HAN KUN
汉 坤 律 师 事 务 所
Han Kun Law Offices

Han Kun Newsletter

Issue 161 (9th edition of 2020)

Legal Updates

1. **Brief Analysis of China's Technology Export Management System—from the Perspective of Revising the Catalogue of Technologies Subject to Export Bans and Restrictions**
2. **Suspended Sword of Damocles: Provisions on the Unreliable Entity List Promulgated**

1. Brief Analysis of China's Technology Export Management System—from the Perspective of Revising the Catalogue of Technologies Subject to Export Bans and Restrictions

Author: Intellectual Property Department

On the evening of August 28, 2020, the Ministry of Commerce and the Ministry of Science and Technology jointly published the revised *Catalogue of Technologies Subject to Export Bans and Restrictions*[1] (the "**Catalogue**"), and answered reports' questions regarding the Catalogue[2], which has drawn heated discussion among business circles. To provide our perspective on this issue, we summarize and analyze in this article key issues related to technology export administration rules in China by referring to the Catalogue. We then attempt to compare relevant provisions of the Catalogue to similar industry concerns over restrictions on cross-border data transfers.

The revised Catalogue makes changes regarding high technologies, including drones, 3-D printing, autonomous driving, artificial intelligence, and computer software—areas in which China has grown in strength in recent years. The Catalogue provides that technology exports are governed by the *Regulations of the People's Republic of China on the Administration of Technology Import and Export* (the "**Regulations**"), which stipulate only a general definition of technology export and do not prescribe specific implementing rules. Although business circles generally consider the Regulations apply primarily to Chinese parties that transfer technologies overseas, there is another literal interpretation of application scope of the Regulations, that is, they govern the cross-border transfer of technologies created in China. Furthermore, in addition to the transfer and licensing of technologies, the export of technologies involved in cross-border transactions are also subject to technology export reviews, such as in cross-border investment, financing, and mergers and acquisitions. However, under the current technology export control rules, technology export reviews in such cross-border transactions face many challenges in practice, because of the complexity of technology transfers, greater uncertainty in such cases, and because many issues still await further regulatory clarification.

In addition, similarities exist with respect to the structures of the technology export control system and the cross-border data transfer system (still being formulated). For example, both stipulate classified protection of technologies/data and require review prior to the transfer of specific types of subject matter. Note that there may exist overlap in classification of specific technical fields under these two systems. Parties should also pay attention to differences in the focus of review and specific review rules when applying these two systems so as to avoid issues arising in practice due to links between the two systems.

In addition, China remains at the early stages of formulating technology export controls and is far behind

[1] The official website of the Ministry of Commerce: Adjustment and Promulgation of the Catalogue of Technologies Prohibited and Restricted from Export by China by the Ministry of Commerce and the Ministry of Science and Technology(http://www.mofcom.gov.cn/article/news/202008/20200802996694.shtml).

[2] Official website of the Ministry of Commerce: Person in Charge of the Department of Trade in Services of the Ministry of Commerce Answering Reporters' Questions on the Adjustment of Catalogue of Technologies Prohibited and Restricted from Export by China (http://www.mofcom.gov.cn/article/news/202008/20200802996696.shtml).

the United States, which has already established a systematic administrative enforcement system in relation to technology export controls. While the relevant systems have begun to take shape in China through the establishment of the "unreliable entities list" and "transaction-restricted countries list," the implementation of such systems requires the cooperation of legislative and enforcement departments.

The Catalogue stipulates revisions mainly involving high-tech industries; relevant export review rules remain to be further clarified

I Revisions mainly involve high-tech industries such as drones, 3-D printing, autonomous driving, artificial intelligence and computer software

The revisions to the Catalogue involve a total of 53 technical items, which were finalized upon consultation with relevant departments, industry associations, industry academic circles, and the public:

1. Removed four technical items from items prohibited from export, including microbial fertilizer technology, caffeine production technology, riboflavin production technology, and vitamin fermentation technology.

2. Removed five technical items from items prohibited from export, including Newcastle disease vaccine technology, natural medicine production technology, functional polymer material preparation and processing technology, chemical synthesis and semi-synthetic medicine production technology, and information security firewall software technology.

