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China's New Export Control Law: A Fact Sheet With Practical Applications

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On October 17, 2020, the Export Control Law of the People's Republic of China ("EC Law") was finally promulgated after three rounds of deliberation by the 13th National People's Congress. The new EC Law will take effect on December 1, 2020. The new EC Law unifies China's regulatory system of export control in order to safeguard its national security and interests, fulfill international obligations such as non-proliferation, and strengthen and standardize export control requirements.

The emergence of China's EC Law is significant because it represents the first effort of its kind to launch a unified and comprehensive export control regime. Unlike the United States, China's approach to trade controls has historically involved merely scattered provisions on import and export controls across various laws and administrative rules. The new EC Law is a strategic pivot for the country as it matures in its view of its own national security and its place in the world as a competitive producer of sensitive goods. The EC Law is also a stark paradigm shift for those in the United States and elsewhere who have built production and other interest in the PRC on the expectation of relative freedom for the export and use of those items.

This article examines the fundamental elements of the new EC Law so that those readers with operations in China, or whose supply chains depend upon production in China, may better understand this change and its resulting compliance obligations. We provide a basic fact sheet on key aspects of the law including: (1) the scope of controlled items; (2) those parties subject to the law; (3) those activities subject to the law; (4) the controlling authorities; (5) their controlling measures; (6) the "black list" targeting importers and end-users; (7) reciprocal measures against other nation-states; (8) the administrative consequences of violation; (9) the criminal consequences of violation; and (10) the extra-territorial effect. We also explore key take-aways and compliance obligations for consideration while considering the practical impact on supply chains.

1. Controlled Items. The EC Law applies to export of the following items (Article 2):

- Dual-use items: items that have both civil and military uses or contribute to the enhancement of military potential, especially those goods, technology and services that can be used to design, develop, produce or use weapons of mass destruction and vehicles of their transportation;
- Military products: equipment, special production facilities and other related goods, technologies and services used for military purposes;
- Nuclear: nuclear materials, nuclear equipment, non-nuclear materials used in reactors, and related technologies and services;

- Other goods, technologies, services and items related to safeguarding national security and interests, fulfilling international obligations such as non-proliferation; and
- Technical materials and data related to the above mentioned items.

2. Controlled Parties. The following parties are subject to the regulation of the EC Law (Articles 15, 16, 18 and 20):

- Export operators;
- Intermediary service providers for export transactions, including agency, freight forwarding, delivery, customs declaration, third-party e-commerce transaction platform and financial service providers; and
- Importers and end users of controlled items.

3. Controlled Activities. The EC Law not only regulates direct export activities, but also control deemed export, re-export and special export activities (Articles 2, 12 and 45), including:

- Transferring of controlled items from the territory of China to overseas;
- Citizens, legal entities and unincorporated entities of China (should covering wholly or jointly owned China subsidiaries invested by foreign entities) providing controlled items to foreign entities and individuals (the EC Law is silent on whether such activities need to be performed within or outside of the territory of China);
- The transit, transshipment, transportation or re-export of controlled items; and
- The export of controlled items, from bonded areas, export processing zones and other special customs supervision areas, and export supervision warehouses, bonded logistics centers and other bonded supervision places, to overseas.

4. Controlling Authorities. The State Export Control Administrations include (Article 5):

- The departments undertaking export control functions of the State Council and the Central Military Commission; and
- The relevant departments of the people's governments of provinces, autonomous regions and municipalities directly under the Central Government which are responsible for export control related work in accordance with laws and administrative regulations.

