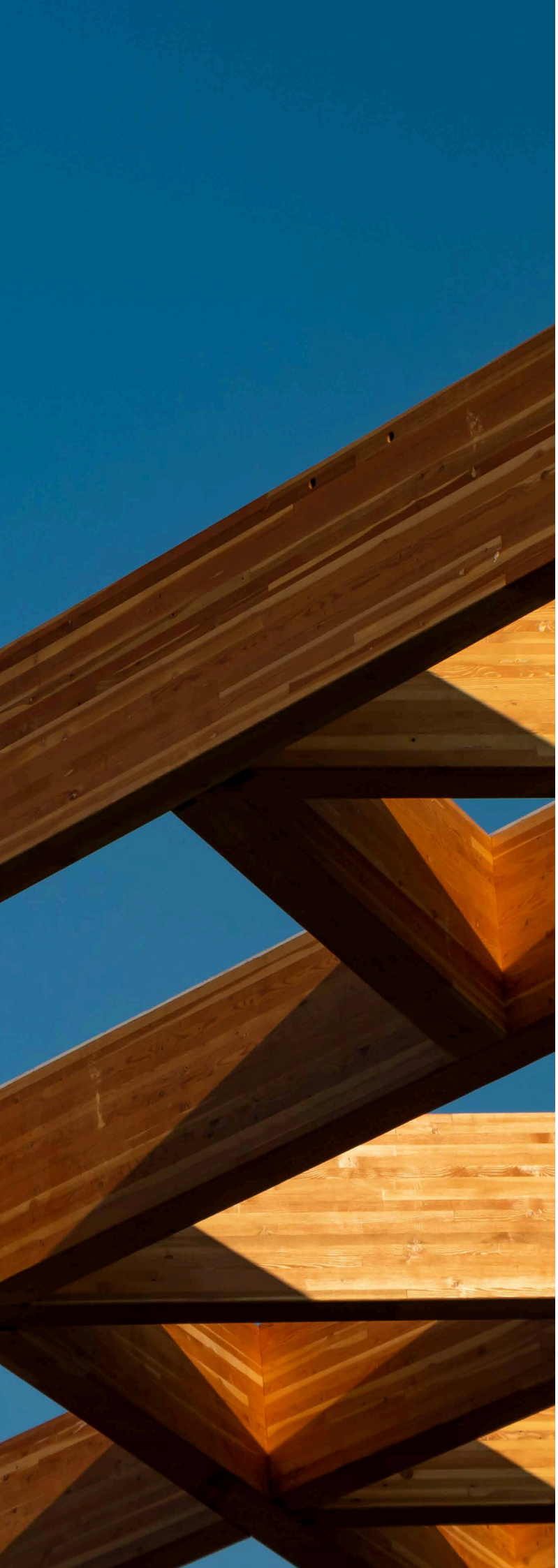

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Key issues for Multinational Companies in light of the Anti-Foreign Sanctions Law of China

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On 10 June, 2021, the Anti-Foreign Sanctions Law of the People's Republic of China ("**Anti-Foreign Sanctions Law**") was passed by the Standing Committee of the National People's Congress and officially promulgated for implementation. Compared with the Regulations on the Unreliable Entity List ("**Unreliable List**") and the Measures for Blocking Improper Extraterritorial Application of Foreign Laws and Measures ("**Blocking Measures**") issued by the Ministry of Commerce ("**MOFCOM**"), the Anti-Foreign Sanctions Law is a law passed by the National People's Congress, i.e., of a higher level. This provides a higher and clearer legal authorization and basis for China to impose sanctions, while also providing a means for Chinese enterprises to deal with foreign sanctions and "improper" extraterritorial application of foreign laws. The Anti-Foreign Sanctions Law is, therefore, of importance both for multinationals and for Chinese companies that may be affected.

This article will discuss the main mechanism established by the Anti-Foreign Sanctions Law, its possible impact on Chinese and foreign companies and raises some problems for companies that they will have to deal with.

I. Situations targeted by the anti-sanction measures

Article 3.2 of the Anti-Foreign Sanctions Law provides that China's anti-sanction measures are aimed at the act where "a foreign country violates international law and basic norms of international relations, contains or suppresses China on various pretexts or, in accordance with its own laws, adopts discriminatory restrictive measures against any Chinese citizen or organization, and interferes China's internal affairs". It is not sufficient for the Anti-Foreign Sanctions Law to apply when there is just one of the elements described above; for the law to apply; all of the elements must be evaluated in a comprehensive manner. When interpreted together with the wording used in Article 3.1, we believe that the Anti-Foreign Sanctions Law essentially focuses on "interfering China's internal affairs" and the discriminatory restrictive measures that are considered to fall within this definition are the most likely target of the Anti-Foreign Sanctions Law.

