



The 2020 Chinese export control law: a new compliance nightmare on the foreign trade law horizon?

Dominic Köstner¹ · Marcus Nonn²

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Abstract

On 1 December 2020, the Export Control Law of the People’s Republic of China entered into force. The PRC’s first comprehensive piece of legislation on export control had been passed by the Standing Committee of the National People’s Congress on 17 October 2020 after a three-year legislative process. Regarded as one of the PRC’s key responses in the engulfing China-United States trade dispute, the law has attracted wide public attention. It has been described as “a new flashpoint in EU-China relations” posing “substantial challenges for European companies”. The compliance costs of European companies who have a direct or indirect trade relationship with China will likely increase as a consequence of the ECL and so does the legal uncertainty involved in doing business in and with China. The essay will examine the ECL’s background (1) as well as its legislative approach and key provisions (2). It will then attempt to gauge the ECL’s immediate impacts and project its potential future developments (3).

Keywords Chinese law · Trade law · Compliance · US-China trade dispute

Dr. Dominic Köstner, LL.M. (King’s College London) is an attorney-at-law and partner in the Shanghai office of GvW Graf von Westphalen. Marcus Nonn is a research assistant at the Institute for Comparative Law, Conflict of Laws and International Business Law of Heidelberg University (Professor Kronke). The authors would like to thank Yan Huanlei for her valuable support and comments.

✉ Dominic Köstner
d.koestner@sh.gvw.com

Marcus Nonn
marcus.nonn@ipr.uni-heidelberg.de

¹ GvW Graf von Westphalen, Shanghai, People’s Republic of China

² Heidelberg University, Heidelberg, Germany

On 1 December 2020, the Export Control Law¹ (“ECL”) of the People’s Republic of China (“PRC” or “China”) entered into force. The PRC’s first comprehensive piece of legislation on export control had been passed by the Standing Committee of the National People’s Congress on 17 October 2020 after a three-year legislative process. It regulates the export of items critical to Chinese national interests. Under the ECL exporters of so-called ‘controlled items’ are required to obtain licenses before exporting them. Alongside traditional ‘controlled items’ such as military products and dual-use goods, the law also provides the basis to monitor more broadly the export of sensitive materials and technologies (cf. Art. 2 ECL).

Regarded as one of the PRC’s key responses in the engulfing China–United States trade dispute, the law has attracted wide public attention. It has been described as “*a new flashpoint in EU–China relations*” posing “*substantial challenges for European companies*”.² The compliance costs of European companies who have a direct or indirect trade relationship with China will likely increase as a consequence of the ECL and so does the legal uncertainty involved in doing business in and with China.

This article will examine the ECL’s background (1) as well as its legislative approach and key provisions (2). It will then attempt to gauge the ECL’s immediate impacts and project its potential future developments (3).

1 Background

1.1 China–United States trade dispute

The ECL has predominantly been understood as the PRC’s primary response to the United States’ ever more restrictive foreign trade regime.³ Under the Trump administration, the United States had targeted major Chinese companies such as Huawei Technologies, SMIC and TikTok owner ByteDance with often severe measures. This trend is believed to be continued—while not in tone so in essence—under the new Biden administration.⁴ The ECL can be viewed as part of a broader legislative ramping-up on the side of the PRC.⁵ It goes hand-in-hand with efforts like the

¹ 中华人民共和国出口管制法 (PRC Export Control Law) 17 October 2020, an unofficial translation is available at https://www.cov.com/-/media/files/corporate/publications/file_repository/prc_export_control_law_2020_10_cn_en_covington.pdf Accessed 23 September 2021.

² Concern voiced by Mikko Huotari, Executive Director of the Mercator Institute for China Studies (MERICS), <https://merics.org/en/briefing/chinas-new-export-control-law> Accessed 23 September 2021.

³ Kim (2021) Global Export Controls of Cyber Surveillance Technology and the Disrupted Triangular Dialogue. *International and Comparative Law Quarterly* 70/2:379–415(400, 404); Milhaupt CJ/Callahan (2021) *The Rule of Law in the U.S.–China Tech War*. (Forthcoming), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3840584 Accessed 23 September 2021.

⁴ Oertel J US-China confrontation and repercussions for the EU (ECFR commentary) <https://ecfr.eu/article/us-china-systemic-rivalry-repercussions-for-the-eu/> Accessed 23 September 2021.

⁵ Huang (2021) China’s Take on National Security and Its Implications for the Evolution of International Economic Law. *Legal Issues of Economic Integration* 48/2:119–146(133 f.).