3. Added 23 technical items restricted from export, including artificial breeding technology of agricultural wild plants, cashmere goat breeding and breed breeding technology, space material production technology, large-scale high-speed wind tunnel design and construction technology, aerospace bearing technology, and laser technology.

4. Revised the control points and technical parameters of 21 technical items, including but not limited to crop breeding technology, aquatic germplasm breeding technology, chemical raw material production technology, biological pesticide production technology, spacecraft measurement and control technology, space data transmission technology, map-making technology, information processing technology, vacuum technology, and other fields.

Based upon the revised content, we can observe that China has gradually strengthened export controls over high-tech industries including drones, 3-D printing, autonomous driving, sensors, artificial intelligence, pharmaceutical manufacturing, telecommunications equipment, and computer software.

Revising the Catalogue was not an impulsive action of the regulatory authorities, but rather a long-planned project. As early as 2018, relevant departments had begun to solicit public comments on revising the Catalogue, and the Ministry of Commerce and the Ministry of Science and Technology finally promulgated the Catalogue following repeated deliberations and by considering development trends in the international environment. The market's strong reaction reflects the demand for the revising the Catalogue. We should, however, also avoid unduly interpreting the Catalogue in light of the current sensitive international political and business environment.

In addition, promulgation of the Catalogue marks only the beginning of adjustments to the technology export control system. The Ministry of Commerce and the Ministry of Science and Technology continue to advance revising the Catalogue in an orderly manner and may further reduce restricted items in the Catalogue to allow the market to play a bigger role. Furthermore, we should also pay attention to impact produced by changes in the international environment on the revising of the Catalogue.

II Applicable subject matter of export-restricted technologies for review

According to Article 2 of the Regulations: "*the import and export of technology refers to transfers of technology from outside the People's Republic of China into the territory of the People's Republic of China,* ***or vice versa****, by way of trade, investment, or economic and technological cooperation. The transfer of technology referenced in the preceding paragraph include the transfer of patent rights, the transfer of patent application rights, patent implementation license, the transfer of technology secrets, technical services, and technical transfer in other manners.*"

The person in charge of the Department of Trade in Services of the Ministry of Commerce, in answering reporters' questions regarding the Catalogue, mentioned that: "*Transfers of technology beyond the territory of the People's Republic of China, whether by way of trade or investment, etc., must be conducted in accordance with the Regulations." According to Article 31 of the Regulations: "Technologies restricted from export shall be subject to license for export; without a license, no export-restricted technologies shall be exported.*"

The Regulations stipulate a relatively broad applicable scope of technologies subject to export restrictions. Business circles have tended to hold that the Regulations apply to the transfer by Chinese entities of export-restricted technology to foreign entities, which requires prior approval of the local department of commerce. However, the restrictions may also be literally interpreted to apply to transfers abroad of technologies generated within China, whether such technologies are generated by a foreign entity or a Chinese entity, which would all require prior approval of the local department of commerce. We await the regulatory authorities to further clarify whether, in practice, such technology transfers will be subject to supervision and the strength of the regulations.

III Further clarification awaited on detailed rules for export reviews of restricted technologies

If a transaction solely involves the transfer of export-restricted technologies *per se*, the rules have been clarified such that the relevant parties must submit an application and undergo a technology export review prior to the transfer (such as the transfer of patent rights, technology secrets, or license contracts).

However, the Regulations do not specify whether prior approval is required for transactions which partly involve the export of export-restricted technologies, such as cross-border mergers and acquisitions, investment, and financing. In practice, it is common for technology transfers to separate the technologies from the other parts of a transaction. That is to say, the technology transfers usually are handled separately after reaching a preliminary transaction agreement in the transactions relating to the cross-border mergers and acquisitions, investment, and financing. If a technology export

cannot be completed due to any reasons, the parties will negotiate to determine whether to proceed with the transaction or adjust the transaction consideration according to the specific circumstances.

In practice, it is difficult to reach consensus on the scope of technologies to be exported before substantive transaction negotiations commence if the technology export itself is not substantial to the actual negotiations (regarding investment, financing, and mergers and acquisitions). To get the prior permission of the entire transaction is quite difficult and the variation of transaction will further need to re-apply the permission of relevant technologies export, and thus will result in cumbersome procedures and the wasting of resources. In such cases, it is common practice to apply for an export license for the relevant technologies included in the transaction after reaching the final agreement. It remains to be seen in practice how the regulatory authorities will deal with these circumstances and their requirements.

