the whole applies to entities that violate the principle of ordinary market transactions or engage in discriminatory measures against Chinese companies (such as cutting off supply); (2) There are more restrictions imposed on entities listed on the UEL. In addition to being restricted and prohibited from certain import or export activities, being listed on the UEL may also mean that the entity is restricted from investing in China, have restrictions put on personnel entering China, and may be subjected to fines; and (3) The consequences of trading with listed entities are different. Under the Export Control Law, the export operator will be subject to serious legal liability if it conducts transactions with listed entities, while it remains unclear, as yet, what liabilities confront those trading with entities on the UEL.

7. Intermediary Agencies' Obligation for Compliance

Article 20 of the Export Control Law stipulates that no organization or individual may provide agency services, freight, delivery, customs declaration, third-party e-commerce transaction platforms, financial services or other services for export operators who engage in export activities in violation of export control regulations. Not only export operators, importers and end-users, but also any agency that engages in third-party intermediary services should also make sure that they comply with the law.

In terms of legal liability, any intermediary agency will be liable when delivering services while being aware that export operators they are serving are engaged in export activities in violation of export control regulations. The punishment can include being fined, as having any illegal income confiscated.

8. Criminal Liability for Violation of the Export Control Law

The Export Control Law has increased the punishment imposed on those who are found violation of the law. Article 43 stipulates that "any entity, in violation of the provisions of this law, *exports prohibited items or exports controlled items without permission* should be subject to criminal liability in accordance with the law" (our italics added).

If found guilty of "exporting prohibited items" and/or "exporting controlled items without permission", those activities would amount to smuggling, which is a crime under Chinese law.²

In addition, "exporting prohibited items" and "exporting controlled items without permission" may also constitute the crime of illegal business operations. It is worth noting that both the crime of smuggling and the crime of illegal business operations can be a corporate crime. If an entity commits a crime, in addition to the fines imposed on the entity, the person in charge, and other people with direct responsibility, may also be held criminally responsible.

9. Extraterritorial Effects

When announcing this year's legislative plan, the Standing Committee of the National People's Congress specifically mentioned that the Export Control Law should be formulated with extraterritorial effect, that is, applies in jurisdictions outside China. The Export Control Law would be one of a number of laws with extraterritorial effect.

Firstly, under Article 44 of the Export Control Law, organizations and individuals outside the People's Republic of China that violate the export control regulations so as to endanger China's national security and national interests, or to hinder the performance of China's international obligations (such as non-proliferation), shall be dealt with in

2. According to the Criminal Law of the People's Republic of China ("the Criminal Law") and applicable judicial interpretations, "exporting prohibited items" and "exporting controlled items without permission" may amount to smuggling, which is a crime. Article 151 of the Criminal Law further stipulates that the smuggling of weapons, ammunition and nuclear materials constitutes a crime. The seventh amendment to the Criminal Law explicitly states that "smuggling of other goods and articles prohibited by the country from import and export" also constitutes the crime of smuggling. The 2014 Judicial Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Handling Criminal Smuggling Cases further points out that whoever imports or exports goods or articles restricted from importing or exporting without permission, if that constitutes a criminal offense, shall be convicted of and punished for the crime of smuggling.

accordance with the law, including being investigated for legal liability. Compared with Article 2 of the *Anti-Monopoly Law*, which also has application in jurisdictions outside of China, the Export Control Law goes further, stipulating that foreign entities should be subject to legal liabilities if they breach the law.

Secondly, the Export Control Law stipulates the need for a verification system for end-user/end-use control, providing a legal basis for conducting overseas on-site inspections.

Thirdly, the Export Control Law includes “re-export” as one of the controlled activities.

10. Authorities Allowed to Take Reciprocal Retaliation Measures

If any country or region abuses export control measures so as to endanger the national security and interests of the People’s Republic of China, the People’s Republic of China may take reciprocal measures against the country or region (Article 48).

This provision is intended to address past occurrences where China believes that certain countries have used export control measures to obstruct normal economic and trade cooperation, to interfere in China’s internal affairs, and to seriously endanger China’s national security and national development interests. The retaliation provision provided in the Export Control Law demonstrates that the Chinese government has taken up a stronger position since the draft of the Export Control Law was first released in June 2017 for public comment. In the very first version, there was provision for China to take “relevant measures” against countries (or regions) that imposed discriminatory export control measures on China. This provision was dropped from the first and second draft of the Export Control Law. However, in the officially promulgated Export Control Law, the concept of taking “relevant measures” is reinstated but is strengthened to allow for China to take “reciprocal measures”.

Conclusion

The terms “national security and interests” appear no fewer than 10 times in the Export Control Law, highlighting the law’s underlying purpose to maintain national security and protect China’s national interests. The Ministry of Commerce and the Ministry of Science and Technology announced the publication of the revised *China’s Prohibited and Restricted Export Technologies Catalogue* on August 28, and the *Regulations on Unreliable Entities List* on September 19.

The promulgation of the Export Control Law is a further plank in the Chinese government’s strategy to safeguard the country’s national security and protect its interests through legal mechanisms. We can expect the authorities charged with formulating the regulations to implement the law to move quickly to put the regulations in place, to revise the control list, and to become more active in enforcement of export controls.

For exporting Chinese and foreign companies, the principal takeaway is that they need by law to establish internal export control compliance policies, procedures and systems.

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