Ministry of Commerce (“MOFCOM”) adjusting the *Catalogue of Technologies Prohibited or Restricted from Export of the PRC* on 28 August 2020⁶ and issuing the new *Provisions on the Unreliable Entity List* on 19 September 2020.⁷ The former has served as a high-profile example of the recent politicization of export control regulations. Observers assessed that the move to expand its catalogue of restricted technologies directly aimed to interfere with the looming deal to acquire TikTok’s U.S. operations.⁸ The ECL’s politicized background is at its most obvious in Art. 48 ECL. It stipulates that the PRC may take “*reciprocal measures*” against any country or region which “*abuses export control measures to endanger the national security and national interests of the [PRC]*”.⁹

1.2 Made in China 2025

Since 2015, the Chinese government has aimed to comprehensively upgrade the PRC’s manufacturing sector with the strategy *Made in China 2025*.¹⁰ Broadly, it seeks to move the PRC away from primarily being an importer of foreign high-tech products through the use of *smart manufacturing*.¹¹ This shift to becoming an exporter of its own high-end technological solutions calls for a comprehensive export control framework, thus signifying the PRC’s ascent and acting like a status symbol that the country’s technologies are sought-after by others.

1.3 Regional Comprehensive Economic Partnership (“RCEP”)

The ECL entered into force just days after the signing of the RCEP, a free-trade agreement comprising most major economies of the Asia–Pacific region (including the PRC), which marked a milestone of economic integration in Asia. This may appear as a dissonance. However, the move might simply indicate that the PRC is in

⁶ 《中国禁止出口限制出口技术目录》调整内容 (Adjustments to the Catalogue of Technologies Prohibited and Restricted from Export of the PRC) 28 August 2020.

⁷ 不可靠实体清单规定 (Provisions on the Unreliable Entity List) 19 September 2020, an official translation is available at <http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml> Accessed 23 September 2021.

⁸ Mozur P/Zhong R/McCabe D (29 August 2020) TikTok Deal Is Complicated By New Rules From China Over Tech Exports. New York Times <https://www.nytimes.com/2020/08/29/technology/china-tiktok-export-controls.html> Accessed 23 September 2021.

⁹ Incidentally, the Congressional Research Service has addressed the concern of “*tit-for-tat*”, “*retaliatory use of export controls*” in one of its papers, <https://fas.org/sgp/crs/row/IN11524.pdf> Accessed 23 September 2021.

¹⁰ The PRC State Council’s official notice on issuing “*Made in China 2025*” is available at http://english.www.gov.cn/policies/latest_releases/2015/05/19/content_281475110703534.htm Accessed 23 September 2021, for a detailed investigation see Wübbeke J/Meissner M/Zenglein M/Ives J/Conrad B (2016) *Made in China 2025—The making of a high-tech superpower and consequences for industrial countries*. MERICS Papers on China 2/Dec 2016.

¹¹ Cf. Wübbeke J/Meissner M/Zenglein M/Ives J/Conrad B (Fn. 10), p. 7: “*China seeks to gradually replace foreign with Chinese technology at home—and to prepare the ground for Chinese technology companies entering international markets.*”.

fact working towards Asian economic integration while simultaneously pursuing the path of decoupling from Western economies.

2 The law

2.1 Legislative history and significance

The ECL is the first comprehensive piece of legislation on export control in the PRC. The country's legal system of non-proliferation and export control has been developing since the 1990s.¹² Up to this point, the Foreign Trade Law¹³ has laid at its centre. It was enacted in 1994 and saw major revisions in 2004 (following the PRC's accession to the WTO) and 2016. Some view this law as a “*direct predecessor*” to the ECL.¹⁴ Chinese export control is also rooted in the Customs Law¹⁵ and stretches over a host of regulations and ministerial decrees (see Table 1).

To gauge the ECL's significance, it is important to understand that the Chinese system of export control, although fragmented, was “*fairly complete*”¹⁶ even before the ECL's introduction. The plethora of regulations addressed individual categories of goods,¹⁷ e.g. “*nuclear materials*”,¹⁸ “*nuclear dual-use items*”,¹⁹ “*missiles and missile-related items*”,²⁰ “*controlled*” or “*certain*” chemicals,²¹ “*dual-use biological agents*”,²²

¹² Kim H (Fn. 3), p. 401.

¹³ 中华人民共和国对外贸易法 (PRC Foreign Trade Law) 12 May 1994, an official translation of the 2004 version is available at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045871.shtml> Accessed 23 September 2021.

¹⁴ Höft (2018) Der Entwurf eines neuen Exportkontrollgesetzes der VR China. ZChinR 25:102–112(107).

¹⁵ 中华人民共和国海关法 (PRC Customs Law) 22 January 1987, last revised in 2021, an unofficial translation of the 2017 version is available at <https://www.hongfanglaw.com/wp-content/uploads/2019/10/Customs-Law-of-the-Peoples-Republic-of-China-2017-AmendmentEnglish.pdf> Accessed 23 September 2021.