IV Procedures for the export review of export-restricted technologies

Since 2007, the Ministry of Commerce has delegated the authorization to grant license for import and export of export-restricted technologies to the competent commerce administrations of provinces, autonomous regions, and municipalities directly under the central government. According to the Regulations, the export review of export-restricted technologies mainly involve two aspects, i.e. trade review and technical review. The specific review process is as follows:

1. An enterprise planning to export export-restricted technologies should complete an *Application for Export of Technologies Subject to China Export Restrictions* before entering into substantive negotiations regarding the export and file the application with the provincial commerce department. The parties should go through review procedures in advance for the export of secret information if the technologies to be exported involve state secrets.

2. After receiving a technology export application, the competent commerce department will review the application, together with the competent department of science and technology, and make a decision indicating whether to approve the application within 30 business days from the date of receipt of the application, and to those whose application for technology export has been approved shall issue a *People's Republic of China Letter of Intent for Granting Technology Export License*. The applicant may engage in substantive negotiations and sign a technology export contract only after obtaining a letter of intent.

3. The applicant must apply for a *Technology Export License of the People's Republic of China* after executing a technology export contract. The competent commerce department will review the authenticity of the technology export contract and shall make a decision to indicate whether it approves or rejects the technology export within 15 business days from the date of receipt of the relevant application. If the technology export is approved, the applicant will be issued a *Technology Export License of the People's Republic of China*. The technology export contract will then take effect from the date of issue of the technology export license.

Comparing the technology export control and cross-border data transfer systems

Similar to the technology export review system, China has been actively exploring the establishment of a security assessment system for cross-border data transfers.

According to Article 37 of the current *Cybersecurity Law of the People's Republic of China,* operators of critical information infrastructure must store personal information and important data within the territory of China and undertake security assessment procedures if it is necessary to transfer such data cross-border. Subsequently, Chinese authorities have indicated their intent to extend the security assessment obligations to all network operators and have proposed specific review procedures and key review points in the *Measures for Security Assessment of Cross-border Transfer of Personal Information and Important Data (Draft for Comment)*, the *Measures for Security Assessment of Cross-border Transfer of Personal Information (Draft for Comment)*, and the *Information Security Technology - Guidelines for Data Cross-border Transfer Security Assessment (Draft for Comment)*, etc. A draft law on data security issued in July of this year indicates that China intends to establish a data security review system, conduct national security reviews of data activities that affect or may affect national security, and implement export controls on data in relation to the performance of international obligations and the safeguarding of national security.

Technology export controls and data export controls are similar in many aspects including regulatory views, procedural timing, focus of review and validity of assessment results, although the focus of technology export control lies in the technology *per se*, while focuses of data export security review lies in the ownership, circulation or controller of the data. In the following, we will compare the two systems from the following aspects:

1. **Regulatory views**: The systems provide classified protection of either data or technology. At present, cross-border data transfer security assessments apply only to personal information which concerns the legitimate interests of individuals and to important data which concern the overall interests of the State and society.

2. **Procedural timing**: Cross-border data transfer security assessments commence after the data transferor and the data receiver sign a data transfer contract and before the data transfer actually takes place. For technology export reviews, the technology exporter must first obtain a *Letter of Intent for Granting Technology Export License*, who then signs a technology export contract and finally applies for an export license with the relevant authorities by submitting the technology export contract and other materials.

3. **Focus of review**: Personal information cross-border transfer security assessments mainly focus on whether such transfers harm the rights and interests of personal information subjects. Meanwhile, important data cross-border transfer security assessments focus on whether the transfer harms national security, social public interests, or related industrial policies, etc.

4. **Validity of assessment results**: Within a certain period of time after completion of the data export security review (e.g., two years for personal information cross-border transfers), the parties need not again undertake the cross-border assessment process if they intend to transfer data to the same receiver multiple times or continuously and there is no change to the destination jurisdiction, type of

data transferred, or duration of storage. In terms of technology export reviews, a *Letter of Intent for Granting Technology Export License* remains valid for three years and the parties need to apply for a new export license if a change occurs to the main content of the technology transfer contract.

