

New Chinese Law Passed to Create the Nation's First Comprehensive Export Control Framework

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Introduction

On October 17, 2020, the National People's Congress Standing Committee adopted the Export Control Law of the People's Republic of China (the "PRCECL") within a year after the first draft law was put before the nation's top legislative body.

The PRCECL streamlines and consolidates the previously fragmented regulations by

- setting out the control and licensing framework,
- creating an export control entity list regime, and
- centralizing further the enforcement powers

to enhance the Chinese government's ability to control and monitor the exports of military, dual-use, and other goods, technology and services in accordance with its national interests.

The PRCECL was put through an accelerated legislative process. The text that formed the basis of the PRCECL was originally prepared by the Ministry of Commerce in 2017. After it was added on the list of top legislative priorities in 2019 amidst heightened international tensions concerning China's trade and export matters, the Ministry of Justice coordinated with over 50 Chinese ministries, departments, regional government bodies, business associations and enterprises before finalizing the first draft law for deliberation of the National People's Congress Standing Committee in December 2019. The second draft was deliberated in June 2020 and the third and final draft was considered in October 2020 before its final adoption on October 17, 2020. The new law will enter into force on December 1, 2020.

Q&As

This section highlights the key features of the new Law. The significant changes made to the June 2020 draft law in the final adopted version are noted below.

Question 1: How are controlled items defined?

The PRCECL is applicable to the export, transit, through shipment, transshipment, and reexport of controlled items, a term broadly defined under Article 2.

"Controlled items" cover not only dual-use, military and nuclear items, but also "other goods, technologies, services and items relating to the maintenance of national security and interests, and performance of anti-proliferation and other international obligations" (collectively, "Controlled Items"). The phrase "maintenance of national security and interests" is not found in the June 2020 draft law.

Additionally, Controlled Items include "[t]echnical information and other data related to the items." This is a notable change from the June 2020 draft law.

Question 2: Who is enforcing the PRCECL?

The departments responsible for export control under the State Council and the Central Military Commission, collectively State export control administrative departments ("SECADs"), are vested with power to enforce the PRCECL, including through inspection of venue, seizure of Controlled Items,

interview and information enquiries, imposition of shipping suspension, order of return of exported Controlled Items, and review of bank account.

Historically, the Industrial Security and Import and Export Control Bureau of the Ministry of Commerce is the principal organ responsible for enforcing import and export regulations promulgated by the executive branch. Other relevant government authorities include, among others, the State Administration of Science, Technology and Industry for National Defense, the General Administration of Customs, and the Ministry of Foreign Affairs.

Question 3: Are exporters deemed to have complied with the export control rules if they follow the procedures with respect to items on the control lists?

Control lists will be published by the government, but exporters may also be exposed to legal risk with respect to unlisted items. While it is apparent that the intended export of Controlled Items would require a license, the export of unlisted items may also require a license in certain circumstances. Under the PRCECL, exporters are expected to exercise judgment as to whether the export of certain unlisted items poses a risk of: (1) endangering national security or national interests, (2) being used in connection with weapons of mass destruction, or (3) being used for terrorist purposes. Under Article 12, if an exporter “knows or should have known” that such a risk is present, the exporter would be required to apply for a license. When in doubt, an expert is expected to consult with the SECADs.

Question 4: Will there be a list-based regime under the PRCECL to punish bad actors? What are the implications of being added to the entity list? Is this list the same as the “unreliable entity list”?

Yes. Under Article 18, both end users and importers of Controlled Items could potentially be placed on the entity list if they:

- breach export control regulations regarding “end users” or “end uses”;
- endanger China’s national security and interests; or
- apply Controlled Items to terrorist activities.

The PRCECL bars exporters from dealing with end users or importers on China’s entity list. With respect to the listed end users and importers, SECADs may impose measures to prohibit or restrict their deals relating to the relevant Controlled Items and suspend the export of such Controlled Items to the listed entities. However, where the end users or importers have taken measures such that the circumstances causing them to be listed no longer prevail, they may apply to the SECADs for removal from the entity list. The provision concerning the removal process is a new addition in the final adopted version.

This mechanism is distinct from the “unreliable entity list” (“**UEL**”) regime, which is a different component in China’s toolkit for advancing national interests through economic measures. The plan to create a UEL framework was first announced by the Chinese government in May 2019. After over a year, on September 19, 2020, China’s Ministry of Commerce issued the Provisions on the Unreliable Entity List, under which foreign entities may be added to the UEL as a result of their economic, trade and other activities that endanger China’s national sovereignty, security or development interests, interrupt normal transactions with or employ discriminatory measures against a Chinese party which breaches the “normal market transaction principles and causes serious damage to the legitimate rights or interests” of the Chinese party. No entity has yet been designated on the UEL.

Given the focus on national security and interest in both the export control regime and UEL framework, there may be companies that end up on both lists.

Question 5: Does the PRCECL have extraterritorial effect?

Yes. Acts committed outside of China are punishable. Article 44 of the PRCECL provides that any organization or individual “*outside the territory*” of China that violates the provisions relating to the administration of export control in this Law, and endangers the national security or interests of China or hinders China’s performance of non-proliferation and other international obligations, shall be subject to legal liability.

Question 6: Does the PRCECL make reference to the export control regime of a foreign country?

Yes. Article 48 of the PRCECL unequivocally provides that China can “*take reciprocal measures*” if any country or region “abuses export control measures” and “endangers the national security and interests of China.” This provision was added when the PRCECL was adopted.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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