¹⁶ Joint EU-China Handbook on Export Control of Dual-Use-Items, Vol. 1, Part II, p. 6.

¹⁷ Wolfgang H-M/Gerharz (2020) Das neue chinesische „Export Control Law“. AW-Prax 2020:517–523(517).

¹⁸ 中华人民共和国核出口管制条例 (PRC Regulations on the Control of Nuclear Exports) 1997, last revised in 2006.

¹⁹ 中华人民共和国核两用品及相关技术出口管制条例 (PRC Regulations on Export Control of Nuclear Dual-Use Items and Related Technologies) 1998, last revised in 2007.

²⁰ 中华人民共和国导弹及相关物项和技术出口管制条例 (PRC Regulations on Export Control of Missiles and Missile-related Items and Technologies) 2002.

²¹ E.g. 中华人民共和国监控化学品管理条例 (PRC Administrative Regulations on Controlled Chemicals) 1995, last revised in 2011; 《中华人民共和国监控化学品管理条例》实施细则 (Implementing Rules of the PRC Administrative Regulations on Controlled Chemicals) 1997, last revised in 2018; 有关化学品及相关设备和技术出口管制办法 (Measures on Export Control of Certain Chemicals and Related Equipment and Technologies) 2002.

²² 中华人民共和国生物两用品及相关设备和技术出口管制条例 (PRC Regulations on Export Control of Dual-Use Biological Agents and Related Equipment and Technologies) 2002.

Table 1 Hierarchy of previous legislation on PRC export control

For a list of previous regulations on export control see Liu X (2016) Upgrading to a New, Rigorous System - Recent Developments in China's Export Controls. RUSI Occasional Paper, p. 21 f.

“arms export and military products”.²³ Together they formed a mosaic-like export control regime whose few gaps could be found in the field of conventional dual-use items.²⁴ Dual-use items are “items, including software and technology, which can be used for both civil and military purposes”.²⁵ Rather than redefine the existing regime, the ECL aims to unify export control, significantly expand its scope, and strengthen the authorities’ powers of control and enforcement.

The ECL went through a three-year legislative process after its base had been laid out in a MOFCOM draft of 16 June 2017²⁶ (“2017 draft”). The Standing Committee of the National People’s Congress deliberated on the law three times between December 2019 and October 2020²⁷ before passing it on 17 October 2020. The law came into effect on 1 December 2020. Some of the more significant discrepancies between the final version and previous drafts will be discussed at a later point.

The question remains to what extent the existing laws and regulations will continue to be applicable. This is particularly relevant to those dual-use goods that are already covered by the various existing regulations of dual-use items mentioned above. A definitive answer cannot yet be given. It is, however, advisable to take

²³ 中华人民共和国军品出口管理条例 (PRC Administrative Regulations on Arms Export) 1998, last revised in 2002.

²⁴ Speaking of lacking controls concerning *dual-use items related to conventional weapons*: Liu X (2016) Upgrading to a New, Rigorous System - Recent Developments in China's Export Controls. RUSI Occasional Paper, p. 18.

²⁵ As defined in Art. 2(1) Regulation (EU) 2021/821, the EU’s latest regime on dual-use items.

²⁶ 中华人民共和国出口管制法(草案征求意见稿) (PRC Export Control Law (Draft for Comment)) 16 June 2017, Chinese version available at <https://npcobserver.com/wp-content/uploads/2017/08/export-control-law-2017-draft.pdf> Accessed 23 September 2021.

²⁷ The changes made in the deliberations are compiled at <https://npcobserver.com/legislation/export-control-law/> Accessed 23 September 2021.

the cautionary stance that the ECL does not aim to directly invalidate prior legislation,²⁸ at least for the duration of a transitional period. It would not be an uncommon approach for PRC legislation to introduce a new regulatory centrepiece without rescinding existing laws and regulations.²⁹ It is still reasonable to focus on the ECL since the obligations imposed in previous regulations hardly ever exceed those stipulated in the ECL. In any case, the lack of clarity concerning the interaction of the ECL with its ‘predecessors’ constitutes one of the law’s main shortcomings.

2.2 Legislative approach

The approach adopted by the legislator in drafting the ECL once more resembles other recent pieces of legislation, such as the *PRC Cybersecurity Law* of 2016³⁰ or the *Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures* of 2021,³¹ more commonly known as the *Blocking Rules*.

