

# **SIEPS**

**INDUSTRY TRADE ASSOCIATION for  
STRATEGIC PRODUCTS**



**Les ATELIERS du SIEPS**  
**18 novembre 2021**

**CHINA EXPORT CONTROL LAW**  
**IMPACT ON IMPORT EXPORT COMPANIES**

# 1 - INTRO

---

- Last few years China went on a major legislative revamp
- Export Control Law (ECL) of the People's Republic of China (PRC) came into force on 1 December 2020
- We provide an update of the ECL, incorporating lessons learned from various real cases in order to better understand and comply with the law

# 2 - Key principles

---

## A - FRAMEWORK

- first comprehensive and consolidated export control law
- dual-use items, military products, nuclear products, and other goods, technologies, services
- protecting national security and interests and fulfilling international obligations relating to non-proliferation
- export outside of the China territory, as well as the provision of Controlled Items by a PRC citizen, legal person or unincorporated organization to any foreign organization or individual

# 2 - Key principles

---

## **B – Authority in charge**

- State Council and the Central Military Commission
- State Export Control Administrative Departments” (SECADs) shall be responsible for tasks relating to export control
- Ministry of Commerce (MOFCOM), administration of the ECL
- National Export Control Authorities (NECA), publish relevant control list
- State Administration of Science, Technology and Industry for National Defence (SASTIND), for military applications
- State Cryptography Administration (SCA)
- General Customs Administration (GAC)

# 2 - Key principles

---

## C – Controlled Goods and Technology

- Dual Use Control List effective from 1 January 2021
- Yearly update
- amongst others, nuclear products; non-nuclear materials used for nuclear materials, nuclear equipment and reactors; radioisotopes and radiation devices
- missiles; biological products; controlled chemicals; precursor chemicals; specific civilian items as well as related equipment and technologies.
- Encryption items and related technologies

# 2 - Key principles

## **D – Chinese Control List vs WASSENAAR Control List**

- Some similarities but
- Based on PRC tariff codes accompanied by certain technical description or parameters
- Export Control Classification Number (ECCN) not more applicable in China
- no military items or technology have been incorporated into the ECL framework as they remain regulated under separated regulation
- Possible alignment with international standards in the future

# 2 - Key principles

---

## **E – Import/Export Technology subject to licensing requirements**

- artificial intelligence interactive interface technologies,
- speech synthesis and evaluation technologies,
- scanning and photo recognition technologies,
- cryptographic security technologies,
- information countermeasure and defense technologies,
- laser technologies and space and aerospace-related technologies
- and others



# 2 - Key principles

---

## F – Catch All and Temporary Controls

- Temporary controls on unlisted items can be implemented for two years
- Catch all provisions are implemented if an exporter knows or should know, or is notified by the authorities that there is a risk of the relevant goods, technologies and services:
  - endangering national security and interests;
  - being used to design, develop, produce or use weapons of mass destruction and their delivery vehicles
  - being used for terrorist

# 3 – Export Licensing

---

## A – Licensing Regime

Licensing authorities will consider the following factors when deciding whether to grant a license:

- national security and interests;
- international obligations and commitments to foreign parties;
- type of exports;
- sensitivity of Controlled Items;
- destination country or region;
- end-users and end-uses;
- export operator's relevant credit records; and
- other factors stipulated by laws and regulations.

# 3 – Export Licensing

---

## B – Export control compliance program

MOFCOM announcement No. 10 of 2021 on "Internal Compliance Guidelines on the Export of Dual-Use Items" ("**Guidelines**") elaborates on nine key elements that establish an effective internal compliance program with respect to dual-use goods and technology: The elements are:

- (i) enactment of a policy statement;
- (ii) establishment of an organizational structure;
- (iii) comprehensive risk assessment;
- (iv) establishment of review procedures;
- (v) formulation of emergency measures;
- (vi) training and education;
- (vii) compliance audits;
- (viii) recordkeeping
- (ix) management manual preparation.

# 3 – Export Licensing

---

- In addition, practical tips on how each of the key elements can be incorporated into an export operator's compliance processes and sets out template commitment statements and sample red flag considerations.
- Guidelines has no force of law but promises certain licensing facilitation for exporters that establish and maintain sound and well-implemented internal compliance programs.

# 4 – End User/Use Controls

---

## **A - End-user and end-use certificate**

ECL further strengthens controls over end-users and the end-use of Controlled Items

- Exporter must submit end-user and end-use certificates,
- End-user must make the commitment that without permission from the Chinese authorities, it will not alter the end-use of the Controlled Item or transfer it to a third party.
- Exporters that learn of changes in the end-user or the end-use must promptly notify the authorities

# 4 – End User/Use Controls

---

## **B - Importer and end-user blacklisting**

ECL also provides for the establishment of a control list for importers and end-users who:

- breach their end-user and end-use control requirements
- may do harm to national security and interests
- use the Controlled Items for terrorism purposes
- Importers and end-users listed on the control list may be subjected to certain export prohibitions or restrictions.

## 5 – Sanctions against countries, entities or persons

### **A - Export prohibitions**

- Export prohibitions may also be imposed in respect of specific countries, regions, organizations or individuals.

### **B - Reciprocal measures.**

- ECL also provides the Chinese government with the power to take reciprocal measures against any country or region that abuses export control measures to endanger the national security and interests of the PRC.