The comparison of these two systems is as follows:

Items	Data Cross-border Security Assessments	Personal Information Cross-border Security Assessments	Technology Exports
Governing laws and regulations	*Measures for Security Assessment of Cross-border Transfer of Personal Information and Important Data (Draft for Comment, 2017).*	*Measures for Security Assessment of Cross-border Transfer of Personal Information (Draft for Comment, 2019).*	*Regulations of the People's Republic of China on Administration of Technology Import and Export (2019).* *Measures for Administration of Technologies Prohibited and Restricted from Export (2009).*
Definition of cross-border transfer /export	According to *Information Security Technology - Guidelines for Data Cross-border Transfer Security Assessment (Draft for Comment)*: cross-border data transfers refer to the activities of providing data to foreign institutions and entities within China but which are not under the legal jurisdiction of China or are not registered in the country; data which has not been transferred to a location outside of the country, but is accessed by overseas organizations, institutions, or individuals (except for public information and website access); the internal data of a network operator group is transferred from China to the outside which involve data generated during domestic operations.		Transfers of technology from within China to abroad through manners including trade, investment, or economic and technical cooperation.
Regulatory authority	Cyberspace administration, industry administration, or regulatory department.	Provincial cyberspace administration.	Commerce department, science and technology department.
Governing objects	Personal information and important data.	Personal information.	Export-restricted technology.
Process launch time	Self-assessment: cross-border data transfers that meet specific conditions must be filed with the competent industry or supervisory department.	Apply to the regulatory authority for assessment after the execution of a contract; file a report on the personal information export with the regulatory authority at the end of each year.	Apply for a technology export license with the provincial-level commercial department first; then sign a technology export contract after obtaining the *Letter of Intent for Granting Technology Export License*; then apply for a technology export license with the commerce department.
Focus of review	■ Consent of personal information subjects and the impact on the personal rights and interests of those subjects.	■ National laws, regulations, and policies. ■ Impact on the legal rights and interests of	■ Chinese foreign trade policy, industrial export policy, and Chinese foreign commitments.

Items	Data Cross-border Security Assessments	Personal Information Cross-border Security Assessments	Technology Exports
	■ Impact on National security and social public interest.	the personal information subjects. ■ Whether the contract can be effectively executed. ■ The operating status of the network operator or information receiver.	■ National security, science and technology development policy, industrial technology policy, etc.
Time for the review process	60 business days.	15 business days, may be extended depending upon the specific circumstances.	30 business days is required for issuance of the *Letter of Intent for Granting Technology Export License*, 15 business days for issuance of Technology Export License.
Validity of assessments	Carry out security assessments at least once a year; security assessments should be re-conducted timely if the data receiver changes, or any aspects of the data cross-border transfer undergoes substantial change.	No need to repeat security assessments if personal information is transferred to the same receiver multiple times or continuously; assessments shall be conducted every two years or re-conducted in any aspects of the data cross-border transfer undergoes any substantial changes.	The *Letter of Intent for Granting Technology Export License* shall stay valid for three years. Parties need to re-apply for a technology export license if the main contents of the technology transfer contract changes.

In practice, there may exist many overlapping areas between the data cross-border transfer and technology export control systems.

For example, several technologies restricted from export newly added to the Catalogue are essential for data transmission, encryption and applications, including “item 21: personalized information push service technology based on data analysis”, “item 48: system and data rapid recovery technology”, and “item 51: database system security enhancement technology.” Some companies may provide original data to the foreign parties when exporting technical capabilities to such foreign parties. In such cases, the data cross-border transfer would be subject to review under both systems, if the original data provided involves citizens’ personal information (such as biometric information) or important data (such as data related to state secrets).

From the above table, we can see the there are many differences between the two systems in terms of procedural timing, the time required for review, and the validity of assessment results. We recommend enterprises plan and make preparations correspondingly, and to adjust their processes depending upon how regulators may connect these two systems in the future.

