



China's New Export Control Law

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On October 17, 2020, the Standing Committee of China's National People's Congress (NPC) passed the Export Control Law of the People's Republic of China (the ECL), which will take effect on December 1, 2020.¹ The ECL establishes China's first comprehensive framework for restricting exports of military and dual-use products and technology for national security and public policy reasons. Through the ECL, exports and transfers of products, technology, and services may be prohibited or subject to licensing requirements based on the product features, end-users, destinations, or end-uses. While many administrative features resemble foreign export control practice, certain provisions—notably the ECL's requirement that exporters seek licenses for export transactions not covered by published control lists that might potentially harm China's national security or national interests, broad authorization to restrict exports to foreign companies deemed to threaten such harms, and an explicit authorization to retaliate against foreign abuses of export control rules—pose new risks and challenges for Chinese exporters and their customers.

Legislative Context

The ECL's promulgation capped an accelerated legislative process amidst escalating tensions with the U.S. and other export markets. Before the ECL's enactment, China's export control rules were littered through the Foreign Trade Law, the Customs Law, the Criminal Law, and a montage of administrative regulations. As Chinese companies were increasingly penalized for violating foreign export controls or designated for export restrictions in recent years, the Chinese government accelerated the development of an integrated export control regime. Starting from a June 2017 draft prepared by the Ministry of Commerce, the NPC moved with a typical speed from initial publication of a draft law in December 2019 to the promulgation of the final law ten months later. Much as the September 2020 Provisions on the Unreliable Entity List established a counterpart to foreign economic sanctions regimes, the ECL upgrades China's counterparts to foreign export control measures.

Modern export control policies necessarily involve complex technical issues, interfaces with multilateral conventions on weapons of mass destruction (WMD), and blunt foreign policy and security policy judgments. Crucial elements of Chinese export controls will likely be fleshed out through the drafting of new implementing measures and conforming revisions of existing regulations. Nevertheless, the final text of the ECL signals likely enforcement priorities and compliance risks.

Decentralized Administration

The ECL largely preserves China's decentralized export control administrative structure. The “departments under the State Council and departments under the Central Military Commission that undertake the functions of export control” are collectively defined as “State Export Control Authorities” and charged with responsibility for export control activities “within their respective jurisdictions.” The ECL calls for the establishment of an “export control coordination mechanism,” and specifically calls for departments under the State Council (though not the Central Military Commission) to collaborate and share information. Other jurisdictions similarly charge different agencies with regulating exports within their core competencies, but this can result in overlapping licensing regimes and control lists based on different nomenclature and

procedures.

Controlled Items

The ECL defines “controlled items” to include dual-use items (with both civilian and military applications), military products, and nuclear materials. In addition, “controlled items” include “ *other goods, technologies, services, etc., that are related to the maintenance of national security and interests and the implementation of international obligations such as non-proliferation.*” The final text of the ECL broadened the coverage of “controlled items” from prior drafts.

- Throughout the ECL, references to “national security” in prior drafts were replaced with references to “national security and interests.” Distinguishing “national security” from “national interests” provides an explicit basis for export control measures designed to advance foreign policy or industrial policy goals unrelated to conventional defense and security risks.
- The final text extends the definition of “controlled items” to encompass “data such as technical documentation relating to the items.” Chinese media reports suggest that this amendment ensures that source code, algorithms, and similar data are clearly subject to export controls.

The ECL itself does not prescribe the format, nomenclature, methodology, or scope through which the various State Export Control Authorities might define the controlled items subject to export controls within their respective jurisdiction. Significantly, some of the most controversial aspects of U.S. export controls involve coverage rules, such as the “*de minimis* rule” and “foreign direct product rule” bringing certain products manufactured outside the U.S. with U.S.-origin components, equipment, or technology within the ambit of U.S. export controls and licensing requirements. It remains to be seen whether any State Export Control Authorities follow suit in defining controlled items.

Covered Transfers and Transactions

The ECL defines “export controls” as restrictions on “ *transfer of controlled items from the territory of the People’s Republic of China to overseas*” and “ *the provision of controlled items by any citizen or incorporated or non-incorporated organization of the People’s Republic of China to any foreign organization or individual.*” The ECL also applies to “ *the transit, transshipment, through transportation, or re-export of controlled items, or the export of controlled items from any bonded areas, export processing zones or other special customs supervision zones or export supervised warehouses, bonded logistics centers or other bonded supervision premises to overseas.*” The ECL’s restrictions and licensing requirements may thus apply to a broad range of conduct and transactions. For example, the reference to “re-exports” may cover subsequent transfers of controlled items to third countries (and, potentially, to transfers within the same foreign country). Given the expansive definition of controlled items to include “technologies” and “data,” disclosures of controlled technology to third persons may also be treated as exports (similar to the U.S. concept of deemed exports).

Product Control Lists and Temporary Controls

The ECL authorizes a general framework for State Export Control Authorities to identify controlled items subject to export controls through published “control lists.” Control lists are to be updated periodically. In addition to general control lists, the ECL authorizes State Export Control Authorities to list items for “temporary controls” for a provisional period of up to two years before determining whether or not to list the items on a control list.