## 5 – Sanctions against countries, entities or persons

- Chinese government has published the Unreliable Entity List Regulations (UEL Regulations), which took effect on 19 September 2020. The UEL applies separately and is entirely independent from the ECL.
- respond to certain trade policies taken by foreign countries that may adversely impact China, particularly policies that result from the US-China trade conflict
- Chinese government may impose restrictions on foreign enterprises, organizations or individuals that engage in certain activities that endanger China's national sovereignty, security or development, or that cause serious damage to the legitimate rights and interests of Chinese enterprises, organizations and individuals.
- Such activities may include the application of discriminatory measures or the suspension of normal business transactions by disregarding market-based trading principles.
- Entities on the UEL may be subject to a variety of restrictions (import and export, investment, travel, etc.) and may be liable for fines and penalties. No entity has been listed on the UEL yet.



# 6 – Deemed export, re-export, extraterritorial

## **A - Deemed export.**

ECL not only applies to the cross-border transfer of Controlled Items from China, but also to foreign entities and individuals either within or outside of China.

Guidelines issued by the MOFCOM (not legally binding) cover circumstances where:

- a company engages foreign employees in the research and development of controlled technologies
- a company publishes information regarding controlled technologies in an open trade fair (provided as examples of a possible "deemed export")

# 6 – Deemed export, re-export, extraterritorial

## **B - Re-export**

- The definition of "re-export" (i.e., the export of items containing a *de minimis* amount of PRC-controlled content from one foreign country to another foreign country), which was initially included in the first draft of the ECL, was removed from the final version of the law
- References to "re-export" are still included within the context of Article 45, where the ECL applies in respect of transshipment and transit activities, as well as the transfer of goods from customs-supervised zones in China to a place overseas.

## 6 – Deemed export, re-export, extraterritorial

### **C - Extra-territorial application.**

- Article 44 further provides that organizations and individuals outside of the territory of China that violate the ECL may be held legally liable.

# 7 – Encryption regime

---

## A - New Encryption Law vs Encryption Regulation

- Commercial Encryption Regulations were issued in 1999,
- Encryption Law (EL), issued 1 January 2020, its first national law (as opposed to regulations) to systematically regulate three categories of encryption:
  - core encryption, used to secure state secrets
  - ordinary encryption, used to secure state secrets
  - commercial encryption, deal with information that are not state secrets

# 7 – Encryption regime

---

Change of tone in respect of China's commercial encryption which introduces

- a non-discrimination principle in the application of the EL, including in respect of foreign invested enterprises that engage in the scientific research, production, sale, service, import and export of commercial encryption
- provides a list of encryption items subject to import and export control to be published.
- a general licensing exemption for commercial encryptions used in mass consumption products is also incorporated into the EL, but lack of clarity or guidance on how and when this exemption may apply.
- On 8 August 2020, SCA released a revised draft of the Commercial Encryption Regulations for public consultation, with the period for public consultation ending on 19 September 2020, but no further announcements have been made to date

# 7 – Encryption regime

---

## **B - New encryption list**

Pursuant to the EL, MOFCOM, SCA and GAC jointly issued

- Announcement 2020 No. 63/2020 implemented from 1 January 2021, sets out new catalogues of encryption products that are subject to import and export controls repealing the previous Announcement No. 18/2009.
- the control list for import only contains four tangible items, which in effect means that no intangible encryption technology is subject to import controls.
- In contrast, the control list for exports is notably more comprehensive and covers both tangible and intangible items.
- items set out in the export control list bear descriptions that are now generally more aligned with the international standards for encryption control.

# 7 – Encryption regime

---

## C - Licensing under ECL / dual-use regime

- The catalogue of encryption products set out in Announcement No. 63/2020 has been incorporated in its entirety into the DUI List.
- This means that encryption products subject to import or export licensing requirements are caught under both the Encryption Law and Export Control Law.
- In practice, only one dual-use license under the ECL would be required.
- Consistent with the DUI List, encryption items and technologies are also identified based on tariff codes and technical descriptions.

# 8 – Key challenges and risks

---

Given the recent implementation of the ECL there exist areas:

- where the practical implementation of the ECL is slowly catching up with legislative changes
- where additional guidance on the interpretation of requirements is much needed.

To better identify and navigate risks arising from export control law developments, here under some common identified pitfalls and challenges industry faces:



# 8 – Key challenges and risks

- in implementing reliable product screening processes and accurately determining the control status of items and technologies, especially given that the ECCN classification adopted in other jurisdictions cannot readily be applied in China
- in relying fully on the tariff classification and control status determination made by manufacturers or freight forwarders, noting that the responsibility to obtain an export license generally lies with the exporter of record
- in bridging legal interpretation and practical administration/enforcement, particularly where an item is caught by a tariff code of a Controlled Item but does not fall within the technical parameters of the same, noting that GAC, the key enforcement agency for import and export control, is primarily guided by the tariff classification of exported goods
- end-use and end-user-related non-compliance due to a lack of appreciation of the increased controls under the ECL and the dual-use regime
- potential transfers of technologies without proper assessment of restrictions under the ECL and Technologies Regulations
- potential risks of "deemed exports" occurring without an appropriate license where business engages foreign employees to work with Controlled Items, coupled with the uncertainty around licensing requirements and process for "deemed exports"



# CONCLUSION

---

- Companies doing business in and with China are encouraged to carry out a global evaluation of the implications of the new ECL on their operations in order to manage their risks
- As the implementation of the ECL progresses, more guidance, including in the form of implementing regulations, are expected to be published in the near future
- As such, companies should pay attention on the latest developments in this area to ensure timely responses in the increasingly sophisticated compliance environment in China.

# CONTACT

---

contact: [sieps@sieps-france.fr](mailto:sieps@sieps-france.fr)

tel: 06 03 68 54 20