Key terms of the law, in particular the frequently used terms “national security” and “national interests”, provide substantial room for interpretation by the relevant authorities and a number of issues are not, or only rudimentarily, addressed in the final law, thereby providing the authorities with wide discretion in applying the law. This situation leaves the potentially affected economic actors with a high degree of uncertainty with regard to their rights and obligations under the legislation. This makes it effectively impossible for them to be in full compliance with the applicable legal framework and creates a sword of Damocles looming over companies doing business in the PRC. This deliberate vagueness that is typical for PRC legislation leaves room for subsequent ad hoc adjustments and concretization in the form of implementing measures or administrative regulations.³²

2.3 Overview of the ECL

The ECL is divided into five chapters and contains a total of 49 articles. Chapter 1 sets out a number of general provisions including the legislative purpose of the ECL which shall “safeguard national security and interests, perform non-proliferation and other international obligations, and enhance and regulate export control”

²⁸ See also Liu X (fn. 24), p. 18.

²⁹ Concerning the similar approach of the PRC Cybersecurity Law: Köstner D/Nonn M (2020) *Das Cybersecurity Law der VR China*. MMR 2020:591–596(591).

³⁰ 中华人民共和国网络安全法 (PRC Cybersecurity Law) 7 November 2016, an unofficial translation is available at <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/> Accessed 23 September 2021.

³¹ 阻断外国法律与措施不当域外适用办法 (Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures) 9 January 2021, an official translation is available at <http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml> Accessed 23 September 2021.

³² On this “style” of legislation see also Köstner D/Nonn M (fn. 29), p. 592.

(Art. 1). In addition, Chapter 1 introduces various definitions and terms used throughout the law. Chapter 2 establishes the actual export control regime under the ECL by, *inter alia*, requiring a license for the export of controlled items (Art. 12) and setting out the factors to be taken into account by the authorities when deciding on the granting of such license (Art. 13). Chapter 3 for the most part addresses the competent PRC export control authorities in fulfilling their obligations under the ECL, such as providing them with wide supervision and inspection competencies to investigate potential violations of the ECL (Art. 28). Chapter 4 contains a wide range of administrative fines and other sanctions for violations against the ECL. Chapter 5 is titled “Supplemental Provisions”. Notably, it significantly broadens the scope of applicability of the ECL by also covering “the transit, trans-shipment, through-shipment, and re-export” of controlled items (Art. 45). Moreover, it sets out the date of legal effectiveness of the ECL in Art. 49.

In the following, the ECL’s general scope of application will be laid out before examining the obligations imposed on both exporters and importers. In light of the PRC’s ever increasing export sector and the importance of EU-China trade relations from a business perspective, particular attention will be dedicated to the pressing questions of what exports require a license and how export operators obtain such an export license. Lastly, some of the penalties for violating the ECL will be outlined.

2.4 Scope of application

2.4.1 Material scope of application

The ECL outlines its material scope of application by defining the terms ‘controlled items’ and ‘export control’ in its Art. 2. Controlled items are ‘*dual-use items, military items, nuclear items and other goods, technologies, services and items relating to the maintenance of national security and national interests, and performance of antiproliferation and other international obligations*’. It is further specified that this ‘*includes technical information and other data related to the items*’. Notably, the specification of what items touch on national security and interests will be of great importance. Article 4 ECL holds out the prospect of the state implementing corresponding ‘*control lists*’. Since the ECL itself only broadly outlines what items are subject to export control, these catalogues of specific controlled items will greatly enhance the understanding of how extensively the PRC’s authorities seek to employ this new export control framework (cf. *infra* para. 2.5.1) No control lists that directly refer to Art. 4 ECL have been published as of September 2021. However, as laid out above (cf. *supra* para. 2.1), control lists that were in effect prior to the ECL may still be applicable. In any case, blind reliance on control lists would be ill-advised since the term ‘controlled items’ is not identical with ‘items on the control lists’. This is due to the ECL’s catch-all provision (see Art. 12 ECL) and provision on temporarily controlled items (see Art. 9 ECL) which will be expanded on below.

Export control is defined as ‘*prohibitive and restrictive measures taken by the state*’ against two kinds of actions: the ‘*transfer of any Controlled Items out of the [PRC]*’ and the ‘*provision of any Controlled Items by any citizens, legal persons or non-corporate organizations of the [PRC] to any foreign organizations and individuals*’. There are thus two alternative actions that constitute an export: the transfer or the provision of an item. A closer look at the second alternative reveals that an important constellation may fall under this understanding of ‘export’. According to the wording of Art. 2 ECL, the provision of a controlled item to a ‘*foreign organization or individual*’ is considered an export regardless of whether or not that item leaves the PRC. This suggests that in the ‘provision’ alternative, the law may create the fiction of an export where (a) a PRC entity provides a controlled item to a foreign entity within the PRC and (b) a PRC entity provides a controlled item to a foreign entity whilst outside of the PRC.³³ This understanding would drastically expand the ECL’s scope of application to the point that it may comprise the disclosure of sensitive technology among employees of the same multi-national company.

