



# China New Export Control Law: Key Changes and Challenges

The long-awaited Export Control Law<sup>1</sup>, was passed by the Standing Committee of the National People's Congress of China, and will take effect on 1 December 2020. It entails a number of substantial changes to China's current export control regime, while it is ambiguous as to the specific coverage and implementation of certain clauses. Exporters in China as well as foreign importers and customers will need to navigate the challenges of adapting to certain ambiguous regulatory changes.

## China's current export control regime revisited

The current export control regime of China originated from the Foreign Trade Law, and has been developed for years through implementation of a series of administrative regulations and rules as summarised below:

Controlled items	Laws and regulations	Control lists	Regulators
General goods prohibited or restricted from export	– Regulation on the Administration of the Import and Export of Goods	– Catalogue of Goods Subject to Export Licence Administration – Catalogue of Goods Prohibited from Export	MOFCOM <sup>2</sup> NDRC <sup>3</sup> CGAC <sup>4</sup>
General technology prohibited or restricted from export	– Measures for the Administration of Technologies Prohibited and Restricted from Export	– Catalogue of Technologies Prohibited and Restricted from Export	MOFCOM MOST <sup>5</sup>
Military items	– Regulations on Export Control of Military Items	– Catalogue of Military Items Export Control	SASTIND <sup>6</sup> EDDCMC <sup>7</sup>

<sup>1</sup> The Export Control Law was on the legislative agenda with the initial draft released in 2017 and a second draft released in 2019. On 17 October 2020, the Standing Committee of the National People's Congress of China passed the Export Control Law.

<sup>2</sup> Ministry of Commerce

<sup>3</sup> National Development and Reform Commission

<sup>4</sup> General Administration of Customs

<sup>5</sup> Ministry of Science and Technology

<sup>6</sup> State Administration of Science, Technology and Industry for National Defence

<sup>7</sup> Equipment Development Department of Central Military Commission

Controlled items	Laws and regulations	Control lists	Regulators
Nuclear items and technologies	<ul style="list-style-type: none"> <li>– Regulations on Control of Nuclear Export</li> <li>– Dual-use Import and Export Administration Measures<sup>8</sup></li> </ul>	<ul style="list-style-type: none"> <li>– Nuclear Export Control List</li> <li>– Dual-Use Im-Export Catalogue<sup>9</sup> – Section II(1)</li> </ul>	CAEA <sup>10</sup> MOFCOM CGAC
Nuclear dual-use items and technologies	<ul style="list-style-type: none"> <li>– Regulations on Control of Nuclear Dual-use Items and Related Technologies Export</li> <li>– Dual-use Import and Export Administration Measures</li> </ul>	<ul style="list-style-type: none"> <li>– Export Control List of Nuclear-Related Dual-Use Items and Related Technologies</li> <li>– Dual-Use Im-Export Catalogue – Section II(2)</li> </ul>	MOFCOM CAEA CGAC
Guided missiles and related items and technologies	<ul style="list-style-type: none"> <li>– Regulation on Controlling the Export of Guided Missiles and Related Items and Technologies</li> <li>– Dual-use Import and Export Administration Measures</li> </ul>	<ul style="list-style-type: none"> <li>– List of Guided Missiles and Related Items and Technologies Subject to Import and Export Control</li> <li>– Dual-Use Im-Export Catalogue – Section II(6)</li> </ul>	MOFCOM CGAC
Dual-purpose biological products and affiliated equipment and technologies	<ul style="list-style-type: none"> <li>– Regulation on Controlling the Export of Dual-purpose Biological Products and Affiliated Equipment and Technologies</li> <li>– Dual-use Import and Export Administration Measures</li> </ul>	<ul style="list-style-type: none"> <li>– List of Biological Articles of Double-purpose and Related Equipment and Techniques under Export Administration</li> <li>– Dual-Use Im-Export Catalogue – Section II(3)</li> </ul>	MOFCOM CGAC
Controlled chemicals	<ul style="list-style-type: none"> <li>– Regulation on the Administration of Chemicals Subject to Supervision and Control</li> <li>– Dual-use Import and Export Administration Measures</li> </ul>	<ul style="list-style-type: none"> <li>– List of Schedules of Controlled Chemicals</li> <li>– Dual-Use Im-Export Catalogue – Section II(4)</li> </ul>	MIIT <sup>11</sup> MOFCOM CGAC
Chemical products and affiliated equipment and technologies	<ul style="list-style-type: none"> <li>– Measures for Controlling the Export of Relevant Chemical Products and Affiliated Equipment and Technologies</li> <li>– Dual-use Import and Export Administration Measures</li> </ul>	<ul style="list-style-type: none"> <li>– List of Relevant Chemical Products and Affiliated Equipment and Technologies under Export Control</li> <li>– Dual-Use Im-Export Catalogue – Section II(5)</li> </ul>	MOFCOM CGAC
Precursor chemicals	<ul style="list-style-type: none"> <li>– Provisions on the Management of Import and Export of Precursor Chemicals</li> <li>– Dual-use Import and Export Administration Measures</li> </ul>	<ul style="list-style-type: none"> <li>– List of Classification and Types of Precursor Chemicals</li> <li>– Dual-Use Im-Export Catalogue – Sections II(7)/(8)</li> </ul>	MOFCOM CGAC
Certain dual-use items and technologies (e.g., unmanned aerial vehicle and digital computer)	<ul style="list-style-type: none"> <li>– Dual-use Import and Export Administration Measures</li> </ul>	<ul style="list-style-type: none"> <li>– Dual-Use Im-Export Catalogue – Sections II(9)</li> </ul>	MOFCOM CGAC

