



November 27, 2020

## **The Reform of Chinese Export Control Legislation The new regime will enter into force on December 1<sup>st</sup>, 2020**

Willing to implement a more effective export control legislative framework, China engaged over the last few years a deep review of the regime it had initially set in 1990s. Following two drafts, shared with private sector for consultation, the Standing Committee of the National People's Congress enacted on October 17th, 2020 the Export Control Law (the "ECL") which will come into force on December 1st, 2020.

Unlike the EU or the United States, China is not a member of the Wassenaar Arrangement, the Australian Group, or the Missile Technology Control Regime (MTCR). Although it has recently joined the Nuclear Suppliers Group (NSG), **China will now implement a rather autonomous export control**, intended to safeguard national security and interests and perform non-proliferation obligations. Control principles and mechanisms remain however align to those already seen in other regimes, i.e. US and EU.

- **Concerned items and technologies**

The ECL introduces four categories of controlled items (which includes the "data" and "technologies" relating to controlled articles): dual-use items (1), military items (2), nuclear items and other goods (3), technologies and services related to national security (4). Intangible assets such as technology and services are also covered by the law, which also contains a provision allowing the implementation of temporary targeted controls, i.e. controls implemented, in certain circumstances, on certain specific items, not included in the list of controlled goods. These controls, which will be purely discretionary, offer the Chinese government the possibility to enact retaliatory measures against international actors adopting aggressive policies towards China's interests.

- **Obligations to perform under Chinese Export Control Law**

All Chinese based operators willing to export items listed as controlled items should apply for a license to the Chinese authorities. This is a classic provision in export control regimes, although the criteria for an approval of the exportation will be based on several factors, some of them being rather uncommon or vague: national security and interests, international obligations, type of export, sensitivity of the items, destination country or region of the export, end user and end use, credit record of the export operator and "other factors provided in laws and administrative regulations.

With regard to end-destination, the ECL creates a risk management system controlled by the SECAD, which will be responsible for the evaluation and review of the end-users.

The implementation of an internal compliance policy (ICP) will not be compulsory for exporters of sensitive products. However, such an implementation is encouraged for those who wish to benefit from facilitation measures when requesting export licenses. The Chinese authorities implementing the ECL will be obliged under the law to provide guidance for the setting up and implementation of an ICP.

This apparent option left to Chinese based operators to decide whether or not they will implement an ICP will in practice soon become a commercial mandatory requirement, as the ECL contains a hazardous provision according to which a Chinese based entity will not be authorized to provide services to exporters whose international transactions violate export control regulations. The services targeted include, in particular, agency, freight forwarding, delivery, customs clearance, third-party e-commerce platform, financing service, etc. This looks then like a disguised obligation for all operators directly or indirectly involved in activities related to export operations from China, to request KYC (*Know Your Customer*) or KYP (*Know Your Partner*) forms to partners and perform compliance checks prior to the transactions. Without the implementations of such mechanisms, the operator will be at risk of not being able to evidence its good faith and of exposing oneself to unwilled participation into illegal exportations. This article, the content of which resembles the U.S. concept of participation, is certainly one of the most innovative and restrictive provisions of the ECL.

- **The scope of Chinese Export Control Law**

The number of operators whose activities will fall within the scope of the ECL will be important as **the regime is destined to have an extra-territorial reach.**

Businesses located outside China will be subject to China's export control licensing and controls provision in relation to the re-export of Chinese controlled items located outside China.

China also introduces, similarly to the US, the concept of deemed export controls, which provides for licensing controls in relation to the supply of controlled items by Chinese nationals and legal entities to foreign citizens (i.e. individuals that do not have Chinese nationality) and legal entities.

The ECL also grants Chinese authorities the power to establish so-called "black lists" of foreign importers and end users who have violated the end use requirements attached to exported controlled items and technologies, and may endanger China's national security and interests. Carrying out transactions with persons or entities listed on this "black list" is forbidden for any Chinese exporter. An application might be submitted for an exception to the SECAD if the exporter has "a true need" of completing the concerned transaction with a listed operator. The importers and end-users who have been added to the control list may apply for the removal from the said list after taking relevant measures requested by the authorities. The latter may also decide to remove these importers/end-users depending on actual circumstances.

At last, the ECL incorporates an extraterritorial jurisdiction clause which allows the Chinese Government to exercise a power of coercion against persons not established or not present on Chinese territory having violated Chinese export control regulations, or harmed Chinese national security and interests. The ECL introduces a principle of "reciprocity treatment", according to which where any jurisdiction or country uses its own export control policy in an abusive way and as a consequence damages the Chinese national security and interests, the Chinese government may, depending on the actual situation, take the same measures based on the principle of reciprocity.

- **Conclusion**

Through the ECL, China will implement one of the stricter export control regimes currently in place. It is expected that the implementing regulations for the ECL and a revised list of controlled would be disclosed before the 1<sup>st</sup> of December 2020.

Willing to use this regime as an impactful instrument of foreign policy, the authorities will keep discretionary powers on many aspects. Many businesses and groups, which keep production and manufacturing activities in China will be impacted, and a structuration of the export control function within their Chinese based entity or their Chinese based third party supplier will become a necessity.

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**The Customs and International Trade team of DS Avocats is at your disposal to provide you with any further information you may require.**

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