2.4.2 Personal scope of application

Outside of Art. 2 ECL there is no further specification of the personal scope of application. In the ‘transfer’ alternative, the ECL applies to anyone who effects the ‘*transfer of any controlled items*’. In the ‘provision’ alternative, the ECL applies to those provisions by ‘*any citizens, legal persons or non-corporate organizations of the [PRC]*’. The term “legal person of the PRC” may raise doubts as to whether the defining criterion is the location of a corporation’s seat in the PRC or whether corporations that have Chinese majority shareholders are included irrespective of their seat. The convincing interpretation seems to be that Art. 2 ECL refers to entities that are subject to the law of the PRC, i.e. those with their registered seat in the PRC.³⁴ It is unlikely that Art. 2 ECL comprises any entity “*controlled by a Chinese investor*”.³⁵

2.4.3 Territorial scope of application

First and foremost, the ECL covers the export of controlled items to a place outside the PRC. As mentioned earlier, in the ‘provision’ alternative, the ECL can be applicable even if the controlled item does not actually leave the territory of the PRC. In addition, in one of its more remarkable provisions, the ECL stipulates an extraterritorial scope of application. According to Art. 45 ECL, the law also governs the ‘*re-export of any Controlled Items*’. Thus, a third-country recipient of a controlled item seeking to re-export that item to another third country can be subject to e.g. a licensing requirement (Art. 12 ECL, *see below*) by the Chinese authorities.³⁶

³³ With the same interpretation of the almost identical Art. 3 of the 2017 draft: Höft K (fn. 14), p. 109.

³⁴ Höft K (fn. 14), p. 109.

³⁵ Seemingly following this interpretation: Impact of China’s Export Control Law to M&A transactions (JD Supra blog post by Allen & Overy LLP, 30 November 2020) <https://www.jdsupra.com/legalnews/impact-of-china-s-export-control-law-to-61069/> Accessed 23 September 2021.

³⁶ Refer to Sect. 2.3.4 for more details on the “re-export” alternative.

While the ECL does not contain a definition of the term “*re-export*”, this interpretation is based on the explanation provided for in Art. 64 of the 2017 draft. Similar provisions can only be found in U.S. law.³⁷ The ECL’s claim to application outside the territory of the PRC is consolidated by Art. 44 ECL which was introduced in later drafts and stipulates that foreign organizations or individuals can be ‘*subject to investigation and legal liability in accordance with the law*’. This implies a form of extraterritorial jurisdiction that may attempt to pave the way for a criminal liability of foreign companies.

The 2017 draft had included a provision (Art. 67) according to which export licenses were required for exports from the PRC to Taiwan, Hong Kong and Macau bar certain exemptions. Since this provision cannot be found in subsequent drafts and the ECL, one may raise the question as to whether the ECL still aims to cover such exports. Some purport that the ECL likely applies to such exports ‘based on China’s geopolitical understanding and prior export control practice’.³⁸ In the authors’ view, everything in the current administrative practice points to the conclusion that the ECL is fully applicable to exports to Taiwan, Hong Kong or Macau.³⁹

2.5 Obligations for exporters

Export operators bear the primary responsibility for complying with the ECL’s export regime. Article 12 ECL stipulates that they are obliged to apply for an export license if they seek to carry out a relevant export process.

2.5.1 What exports require an export license?

Pursuant to Art. 12 ECL, export operators shall apply for a license to the competent authorities for three categories of items: controlled items listed on the control lists, items under temporary control, and other items that may bear one of three risks that the export operator is or should be aware of or of which he is notified by the SECADs. Those risks are dangers to ‘*national security or national interests*’, any usage in some way related to weapons of mass destruction and a usage for terrorist purposes.

Temporary control means that an item is tentatively treated as a controlled item by the relevant export control authorities for a period of up to two years (an extension is possible) after which it may be added to a permanent control list (Art. 9 ECL).

The obligation contained in Art. 12 ECL to proactively apply for an export license for items that endanger ‘*national security or national interests*’ even though they

³⁷ Höft K (fn. 14), p. 105.

³⁸ See China’s New Draft Export Control Law and Its Implications for International Trade (blog post by Gibson, Dunn & Crutcher LLP, 31 August 2020) <https://www.gibsondunn.com/china-new-draft-export-control-law-and-its-implications-for-international-trade/> Accessed 23 September 2021.