5. Controlling Measures. The EL Law implements a variety of controlling measures to govern the export of restricted items:

- Control List: a unified export control system with a formulated control lists, directories or catalogs of controlled export items; an export license is required to export items in the Control List (Article 4);

- Temporary Control: imposed on goods, technologies and services not in the Control List; shall be announced before implementation; the implementation period shall not exceed two years, but could be cancelled or extended before expiration upon assessment; temporarily controlled items could also be adjusted upon assessment (Article 9);
- Ban on export: the Controlling Authorities may prohibit certain controlled items to be exported or prohibit export to specific destination countries and regions, specific entities and individual (Article 12); and
- Comprehensive control of existing risks: if export operators know or should know, or has been notified by Controlling Authorities, that the relevant export items not listed on the Control List or subject to Temporary Control have the risks of (i) endangering national security and interests, (ii) being used in the design, development, production or use of weapons of mass destruction and vehicles of their transportation, and (iii) being used for terrorist purposes ("Risk Situations"), they should apply for permission from Controlling Authorities or consult with Controlling Authorities for any uncertainty (Article 12).

6. Black List. The EC Law imposes additional specific controls over importers and end users (Article 18):

- Establishment of a Black List of importers and end users who have one of the Risk Situations;
- Importers and end users in the Black List may be prohibited, restricted or suspended in transactions of related controlled items; and
- If the Risk Situations no longer exist, listed importers and end users may apply with Controlling Authorities for remove from the Black List.

7. Reciprocal Measures. The new EC Law creates reciprocal measures that the country may impose against any other nation or region that abuses its own export control measures to endanger the national security and interests of China (Article 48). Those measures will be determined based on the actual conditions at the time.

8. Administrative Consequences of Violation. The EC Law sets severe administrative penalties for export control violations of export operators and third-party intermediary service providers for export transactions, including (Articles 33 to 41):

- Fines up to twenty times the amount involved in the illegal transaction or five million China Yuan;
- Confiscation of illegal income;
- Revocation of export permit;
- Refusal to accept export permit application within five years;
- Prohibition of the executives and other directly responsible personnel of violating entities from engaging in relevant export business activities within five years or even lifetime; and/or
- Entering export control violations into credit records.

9. Criminal Consequences of Violation. The EC law also expressly states that the following two types of violation may lead to criminal liabilities (Article 43):

- Exporting prohibited controlled items; and
- Exporting controlled items without an export permit.

10. Extra-Territorial Effect. The EC Law also creates an extra-territorial effect by expressly stating that any entities and individuals from outside of China who are violating this law will be held accountable according to the law (Article 44).

Compliance Strategies. Implementing regulations and guiding rules may issue soon. Time will be well spent in the interim by assessing the need for export controls compliance programs for China-based goods and for items sourced from the country. This assessment may include strategic considerations of global supply chain management including, as necessary, those production and procurement activities that may be impacted.

For now, it can be expected that a China-specific export control compliance program in response to the new EC Law will likely align with the principles set forth in the law itself (Article 14):

- Self-inspection on import and export items to make sure whether any of such items are fall into the Control List and consultation with the Controlling Authorities and professional advisors whenever there is a doubt;
- Performing due diligence check on qualification of counterparties (e.g., suppliers, customers, end users and intermediary service providers) and transaction risks to avoid dealing with entities or individuals listed on the Black List or otherwise prohibited from relevant transactions (e.g., listed on the Unreliable Entity List by the Ministry of Commerce which may have broader restrictions on listed individuals and entities);
- Revising template contracts as advised by experience legal counsel by adding export control compliance provisions (e.g., representations and warranties regarding end user and end use, and indemnifications by relevant counterparties);
- Paying close attention to the change of laws and regulations related to export control and updating the internal export control compliance system accordingly; and
- Providing routine training on export control related compliance requirements to employees, suppliers and customers.

Practical Observations. At present the EC Law is very vague and lacks the precision required for implementability beyond the basic framework outlined in this fact sheet. Despite the uncertainty, it will be apparent to many readers that the EC Law is similar in function to United States export controls regimes. Each body of law includes the basic elements of: commodity lists, licensing requirements, deemed export and re-export restrictions, denied parties screening, military and non-proliferation protections, and extra-territoriality. Each are also founded in large part on national security impetus, carry the opportunity for broad government discretion in application, and bear the

risk of criminal penalties. Stated simply, the final fully-implemented export controls regime and the compliance programs it necessitates may be conceptually familiar to United States enterprises.

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