2. Suspended Sword of Damocles: Provisions on the Unreliable Entity List Promulgated

Authors: Kevin DUAN | Xuezhen LU | Yadong LIU | Minzhe HU

On September 19, 2020, with the approval of the State Council, the Ministry of Commerce ("**MOFCOM**") promulgated the *Provisions on the Unreliable Entity List* (the "**Provisions**"), which came into effect on the date of promulgation. More than a year after MOFCOM's announcing at the end of May last year that China would establish an Unreliable Entity List ("**UEL**") system, the final Provisions have refined the system and made some adjustments in terms of specific content, reflecting the supervision department's thinking on the legislative purpose, the actual operation details, and the connection with other departmental laws. Together with the recently revised technology import and export management system as well as the current drafts of the *Export Control Law* and *Data Security Law*, the Provisions also reflect the urgency with which China is improving the relevant legislation due to geopolitical changes, and provide an effective means for ensuring China's national sovereignty, public interests, and the legal rights and interests of companies in the context of a complex international environment.

It should be noted that the Provisions continue China's consistent policy consideration of maintaining fair and reasonable international economic and trade rules, and do not impose differential treatment based on country status, nor do they contain preset timetables or issue specific lists simultaneously. Unlike the countermeasures of "an eye for an eye, a tooth for a tooth", the Provisions, together with other related systems mentioned above, provide institutional guarantees for China to adhere to multilateralism and to broadly open up.

In terms of specific contents, compared with previous MOFCOM interpretations, the Provisions highlight the protection of "national interests" and "interests of Chinese enterprises, other organizations or individuals". Whether or not the above interests are damaged and the extent of damage will be taken as the key basis for judging whether the relevant foreign entities should be included in the UEL. The Provisions also add and refine the requirements for delisting relevant entities when appropriate conditions are met. In terms of procedures, the Provisions focus on the protection of legitimacy, increased transparency, and granting foreign entities procedural statement and defense rights during investigations.

The Provisions continue China's consistent policy consideration of maintaining fair and reasonable international economic and trade rules and do not implement differential treatment based on "country", nor do they have a preset timetable or issue the specific lists simultaneously

Article 3 Provisions stipulates that "*The Chinese Government pursues an independent foreign policy, adheres to the basic principles of international relations, including mutual respect for sovereignty, non-interference in each other's internal affairs, and equality and mutual benefit, opposes unilateralism and protectionism, resolutely safeguards the core national interests, safeguards the multilateral trading system, and promotes an open world economy*". This article indicates that the main goal and functional orientation of establishing the system are to safeguard national core interests, safeguard international economic and

trade rules, and promote the construction of an open world economy.

As MOFCOM explained shortly after the UEL was announced, China's establishment of the UEL mainly aims to achieve the following goals: firstly, to safeguard China's national security, including economic security, science and technology security, information security, resource security, etc.; secondly, to protect the social and public interests, safeguard the legitimate rights and interests of enterprises, and prevent Chinese entities from suffering risks such as supply interruptions and blockade in international economic and trade activities; and thirdly, to maintain fair and reasonable international economic and trade rules and the multilateral trade system based on rules, and to maintain the security and stability of global industrial chains[3].

It is worth stressing that the Provisions do not follow the similar system in the United States or classify countries into different risk levels. From the institutional level, China's UEL system will not implement differential treatment for enterprises in different countries. Previous press conferences held by MOFCOM also make it clear that the ultimate purpose of establishing the system is to maintain the order of fair and competitive markets and not to target the enterprises, organizations or individuals of any country[4].

On September 20, 2020, the head of the Treaty and Law Department of MOFCOM also further emphasized when answering reporters' questions about the Provisions[5]: "*First, the Chinese government's position of firmly safeguarding multilateralism will not change... Second, the Chinese government's position of further deepening reform and opening wider to the outside world will not change... Third, the Chinese government's position of resolutely protecting the legal rights and interests of various market players will not change. The Provisions only target a very small number of foreign entities that violate market rules and Chinese laws. Foreign entities that are honest and law-abiding need not be concerned.*"

In addition, the head of the Treaty and Law Department of MOFCOM also stated that the list does not have a preset timetable or a company list. If a foreign entity commits an illegal act listed in the Provisions, the working mechanism will strictly follow the Provisions, comprehensively consider various factors, and seriously and prudently decide whether to include the entity into the UEL and whether to take corresponding measures.