³⁹ One obvious indicator is the fact that the MOFCOM provides specific templates for the end-user and end-use declaration that are only applicable to end-users located in Taiwan, Hong Kong or Macau. The authors’ interpretation has also been orally confirmed by personnel of Shanghai COFCOM.

are neither mentioned in control lists nor subject to the temporary control has been considered one of the ECL's most 'explosive' provisions. It makes export operators responsible for assessing the potential risks of their exports. While catch-all provisions are not entirely new to the PRC's export regime, this expansive understanding creates a significant legal uncertainty. Article 8 of the *Administrative Measures for the Import and Export Permits of Dual-use Items and Technologies*⁴⁰ already contained a less expansive "catch-all provision". Exporters were obliged to apply for an export license if they knew, ought to know or were informed by the relevant authorities that the items to be exported may potentially be used in connection with weapons of mass destruction "*regardless of whether they are included in the Controlling List [sic] or not*". Article 12 ECL does not limit its scope to potential connections with weapons of mass destruction and instead expands it to all cases of items potentially endangering national security or national interests.

2.5.2 How do export operators obtain an export license?

In the following, the administrative procedure of obtaining an export license as well as the substantive requirements will be examined.

Administrative procedure

Throughout most of its provisions, the ECL refers to the SECADs as the administrative bodies in charge of export control. However, this does not hide the fact that the ECL envisions a decentralized administration. "SECAD" is an umbrella term that comprises various departments of the State Council and the Central Military Commission (Art. 5 ECL). The ECL does not detail the administrative structure and instead stipulates that '*the State*' will establish an '*export control coordination mechanism*' relying on cooperation among the different administrative departments. It is to be expected that an emphasis will be put on local administrative bodies. Article 5 ECL provides that the '*departments of all provinces, autonomous regions and municipalities directly under the central government*' will also be responsible for tasks relating to export control.

The authorities competent for receiving and deciding on applications for export licences under the previous export control regime as well as under the new ECL vary from item to item. In the past, the MOFCOM and, concerning matters of non-proliferation, the Ministry of Foreign Affairs ("MFA") were the relevant departments of the State Council overseeing export control.⁴¹ Instructions on who to direct the application to were spread out across different regulations. The *Administrative Measures for the Import and Export Permits of Dual-use Items and Technologies* and its annexes were the primary regulation for administrative competencies. They stipulated that the MOFCOM's 'Quota and License Administration Bureau'

⁴⁰ 两用物项和技术进出口许可证管理办法(Administrative Measures for the Import and Export Permits of Dual-use Items and Technologies) 31 December 2005, an unofficial translation is available at <http://www.asianlii.org/cn/legis/cen/laws/mftaioalfdiat900/> Accessed 23 September 2021.

⁴¹ Liu X (fn. 24), p. 13 f.

and provincial competent departments of commerce (“COFCOMs”), were responsible for issuing export licenses for dual-use items and technologies.⁴² According to the *PRC Administrative Regulations on Arms Export*,⁴³ export licenses for military items were to be issued by the competent military-items export departments of the State, in some circumstances jointly with the relevant departments of the State Council and the Central Military Commission.

Article 5 ECL mentions the “*departments of the State Council and the Central Military Commission that perform the export control functions*” thus implying that no significant change to the current administrative structure is intended. It is possible that further administrative provisions may be contained in future implementing regulations.

All foreign trade operators are subject to a general filing and registration requirement⁴⁴ pursuant to Art. 9 of the PRC Foreign Trade Law.⁴⁵ This can be understood as a form of “*initial registration*”⁴⁶ preceding the application for a specific export license. Additionally, export operators may need to obtain further approvals prior to applying for the individual export licenses. Article 23 ECL explicitly provides for such a “*qualification system*” for exporters of military items.⁴⁷ Moreover, Art. 11 ECL contains a general reference to additional export business qualifications which may be required by other laws and regulations.⁴⁸

The process of applying for an export license continues to vary from item to item. In some cases, it is conducted on a unified online portal operated by the MOFCOM.⁴⁹ However, applications for some items will likely still require hardcopy applications with the provincial COFCOMs. While Art. 33 of the 2017 draft had included a list of documents required for the application, such a regulation did not find its way into the ECL. That list included *inter alia* a copy of the foreign trade contract, technical descriptions of the items to be exported, and declarations on the end-use and end-user. In line with the administrative practice, the declarations on the end-use issued by the designated end-users are sent to the export operators who in turn forward them to the competent authorities.

Article 34 of the 2017 Draft stipulated a period of 45 working days within which the SECADs were to decide on the approval or denial of a license application for dual-use items. Later drafts introduced the possibility of a 15-day extension.

⁴² See fn. 40.

⁴³ See fn. 23.

⁴⁴ Joint EU-China Handbook on Export Control of Dual-Use-Items, Vol. 1, Part II, p. 31 f.; for a description of this registration process see Julius H/Müller (2004) Das neue chinesische Außenhandelsrecht. ZChinR 11:215–227(217 f.).

⁴⁵ See fn. 13.

