

CHINA ISSUES “BLOCKING STATUTE”

On 9 January 2021, the PRC Ministry of Commerce (MofCom) issued its new “blocking statute”, known as the Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures (**Rules**), which came into effect on the same date.

The Rules, together with the Provisions on the Unreliable Entity List (**UEL Provisions**) promulgated by MofCom on 19 September 2020, expand the Chinese government’s arsenal to counteract foreign laws and measures with long-arm jurisdiction.

WHAT TYPES OF FOREIGN LAWS AND MEASURES ARE TARGETED BY THE RULES?

Article 2 of the Rules provides that they “apply to situations where the extra- territorial application of foreign legislation and other measures, in violation of international law and the basic principles of international relations, unjustifiably prohibits or restricts the citizens, legal persons or other organisations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organisations.”

Foreign legislation or measures as provided for in treaties and international agreements to which China is a party are not covered.

Based on the text and background to the Rules, they appear to primarily target secondary sanctions. However, the language is sufficiently broad to also cover primary sanctions, export control and other prohibitive and restrictive measures. The reference to “a third State (or region)” seems to suggest that the Rules, as currently drafted, are not intended to deal with foreign sanctions that may restrict one Chinese party from transacting with another Chinese party.

WHO ARE BOUND BY THE RULES?

Whilst the Rules do not clearly address this issue, one reasonable inference is that the Rules are binding on “citizens, legal persons and other organisations of China” (collectively **Chinese Parties**). On that basis, China-incorporated subsidiaries of foreign companies are legal persons of China and bound by the Rules. Chinese branches of foreign entities (for example, banks) might also be captured, but this is less clear.

In contrast, the UEL Provisions target foreign entities and individuals.

DO THE RULES IMPOSE A REPORTING OBLIGATION?

The Rules impose a reporting obligation on Chinese Parties, which as discussed above include China-incorporated subsidiaries of foreign companies. If a Chinese Party is

Key points

- China issued a blocking statute effective on its date of issue, 9 January 2021, which appears to be modelled upon the EU blocking statute.
- There is a reporting obligation on the part of Chinese parties (including Chinese subsidiaries of foreign companies), which shall report to MofCom any prohibition or restriction from engaging in normal economic and trade activities with a third State or its citizens or entities.
- The foreign laws or measures that will be blocked remain to be designated by way of the issue of prohibition orders.
- Chinese Parties may commence actions in the PRC Courts including for compensation if their rights are infringed by another’s compliance with a blocked foreign law or measure or if they suffer loss from a judgment or ruling based on the blocked law or measure.

prohibited or restricted from engaging in normal economic, trade and other activities with a third State (or region) or its citizens, legal persons or other organisations by any foreign law or measure, it shall report to MofCom within 30 days. The reports may be made confidentially upon request. Failure to so report may subject the Chinese Parties concerned to administrative penalties.

WHICH FOREIGN LAWS AND MEASURES WILL BE BLOCKED BY THE RULES?

The Rules themselves do not designate any specific foreign law or measure that will be blocked. Instead, they set out the working mechanism for such designation. MofCom will, in consultation with other relevant government agencies, issue prohibition orders not to recognise, enforce or comply with specific foreign laws and measures. Only after the issue of a prohibition order will compliance with the corresponding foreign laws or measures be deemed a violation of the Rules.

The Rules also allow Chinese Parties to apply for exemptions from compliance with such prohibition orders.

WHAT ARE THE CONSEQUENCES OF VIOLATING THE PROHIBITION ORDERS?

The Rules provide for two avenues to pursue liability on the part of those who violate prohibition orders: civil litigation and administrative penalties.

Article 9 addresses civil litigation. If a Chinese Party's right is infringed due to another party's compliance with a blocked foreign law or measure, the former may commence an action in the PRC Courts. Furthermore, if a Chinese Party suffers losses from a judgment or ruling based on a blocked foreign law or measure, it may also initiate proceedings before the PRC Courts to seek compensation from the party benefiting from such judgment or ruling. The Rules do not provide for how these provisions will interact with any dispute resolution clause in any relevant contract between the parties.

Article 13 provides for administrative penalties for violating a prohibition order, including warnings, orders for rectification, and fines of unspecified amounts.

WHAT OTHER REMEDIES ARE PROVIDED UNDER THE RULES?

According to the Rules, relevant government agencies will provide guidance and services to help Chinese Parties dealing with foreign laws and measures with long-arm jurisdiction. In particular, the Rules provide that if Chinese Parties suffer significant losses due to compliance with a prohibition order and failure to observe the corresponding blocked foreign law or measure, the Chinese government may provide necessary support on a case-by-case basis.

CONCLUSION

The Rules and the UEL Provisions are the Chinese government's policy tools to protect China's national security and interests. This is not unique to China; similar rules have been adopted by other jurisdictions, including the EU blocking statute, upon which the Rules appear to be modelled. Considering that the Rules are new and generic in nature, it is expected that there will be further clarification and guidance; both Chinese entities and foreign entities doing business in China should pay close attention and be prepared to adjust their compliance practices accordingly.

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