In terms of content, the Provisions highlight the protection of "national interests" and "interests of Chinese enterprises, other organizations or individuals". The identification standard emphasizes objective factors and weakens subjective factors

As for concerns regarding which entities may be included in the UEL, Article 2 the Provisions divides the targeted acts into two categories: firstly, acts which endanger national sovereignty, security or development interests of China; secondly, acts of suspending normal transactions with an enterprise, other organization,

[3] Why introduce the system of Unreliable Entities List? Here is the interpretation of MOFCOM. http://coi.mofcom.gov.cn/article/y/gnxw/201906/20190602869699.shtml.

[4] MOFCOM held a press conference on September 26,2019 http://nz.mofcom.gov.cn/article/jmxw/201910/20191002902948.shtml.

[5] Head of the Treaty and Law Department of MOFCOM answered the reporters' questions about the Provisions on the Unreliable Entity List http://www.mofcom.gov.cn/article/news/202009/20200903002631.shtml.

or individual of China or applying discriminatory measures against an enterprise, other organization, or individual of China, which violate normal market transaction principles and cause serious damage to the legitimate rights and interests of the enterprise, other organization, or individual of China. This Article also provides that any foreign enterprise, other organization, or individual may be included in the UEL if they carry out the above-mentioned acts.

On this basis, Article 7 the Provisions further puts forward the result requirements. When the relevant departments judge whether to include a foreign entity in the UEL, the factors to be considered will include to what degree the national sovereignty, security or development interests of China are endangered; to what degree the legitimate rights and interests of enterprises, other organizations, or individuals of China are damaged; and whether the acts comply with internationally accepted economic and trade rules. In terms of specific application, the head of the Treaty and Law Department of the MOFCOM also said when answering reporters' questions that the scope of application of the Provisions is strictly limited—only for a very small number of foreign entities in violation—and that this scope will not be expanded arbitrarily.

In fact, MOFCOM also responded to this issue last year, explaining that factors to be considered for listing decisions should include: firstly, whether the entity has implemented a block, supply interruption or other discriminatory acts against Chinese entities; secondly, whether entity's behavior is based on non-commercial purposes and violates the rules and contracts of the market economy; thirdly, whether the entity has caused serious damage to Chinese enterprises and related industries; and finally, whether the behavior of the entity poses a threat or potential threat to national security[6].

Compared with the explanations, the final Provisions provide "the national sovereignty, security and development interests" as a separate paragraph, which emphasizes and declares China's determination to safeguard its national interests. This point is also echoed in the purpose of systems regarding national security and data sovereignty, such as those under the *Data Security Law (Draft)*, *Global Data Security Initiative*.

At the same time, the Provisions no longer emphasize "non-commercial purpose" activities, but mainly focus on acts that "violate market transaction principles", downplaying political goals and reflecting the institutional starting point of "maintaining international economic and trade rules." In addition, deleting subjective elements such as "non-commercial purposes" and emphasizing objective factors such as actual influence will help increase predictability in implementing the system.

In terms of procedures, the Provisions focus on the protection of legitimacy, increased transparency, and granting foreign entities procedural statement and defense rights during investigations

In addition to the substantive clauses, the Provisions also stipulate procedures. Article 4 specifies that China will establish a working mechanism to take charge of organizing and implementing the UEL system. The office of the working mechanism is located within the competent department of commerce of the State

[6] Why introduce the system of Unreliable Entities List? Here is the interpretation of MOFCOM. http://coi.mofcom.gov.cn/article/y/gnxw/201906/20190602869699.shtml.

Council and will also be composed of relevant departments[7].

Specifically, including a foreign entity in the UEL will generally require investigatory activities under the working mechanism. However, Article 8 also stipulates that where the facts about the actions taken by a foreign entity are clear, the working mechanism may directly make a decision on whether to include the foreign entity in the UEL and make an announcement. The main provisions for these investigatory activities are summarized as follows:

1. **Initiation Conditions:** Article 5 stipulates that the working mechanism can determine whether to investigate the behavior of the foreign entity *ex officio* or based on suggestions and reports from the relevant parties.

2. **Investigation Method:** Article 6 stipulates that the working mechanism may question relevant parties, search or copy relevant documents and materials, or investigate by other necessary means.

3. **Entity Rights:** Article 6 also grants the entity under investigation with corresponding procedural statement and defense rights.

4. **Consequences of an Investigation:** Article 6 stipulates that, according to the results of the investigation and by taking into consideration the listing factories, the working mechanism will make a determination on whether to include the entity in the UEL and make a public announcement.