Duties of Exporters to Anticipate Risks from Unlisted Products

Significantly, the ECL obliges exporters to assess independently whether an export might sufficiently implicate national security or national interests so as to require a license, even if the product is not listed on any control list or temporary controls. An exporter must apply for an export license “ *if an exporter knows or ought to know or is notified by the State export control authorities that any relevant goods, technologies or services outside the control lists that are to be exported by it may pose*” a risk of “endangering national security and interests” or use in connection with WMD or terrorist purposes. The ECL further directs the exporter to confer with the State Export Control Authorities if it cannot make this determination. Consequently, exporters bear responsibility for gauging whether a specific export transaction might warrant an export license, even if no published control lists expressly require one. As a practical matter, exporters face a contingent enforcement risk for any unlicensed exports from China later deemed inimical to Chinese national interests.

Licensing System

Exporters must apply for an export license from the relevant State Export Control Authority in order to export any item listed on a control list or subject to temporary controls. License applications are to be assessed based on: national security and interest; international obligations; the type of export; the sensitivity of the concerned controlled item; the country or region to which the export is to be made; the end-user and the end use; the exporter's credit history; and any other factors to be prescribed by law or regulations.

End-user and End-use Certifications

In connection with the application, exporters are required to provide documentation establishing the intended end-use and end-user for the controlled items to be issued by the end-user or the government at the end-user's destination. End-users are required to commit not to change the end-use or transfer the item to any third-party without authorization from the State Export Control Authorities. Exporters and importers are further obliged to report any potential change in the end-use or end-user. The ECL directs the State Export Control Authorities to develop risk management systems for monitoring end-users and end-uses of controlled items.

End-user Control List

In addition to the product-based control lists, the ECL directs State Export Control Authorities to establish control lists of importers and end-users determined to (i) violate end-user or end-use restrictions; (ii) "possibly endanger national security and interests," or (iii) use controlled items for terrorist purposes. State Export Control Authorities are broadly authorized to prohibit, restrict, or suspend trade in controlled items or "adopt other measures as necessary" towards any exporter or end user on a control list. Exporters must apply for authorization to engage in otherwise-prohibited trade with designated entities.

Consequently, companies outside of China that are involved in activities deemed to jeopardize Chinese national interests (not limited to national security) may be vulnerable to export controls cutting off supplies from Chinese exporters. Notably, the final text of the ECL inserted language allowing importers or end users to seek removal from the entity control list, underscoring the potential restoration of export flows upon the termination of offending conduct.

Extraterritoriality

The ECL provides that "any organization or individual outside the territory" of the PRC that "endangers the national security and interests" of the PRC or "obstructs the fulfillment of non-proliferation or other international obligations shall be dealt with and pursued for legal liability under the law." While this provision implies the establishment of extraterritorial jurisdiction over offshore conduct violating the ECL, the literal language is not further defined in the ECL.

Facilitation of Export Control Violations

The ECL prohibits any organization or individual from knowingly providing agency, freight, shipping, customs clearance, third-party e-commerce trading platforms, financing, and other services to exporters engaged in export control violations. Violations by such third parties may be subject to fines from RMB 500,000 of up to five times the gains made from the illegal activities.

Investigative Powers & Penalties

When investigating suspected violations, State Export Control Authorities are empowered to inspect places of business; interview relevant persons; review and copy documents and materials; inspect means of transport used for export; seize or detain the items in question; and inquire into relevant bank accounts and similar issues. Investigative measures can be carried out against "the person under investigation," not limited to a Chinese exporter. Requests for information may be addressed to "any stakeholders and other relevant organizations or individuals." Consequently, a foreign end-user's Chinese subsidiaries and personnel may become implicated in export control investigations. Penalties for exporters obstructing or resisting inspections or investigations may include fines, suspension of business, and revocation of export rights for the relevant controlled items.

Offenses & Penalties

Chapter IV of the ECL lists the elements and administrative penalties of various export-control offenses, including: unlicensed exportation of controlled items; unlicensed transactions with controlled end-users or importers; violations of export license terms; violations of export prohibitions; fraud, bribery, or forgery involving export licenses; and facilitation of export control violations. Depending on the nature of the offense, penalties may include fines of up to RMB 5 million or ten times the gains made from the illegal activities, business suspension, revocation of export business qualifications, and restrictions on the responsible individuals' future involvement in export activities. Where administrative violations of ECL also constitute crimes, criminal penalties may also apply.

Reciprocity or Retaliation

New language appended at the end of the promulgated text warns that if “any country or region abuses export control measures and endangers the national security and interests” of the PRC, then the PRC “may reciprocally take measures based on the actual situation.” Beyond the unveiled threat to foreign governments, this article might also be construed as authorizing the State Export Control Authorities to devise and deploy targeted export restrictions in response to specific foreign export control measures.

Chinese exporters and their foreign customers should assess their compliance and potential exposure under the ECL, adopt measures for monitoring compliance, and periodically update their risk assessments as product lines, supply chains, and distribution chains develop—and as China's export control policies evolve.

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