

China already implementing new export control law in response to Huawei restrictions



Recent pronouncements by the Chinese government suggest a fast-tracking for the introduction of its new export control law, write Tim Hesselink, Marc Padberg, Eline Mooring and Ton Bendermacher.

China has recently announced that it will establish a mechanism to control exports to the United States, reportedly to forestall and prevent national security risks. This announcement follows the listing of Chinese telecoms company Huawei on the US Department of Commerce Entity List, in response to which China has threatened to punish foreign companies that cut off ties with Huawei by listing them on an 'Unreliable Entities List'. This mechanism, developed by the Chinese National Development and Reform Commission ('NDRC') pursuant to China's National Security Law, makes it possible to control the export of sensitive technology and rare earth metals required to produce items such as smartphones, lasers, satellites and hybrid and electric cars. This export control mechanism seems to clearly link to the draft Chinese Export Control Law ('ECL'), first proposed by the Ministry of Commerce ('MOFCOM') in 2017. The US-led Huawei restrictions may result in a faster implementation of the ECL.

This article recaps and reviews the draft legislation in order to find out what one can expect from China's new ECL in the near future.

Reform of the current regime

China's current export control framework is made up of a patchwork of various laws (such as the Customs Law, Foreign Trade Law, and Criminal Law) and administrative rules and regulations (e.g., the Regulations on the Import and Export Control of Technologies 2011), which were last amended more than a decade ago.

China's legal framework for export control is relatively young, originating in the 1990s. Unlike the EU Member



States and the US, who joined the international export control regimes a long time ago, China is not a member of the Wassenaar Arrangement, the Australia Group, the Missile Technology Control Regime, nor the Nuclear Suppliers Group.

For a good understanding of China's export control regime, it is important to remember that, for trade purposes, Hong Kong, Taiwan and Macau are considered foreign territory. The transfer of goods from mainland China to these areas is thus considered an export. This means that if the exported goods are controlled items – i.e., the items are subject to export control – compliance with the export control legislation is required in addition to, for example, the customs legislation.

Export Control Law

In June 2017, MOFCOM released a draft ECL, which is aimed at upgrading

the country's existing regime consisting of various laws and regulations. The new ECL involves a number of far-reaching changes. MOFCOM will be responsible for the export control regime, under the supervision of the State Council and the Central Military Commission. MOFCOM's subordinate division, the Bureau of Industry, Security and Import and Export Control will be responsible for reviewing and granting export licences, conducting investigations and enforcement. The Chinese customs authorities act as the gatekeeper of the physical export. What remains similar to the current regime is that the export of military items is exclusively allowed for state-authorized trading companies and dual-use items can only be exported by companies in possession of an export control licence.

New is the expansion of the definition of export: not just the

transfer of controlled items to places outside mainland China, but also the exchange of items between Chinese companies and non-Chinese companies within mainland China is captured under the draft ECL. For example, the sale of a dual-use item from a Chinese technology company to an EU company operating in China is subject to export control. With that, the draft law introduces the term ‘deemed transfer’, which appears to be similar to the concept of ‘deemed export’ in the US, being the transfer of controlled technology to a foreign person in the US for which an export control licence is required.

In addition, China is introducing the concept of ‘re-export’, which is again similar to the US regime and is likely to expand the extraterritorial scope of the Chinese export control legislation. According to this concept, a foreign-manufactured item can be subject to Chinese export control if the content of that item is of controlled Chinese origin. Although the draft law does not provide further details on the term ‘re-export’, it is expected that China – like the US – will apply a 10% *de-minimis* rule. In short: the foreign-manufactured product in question is only subject to export control if the content of controlled Chinese origin does not exceed a 10% threshold.

To conclude, while the Chinese customs law treats warehouses and bonded zones as outside of China’s customs territory, the ECL expands the definition of export to include transfers from these areas.

Control lists

The draft ECL introduces four categories of controlled items: dual-use items, military items, nuclear items and other goods, technologies and services that are related to national security. Not only tangible goods, such as materials and equipment, are subject to the export control legislation, but also intangible goods, such as technology and services (e.g., export in the context of research and product development). The current separate lists of controlled items (such as the individual lists for nuclear export control, biological dual-use items, precursor chemicals etc.) will almost certainly be consolidated into one list of military and dual-use items. The export of nuclear items will remain to be arranged separately and will therefore not be included in the

consolidated list. Unfortunately, the draft text contains no further information about the aforementioned consolidation plans. However, the draft

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text does mention that items outside the control lists could also be controlled upon approval of the State Council, the Central Military Commission and their designated authorities, for a maximum of two years. In addition, the draft text contains a so-called ‘catch-all provision’, with which the Chinese authorities have the ability to extend the control to items not included in the control list, on a case-by-case basis for national security reasons.

China’s enforcement policy and export control ‘retaliation’

The draft law provides MOFCOM and the executive authorities with further investigative and enforcement powers. This includes, for example, the authority to enter and check business premises, conduct interviews, seal and seize assets, and freeze bank accounts. In addition, the new law prohibits any violation or circumvention of export controls. In this context, the ECL mentions exporting without a licence, withholding information or providing false information or materials, obtaining a licence by fraud, bribery or through other illegal means and the avoidance of checks related to export control as punishable conducts. Also, the delivery of controlled items to organisations and persons that are subjected to sanctions is prohibited. It is therefore advisable for companies with supply chains in China to set up strict screening procedures. Violations of the ECL can result in high fines for both companies and individuals – up to 10 times the yearly business revenue or a fine up to RMB 500,000, (approximately EUR 64,000) for companies; and RMB 300,000, (approximately EUR 38,000) for personal liability. Moreover, serious reputational damage must also be taken

into account as the draft law introduces a public register which is maintained by the Chinese authorities which lists non-compliant entities. On the basis of this list, the Chinese authorities have the power to prohibit the export of controlled items to such listed entities. Lastly, the draft law provides for the possibility of initiating retaliatory measures against countries which have subjected China to discriminatory export control measures.

Final remarks

It is clear that with the recent announcement to establish a mechanism that could control the export of rare earth metals to the US, China is taking serious action. Rare earth metals are crucial to the tech and defence industries and China accounts for more than 90% of the global production and supply of these materials during the past decade. This puts China in a powerful position. US defence manufacturers and companies that adopt discriminatory measures such as cutting supplies to Chinese entities like Huawei, are likely to be among the first entities that will face restrictions on importing China’s rare earth metals. While there is still no specific information about the implementation timeline for the ECL, the recent developments show that export control is high on China’s priorities list. With the US-led restrictions on telecoms company Huawei, it seems that China is anticipating the implementation of its new ECL. Since more information about the to-be-established mechanism is yet to come, the impact of the consequences have still to be seen in practice. For now, it is important for companies doing business in China to monitor the developments and prepare for possible export control restrictions.

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