In view of this, we believe that foreign entities should guard against malicious complaints from competitors in their daily business activities. Once they are investigated, foreign entities should actively cooperate with the investigation and fully exercise their statement and defense rights.

Import, export, investment and other activities of UEL-listed foreign entities will be subject to greater restrictions or prohibitions, but the Provisions also set out procedures and conditions for removing foreign entities from the list

The legal consequences of being listed have attracted much attention from outsiders. Article 9 and Article 10 of the Provisions provide for two types of legal consequences.

According to Article 9 of the Provisions, the working mechanism will issue an alert about the risks of conducting transactions with the listed foreign entity and may also specify a time limit for the listed foreign entity to rectify its actions. Combined with Article 11 of the Provisions, the measures in Article 10 will not be implemented during this time limit.

According to Article 10 of the Provisions, the working mechanism may, based on actual circumstances, decide to take one or several of the following measures with respect to a listed foreign entity:

1. restricting or prohibiting the foreign entity from engaging in China-related import or export activities;

[7] According to the provisions of Article 6 of the *Regulations of the People's Republic of China on the Administration of Technology Import and Export*, the State Council and provincial authorities in charge of foreign economic relations and trade (i.e. the current competent department of commerce) are also responsible for the supervision of technology import and export.

2. restricting or prohibiting the foreign entity from investing in China;
3. restricting or prohibiting the foreign entity's relevant personnel or means of transportation from entering into China;
4. restricting or revoking the relevant personnel's work permit, status of stay or residence in China;
5. imposing a fine of the corresponding amount according to the severity of the circumstances; and
6. other necessary measures.

According to Article 1 of the Provisions and the relevant explanations of a MOFCOM spokesperson, the Provisions are mainly formulated in accordance with the *Foreign Trade Law* and the *National Security Law*. Compared with the legislative basis put forward during MOFCOM's press conference last year, Article 1 the Provisions does not explicitly list the *Anti-Monopoly Law*. This may be due to the complexity and uncertainty of the determination of market dominance and justification for the application of the *Anti-Monopoly Law*. If an interruption of transactions or discriminatory behavior by foreign entities constitutes abuse of market dominance as stipulated in the *Anti-Monopoly Law*, it would be investigated and punished by the anti-monopoly law enforcement agency.

Chinese companies need to pay attention to Article 12 of the Provisions which stipulates that, in principle, Chinese companies, other organizations or individuals should not conduct transactions with foreign entities that are restricted or prohibited from engaging in China-related import or export activities, and Chinese companies should submit an application to the working mechanism and obtain prior permission under special circumstances if it is indeed necessary to conduct transactions with the foreign entity. However, the Provisions do not provide legal consequences for Chinese entities that engage in transactions with listed foreign entities in violation of the Provisions. According to Article 37 of the *Export Control Law (Second Review Draft)*, once an export operator violates the provisions and engages in transactions with importers and end users included in the control list, the entity may be warned, ordered to stop illegal activities, have its illegal gains confiscated, and be fined up to 20 times the illegal operating amount. In serious circumstances, the entity will also be ordered to suspend business for rectification or even face revocation of its export business qualifications. Once the *Export Control Law* is officially promulgated and implemented, it may provide a corresponding legal basis for export controls under the UEL system.

Finally, it is worth noting that Article 13 of the Provisions also specifies a delisting mechanism. The working mechanism will enter a decision to delist a foreign entity from the UEL where the entity rectifies its actions with the time limit specified and takes measures to eliminate the consequences of its actions, in accordance with Article 13.1. In addition, a foreign entity may also apply for its removal from the UEL in accordance with Article 13.2 of the Provisions. In such case, the working mechanism will decide whether to delist it based on "actual circumstances".

Compared with the United States, China's UEL system awaits further improvement and implementing rules

In the current international environment, China's UEL system is often compared with similar systems in Europe and the United States. Take the United States for example, the "Entity List" concept was proposed

as early as 1990, and at that time was only to control the export of items that could be used to make nuclear weapons. In February 1997, the U.S. Department of Commerce issued the "Entity List" for the first time. After decades of practice, the U.S. "Entity List" system has relatively complete review standards and supporting measures and has gradually become an important means for the United States to safeguard its national security interests.