⁴⁶ Höft K (fn. 14), p. 110.

⁴⁷ The export of military items in the PRC is limited to a handful of arms trading companies who hold the relevant “qualification”, see Joint EU-China Handbook on Export Control of Dual-Use-Items, Vol. 1, Part II, p. 45 (claiming there are twelve such companies); and <https://www.reportrc.com/article/20200630/10244.html> Accessed 23 September 2021 (claiming there are eleven).

⁴⁸ E.g. 中华人民共和国敏感物项和技术出口经营登记管理办法 (PRC Administrative Measures for the Business Registration for Exports of Sensitive Items and Technologies) 2002, last revised in 2015.

⁴⁹ This portal is available at <http://ecomp.mofcom.gov.cn> Accessed 23 September 2021.

However, the final version of the ECL does not include the time limits that the drafts envisioned, instead announcing a decision within an unspecified “*statutory period*”. Nonetheless, it can be expected that the 45-day period remains the standard SECADs try to adhere to since it is consistent with prior export control regulations⁵⁰ and guidelines.⁵¹

Substantive requirements

According to Art. 13 ECL, the assessment of the license application is based on eight factors: “(1) *national security and national interests*, (2) *international obligations and commitments*, (3) *type of export*, (4) *sensitivity of the items*, (5) *destination country or region of the export*, (6) *end users and end use*, (7) *credit record of the export operator*, (8) *other factors provided in laws and administrative regulations*”. This list is a consolidated version of the various factors found in Art. 21 and 22 of the 2017 draft. Notably, “*national security and national interests*” are placed at the top of the list once more highlighting the ECL’s ambition. The SECADs examine factors based on (a) the export operators themselves, (b) the exported items and (c) their recipients. According to Art. 14 ECL, the implementation of an effective internal compliance system may lead to a preferential treatment of the respective export operator by the SECADs. For instance, the authorities may grant “*a general license for the export of [...] Controlled Items*”.

The SECADs have broad discretion to take measures such as prohibiting, restricting or suspending trade in controlled items with end-users or importers that they deem harmful to national security and national interests. These provisions addressing the end-users and importers are contained in Arts. 15–18 ECL and will be expanded on in the following paragraph.

2.6 Obligations for end-users

The obligations imposed on foreign end-users are laid out in Arts. 15 and 16 ECL. It ensues from Art. 16 ECL that the term ‘end-user’ refers to the final recipient of the exported item. In simple export processes this may often be the importer. However, the crucial point is which party stands at the end of a chain of exports, transfers and assignments.

The primary obligation for end-users is to submit a declaration on the end use of the controlled items. It may be emphasized that solely the export operator is obliged to examine whether an export comprises controlled items and accordingly approach the authorities to apply for a license. It is in the course of this process that the end-user issues its declaration and sends it to the export operator. In some countries, this documentation must be issued by the relevant government agencies. Pursuant to Art. 16 ECL, end-users are prohibited from subsequently changing such approved end use or transferring the items on to a third party without the SECADs’ approval.

⁵⁰ See fn. 20.

⁵¹ E.g. Joint EU-China Handbook on Export Control of Dual-Use-Items, Vol. 1, Part II, p. 32.

Article 16 ECL further stipulates that importers are obliged to immediately inform the SECADs if they become aware of any such change or assignment.

Non-Chinese companies may be affected by these obligations even if they do not directly import goods from the PRC. Regularly, it cannot be ruled out that goods imported from a third country contain components of Chinese origin that are subject to export control under the ECL. The examination of such re-export constellations is particularly pressing since *de lege lata* there is no de-minimis-rule that limits the number of affected cases. Such a provision could be found in Art. 64 of the 2017 Draft but did not find its way into the ECL. Thus, it has to be assumed that the ECL applies to goods that contain controlled components of PRC origin even if the components' share of the final product is minimal. It remains to be seen whether a de-minimis-rule will be introduced by way of future implementing regulations.

Re-export processes consist of two (or more) exports: a first export of the controlled components from the PRC to a third country and a second export of the processed goods from that third country to the end-user's country of residence.