Further, an analysis of speeches delivered by relevant government departments and of China's previous sanction practices, the sanctions imposed by some countries on China's state organs, state staff and Chinese enterprises on the grounds of issues relating to Xinjiang and Hong Kong are the most typical cases of "interfering China's internal affairs", and would, we believe, be the key target of the Anti-Foreign Sanctions Law.

However, the Anti-Foreign Sanctions Law may have a wider application. Article 15 provides that "where foreign countries, organizations or individuals conduct, assist in or support acts that endanger China's sovereignty, security or development interests, and necessary anti-sanction measures need to be taken, the relevant provisions of this Law shall apply *mutatis mutandis*". This provision does not specifically mention the element of "interfering China's internal affairs", so allows for wider interpretation, possibly to include situations where countries impose restrictions on the development of China's high-tech industry through sanctions and export controls.

II. How to understand the "anti-sanction list"

Under Article 4 of the Anti-Foreign Sanctions Law, the relevant departments under the State Council may decide to include individuals and organizations directly or indirectly involved in the development, decision-making and implementation of the discriminatory restrictive measures (as set out in Article 3) on the "anti-sanction list". Article 9 provides that the determination, suspension, modification or cancellation of the anti-sanction list shall be announced in the form of an order by the Ministry of Foreign Affairs ("**MFA**") or other relevant departments under the State Council.

Since July 2020, the MFA has announced a series of anti-sanction measures to impose sanctions on foreign entities and individuals who are viewed as having behaved in ways that are deemed to be unacceptable on issues involving Hong Kong, Taiwan and Xinjiang. The Anti-Foreign Sanctions Law formally establishes the "anti-sanction list", indicating that China's anti-sanction measures will, in future, be standardized and applied more systematically.

In addition, under Article 5 of the Anti-Foreign Sanctions Law, the relevant departments may decide to implement anti-sanction measures on individuals or organizations who or which are specifically related to the subjects on the anti-sanction list, including (1) spouses and immediate family members of individuals listed on the anti-sanction list; (2) senior officers or actual controllers of organizations listed on the anti-sanction list; (3) organizations in which individuals listed on the anti-sanction list are senior officers; (4) organizations that are actually controlled by or established and operated with the participation of individuals and organizations listed on the anti-sanction list. We should point out that the above-mentioned individuals or organizations are not automatically subject to sanctions; whether or not to impose anti-sanction measures on them would need to be formally decided and announced by the relevant departments under the State Council. This is different from the "50%" rule in the SDN system under the laws of the United States, i.e., the property and interests in property of entities directly or indirectly owned 50 percent or more in the aggregate by one or more blocked persons are considered blocked.

III. The anti-sanction measures

Article 6 of the Anti-Foreign Sanctions Law lists three types of anti-sanction measures: first, no visa, no entry, cancellation of visa or expulsion (mainly implemented by the MFA or the Ministry of Public Security (Exit-Entry Administration)); second, seizure, attachment and freezing of movable property, real estate and other types of property in China; third, forbidding or restricting organizations or individuals in China from conducting transactions and otherwise engaging in any cooperation with them.

In addition, the Anti-Foreign Sanctions Law also stipulates the "Miscellaneous Provisions", i.e., "other necessary measures", to grant the administrative organs the necessary discretion.

By way of further explanation, "seizure, attachment and freezing" are "administrative coercive measures", and, according to the relevant provisions of the Administrative Coercion Law, the administrative organ shall deliver a written decision on seizure or attachment or a notice of freezing to the relevant persons when implementing these administrative coercive

measures. What remains to be further clarified in practice is whether the domestic subject is obliged to proactively implement the seizure, attachment and freezing or whether they should only do this after receiving a notice from the relevant departments.

As for the measures of "forbidding or restricting organizations or individuals in China to conduct relevant transactions and cooperation with them", once the State implements such anti-sanction measures against specific organizations or individuals, domestic subjects are required to stop immediately all such commercial or non-commercial transactions and cooperation.

IV. Practical difficulties for companies to identify objects of anti-sanction measures

As mentioned above, in addition to the subjects on the anti-sanction list, the relevant departments under the State Council *may* impose sanctions on individuals or organizations that are related to the subjects on the anti-sanction list. The Anti-Foreign Sanctions Law goes further than the sanctions measures announced by the MFA last year by both refining the scope of "related individuals or organizations", which makes it easier for domestic subjects to comply.