The U.S. export control system comprises a total of eight "lists" established for different situations, the Entity List being one of them. The Entity List is managed and executed by the Bureau of Industry and Security ("**BIS**") of the U.S. Department of Commerce. The U.S. government may include in the Entity List any individual or company it deems to have participated or suspects of participating in activities that violate U.S. national security or endanger the interests of U.S. foreign policy. The End-user Review Committee ("**ERC**") determines whether to include an entity in the Entity List. The ERC will implement licensing requirements for all dual-use items governed by the *Export Administration Regulations* ("**EAR**") on the basis of considering the country of the listed entity and will update and modify the Entity List from time to time.

Compared with the U.S. Entity List system, China's UEL system started relatively late and currently only has higher-level regulations. The supporting measures have not yet been introduced and the implementation of specific systems will require cooperation among legislative, administrative, and law enforcement departments.

Items	China	United States
Legal basis	The legal basis is relatively high, mainly include *Foreign Trade Law*, *National Security Law* and other relevant laws.	*Export Administration Regulations (EAR)*
Competent department	Working mechanism office	Bureau of Industry and Security (BIS)
Grounds for being listed	Any foreign entity may be included in the list if it performs the following actions: (1) endangers national sovereignty, security or development interests of China; (2) suspends normal transactions with an enterprise, other organization, or individual of China or applies discriminatory measures against an enterprise, other organization, or individual of China which violates normal market transaction principles and cause serious damage to the legitimate rights and interests of the enterprise, other organization, or individual of China.	Foreign individuals and entities that violated, are violating or **may** violate U.S. national security or foreign policy interests, or impede BIS or other law enforcement investigations may be included in the Entity List.

Items	China	United States
Consequences of being listed	Entities included in the list will be restricted from engaging in China-related import or export activities or investment activities in China; they will also be restricted from entering or staying in China, and will be fined according to the severity of the circumstances.	Listed entities face more stringent restrictions on access to EAR-controlled items. Export, re-export and domestic transfer of EAR-controlled items to controlled entities require an application for a license from BIS. Most of the licensing review policies are based on a **"presumption of denial"**, and in a few cases, they will be decided on a case by case basis, and most of the licensing exemptions in the EAR cannot be applied to entities listed in the Entity List.
Delisting after being listed	After being included in the Entity List, the working mechanism may, based on actual circumstances, decide to remove the foreign entity from the UEL. Where the relevant foreign entity rectifies its actions within the time limit specified in the announcement and takes measures to eliminate the consequences of its actions, the working mechanism shall make a decision to remove it from the UEL.	After being included in the Entity List, a written appeal can be filed with ERC to request its modification or removal from the entity list, but it is usually very difficult.

Summary

Overall, the purpose of issuing the UEL is not to impose sanctions or restrictions, but to safeguard international economic and trade rules and China's national interests. It also aims to protect entities which strictly abide by the market rules and the spirit of contracts. Same with the export control, data security and exit systems, the UEL is not a countermeasure against a specific country or a specific subject, but aims to improve China's foreign economic and trade system from the legislative level, as well as to provide safeguards in a complex international environment for the maintenance of the international economic and trade order and the market competition environment.

In terms of subsequent implementation, the standards of the Provisions still need to be refined and clarified, including connecting with other departmental laws, related regulations and systems. As for foreign entities directly affected, of greater concern is how to address conflicting laws and regulations among countries in the context of international trade, and the resolution of such conflicts plainly requires the wisdom and flexibility of lawmakers, related administrative bodies, relevant entities, etc. We will continue to monitor for further developments regarding the UEL and international trade matters.

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

Beijing	**Wenyu JIN**	**Attorney-at-law**
	Tel:	+86 10 8525 5557
	Email:	wenyu.jin@hankunlaw.com
Shanghai	**Yinshi CAO**	**Attorney-at-law**
	Tel:	+86 21 6080 0980
	Email:	yinshi.cao@hankunlaw.com
Shenzhen	**Jason WANG**	**Attorney-at-law**
	Tel:	+86 755 3680 6518
	Email:	jason.wang@hankunlaw.com
Hong Kong	**Dafei CHEN**	**Attorney-at-law**
	Tel:	+852 2820 5616
	Email:	dafei.chen@hankunlaw.com