Since Arts. 15 and 16 ECL refer to the end-user, the crucial question is whether or not the end-user is already known at the time of the first export. If a certain corporation is already the designated end-user at the time of the first export, that corporation will have to meet the above-mentioned obligations. Consequently, the second export will require no further license under the ECL. The argument is less obvious where, at the time of the first export, the end-user of the processed goods is not yet known. Presumably, the first export has undergone the relevant export control pursuant to the ECL. The second export, however, may once again be under scrutiny of the PRC's export control regime. This is due to Art. 45 ECL which stipulates that the ECL applies to the "transit, transshipment and through shipment, [and] re-export" of controlled items. The import of goods containing items that are subject to control under the ECL from a third country could constitute a "re-export" within the meaning of Art. 45 ECL. Article 64 of the 2017 Draft defined re-exports as the "*export of goods from outside of the PRC to another country*". Following this understanding, the present case of two exports, first from the PRC to a third country and then from there to another third country would constitute a re-export. While the ECL did not adopt the definition of the 2017 draft, the early administrative practice seems to adhere to this understanding. Either way, it is advisable to follow this broad definition at least tentatively in the absence of further implementing regulations. Thus, the second export of goods from the third country to the end-user's country of residence requires a new export license even if the end-user is not known at the time of the first export. The end-user is obliged to make the declaration of end use in accordance with Arts. 15 and 16 ECL as laid out above. An exception from these conclusions may occur if the goods are processed in such a way that they lose their quality as a controlled item. This is for example the case if a final product which consists, *inter alia*, of controlled dual-use items can then solely be used for civil purposes and cannot be disassembled to its controlled original components.

2.7 Penalties for violating the ECL

The ECL's fourth chapter (Arts. 33–44) contains a catalogue of offenses and penalties. Furthermore, Art. 28 ECL provides the SECADs with broad powers in investigating suspected violations of the ECL. The list of potential measures includes entering places of business, interviewing relevant persons, examining and duplicating relevant documents, checking delivery vehicles, preventing loading, ordering the withdrawal of items, “confiscating”⁵² and seizing related items and examining bank accounts. According to Art. 28(2) ECL, the SECADs right to interview persons relevant to their investigation extends to related organizations or individuals and thus appears not to be limited to the domestic export operator.

The actions that may be penalised include exporting controlled items without a license, fraudulently obtaining the license or violating its terms, conducting transactions with controlled end-users or importers and violating export prohibitions. Resisting or obstructing an investigation is also penalised (Art. 38 ECL). Furthermore, the SECADs may impose penalties for knowingly providing services to exporters violating the ECL (Art. 36 ECL). The fines envisioned can amount to up to 5 million RMB or ten times the illegal turnover. Pursuant to Art. 43 ECL, criminal penalties may also apply.

The aforementioned penalties primarily target the export operators and their domestic affiliates. However, Art. 44 ECL paves the way for a comprehensive extraterritorial liability. It stipulates that foreign organizations and individuals that violate the ECL and endanger the national security and national interests of the PRC are subject to an unspecified “*legal liability*”. There is no catalogue of offenses committed by importers or end-users. However, it can be reasoned from Arts. 15, 16 ECL that making false statements in the end-user declaration or deviating from the commitments made therein would constitute a punishable offense. Furthermore, it is at least conceivable that penalties may be imposed for deliberately or negligently importing controlled items if the export operator has not properly passed the process of obtaining an export license.

The second mechanism through which importers and end-users may be targeted for violating the ECL is the “*restricted list*”⁵³ established in accordance with Art. 18 ECL. They may be included on this “blacklist” for violating their obligations as end users, potentially endangering national security or national interests, or using controlled items for terrorist purposes. Export operators are barred from entering any transactions with entities included on the list. The ECL does not specify whether the term “transactions” refers to transactions of any kind—thereby effectively banning such company from direct trade with the PRC altogether—or solely those related to controlled items. While affected entities may apply to be removed from the list, the SECADs have wide discretion when considering such a removal.

This “blacklist” of end-users and importers is not to be confused with the “*Unreliable Entity List*” (“UEL”). The latter is based on the MOFCOM’s “*Provisions on the Unreliable Entity List*”⁵⁴ which came into force on 19 September 2020. Entities

⁵² The term “查封” (chafeng) can also be translated as “sealing up”. It refers to a sort of confiscation under which owners do not necessarily lose their ownership of the item.

⁵³ The translation “*control list*” has also been suggested.

⁵⁴ See fn. 7.

may be included on the UEL for various reasons that are not limited to the export control regime. However, since the authorities have wide discretion in this regard, it cannot be ruled out that violating the ECL may also lead to an inclusion on the UEL.

3 Summary

The ECL expands the export control regime of the PRC. Key terms such as “national security” and “national interests” leave much room for interpretation thus granting the authorities wide discretion in applying the law. This creates substantial compliance risks for export operators as well as importers and end-users. Offenders face potentially severe penalties. It will be key for all economic actors to assess their exposure to the ECL. This also affects European importers and end-users who may operate within the scope of the ECL even if they do not directly import goods from the PRC.

The ECL will continue to take a more concrete shape through the administrative practice and in the form of implementing regulations. Moreover, the issuing of the list of restricted end-users and importers is still pending. For the moment, companies are well advised to examine the potential impacts of the ECL on their cross-border trade with the PRC and to adjust their compliance measures accordingly.

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