While the scope of the Anti-Foreign Sanctions Law makes things clearer, it also poses practical difficulties for companies - especially multinational companies - whose operations may be impacted by the Anti-Foreign Sanctions Law. For companies in their normal business dealings it may be difficult to exhaustively identify whether their customers, distributors, suppliers or intermediaries are related to the subjects on the anti-sanction list - even where they have conducted necessary due diligence on such entities.

Even financial institutions, which have higher due diligence obligations than other businesses in terms of knowing their clients under the current anti-money laundering due diligence framework, may not easily be able to identify the individuals and organizations related to subjects on the anti-sanction list. For example, the current anti-money laundering laws and regulations provide that financial institutions must identify the parents, spouses, children and other close relatives of "important foreign political persons and senior officers of international organizations" when carrying out due diligence, but are not required to identify the spouses and immediate family members of other individuals. Therefore, if the client of a financial institution is not an important foreign political person, the financial institution would not be required to know the client's spouse and immediate family members, and would not, therefore, be able to confirm whether the client is also subject to the restrictions under the anti-sanction list.

Or, to take another example, the identification of a "natural person" client by a financial institution usually only includes the name, gender, position and other information of the natural person, without identifying which, if any, organizations the natural person serves as the actual controller.

Given these limitations, our view is that companies should fulfill their obligations to identify individuals, as described above in a prudent and reasonable manner, as follows: for any subject on the anti-sanction list, the enterprise has the obligation to stop trading or communicating with it; for the related parties of the subject on the anti-sanction list, it depends on whether the enterprise knows or should reasonably have known that there is an association. If the enterprise fails to find any association after reasonable due diligence procedures, our view is that they may not be held to account for failing in their obligations under the Anti-Foreign Sanctions Law.

V. Subject of obligation of the Anti-Foreign Sanctions Law

Under Article 11, organizations (including foreign-invested enterprises) and individuals (including foreigners in China) in China are required to implement the anti-sanction measures announced by the various departments under the State Council. Organizations and individuals that are held to violate the provisions of the preceding paragraph shall be restricted or prohibited from engaging in such activities. Unlike the Unreliable List and the Blocking Measures, the Anti-Foreign Sanctions Law does not have any exemptions, which is a strong indicator of how strict the Anti-Foreign Sanctions Law is.

Article 12 provides that no organization or individual may implement or assist in the implementation of discriminatory restrictive measures taken by foreign countries against Chinese citizens and organizations, and, furthermore, grants Chinese subjects who may be affected to their detriment, the right to judicial remedy. This Article is extensive and needs to be fully considered by both Chinese and foreign enterprises:

1. Comparing the language in Article 11 and Article 12, we understand that "any organization and individual" in Article 12 will include Chinese subjects and foreign subjects.

2. There are differences between the "right to judicial remedy" provided for in this Article and that outlined in the Blocking Measures. Under the Blocking Measures, it is a precondition that MOFCOM's injunction must have been granted before the Chinese subject can apply for judicial remedy, while in the case of the Anti-Foreign Sanctions Law, there is no requirement for such a precondition. In other words, there is a lower threshold for the Chinese subject to start the process of judicial remedy.

3. The Anti-Foreign Sanctions Law does not clearly define the scope of "discriminatory restrictive measures". From a broad perspective, it seems that the term can include all sanctions and export control measures against China. However, we believe that the "discriminatory restrictive measures" referred to in this Article should meet the conditions of "interfering China's internal affairs" (as set out in Article 3) or "endangering China's sovereignty, security and development interests" (as set out in Article 15).

4. In reality, we have noticed that some domestic and foreign subjects have responded without justification against Chinese subjects that have been sanctioned on the US SDN List or listed for export controls on the US Entity list. An example of such discriminatory behavior has happened in the case of sanctions, where all transactions with Chinese subjects on the SDN list have been stopped, even where there is no US connection; and, in the case of export controls, all cooperation with Chinese organizations on the Entity list has stopped without further analysis of whether the related items are subject to US export controls. Such behavior is discriminatory and it is this behavior that, we believe, is the principal target of Article 12.

The Anti-Foreign Sanctions Law is bound to have a profound impact on the corporate compliance governance of multinational companies. While there are issues subject to further clarification by subsequent legislation and law enforcement, the law demonstrates China's determination to fight against foreign interference into its internal affairs through the means of sanctions and other discriminatory restrictive measures, to which Chinese and foreign enterprises should pay full attention. Fangda has abundant experience in this area and is willing to provide professional support to you in case you have any question.

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