8 Measures for the Administration on Import and Export Licence for Dual-use Items and Technologies

9 Catalogue of Dual-use Items and Technologies Subject to Import and Export Licence Administration

10 China Atomic Energy Authority

11 Ministry of Industry and Information Technology

## Key Regulatory Changes under the Export Control Law

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Indeed, the current export control regulatory framework in China is largely scattered across various laws and regulations. The Export Control Law aims to unify these various export control legislative pieces into a consolidated code, aiming to provide a more powerful regulatory tool to perfect China's export control system by adopting international practice.

1. **Services and data now included in controlled items<sup>12</sup>:** The Export Control Law includes “services” and “data such as technical information relating to the [controlled] items” in the scope of controlled items, in addition to goods and technologies. The insertion of services and data is not a surprise, in light of the increasing volume of cross-border services and current global digitalisation wave. Technically both can be interpreted in a very broad way to capture varieties of activities which are not subject to the traditional export control regime.
2. **Expanded coverage of export to capture “deemed export” and intermediary trade:** Under the Export Control Law, export control does not only apply to the transfer of controlled items from the territory of the People's Republic of China overseas, but also to (a) “provision of controlled items by citizens, legal persons and non-legal person organizations of the People's Republic of China to foreign organizations and individuals”, and (b) transit, transshipment, through transportation, re-export of controlled items, or export of controlled items from special customs surveillance zones such as bonded zones and export processing zones, or from bonded facilities under surveillance such as warehouses under export surveillance and bonded logistics centres.
3. **New regulatory methods of export control:** The current export control regime is primarily governed by way of “controlled catalogues” or “controlled lists”. The Export Control Law sets out a number of new regulatory methods:
  - **Interim export control:** the export control authorities may, subject to the necessary approval of the State Council and/or the Central Military Commission, exercise temporary control over items that are not listed on the export control lists. The term of interim export control is up to two years, and may be extended after assessment prior to expiry. The controlled items under interim export control may be moved to the export control lists upon assessment as well;
  - **Export ban:** the export control authorities may, together with other relevant departments, and upon approval by the State Council and/or the Central Military Commission, prohibit the export of relevant controlled items, or prohibit the export of the relevant controlled items to particular countries and regions, organisations and individuals;
  - **Blacklist of importers and end-users:** the export control authorities may develop a control list of importers and end-users who (a) breach the restrictive requirements on end-users or end-uses, (b) may endanger national security and interests, or (c) use any controlled items for terrorist purposes, and may further prohibit, restrict or suspend the transactions of controlled items with those on such blacklist. Exporters are required not to unlawfully trade with those on the blacklist, unless the exporter obtains a special licence from the export control authorities to trade, or otherwise until the importer or end-user is removed from the blacklist; and
  - **Export control over unlisted items:** the Export Control Law imposes a significant obligation on exporters such that even if the goods, technologies and services to be exported are not within any export control lists, the exporter shall apply to the export control authorities for export licences, so long as the exporter “knows, or should know, or has been notified by the export control authorities”, that such export may have the risk of endangering national security and interests, or is being used in relation to a weapon of mass destruction or for terrorist purposes. The exporter, however, may consult with the export control authorities if it cannot determine whether the export is within the scope of controlled items, and the export control authorities are required to respond in a timely manner.
4. **Encouraging establishment of internal compliance system:** The Export Control Law directs the export control authorities to issue export control guidelines, and to guide export operators to establish and perfect internal export control compliance systems. In respect of those exporters who have set up and operated internal compliance systems well, the Export Control Law further directs the export control authorities to provide “general licensing” and other convenience measures for their export of relevant controlled items.
5. **Strengthened supervision of end-users and end-uses:** The Export Law requires the end-users to undertake that, without permission from the export control authorities, the end-uses of the relevant controlled items will not be altered and the relevant controlled items will not be transferred to any third party. The law also requires the exporter and the importer to report immediately to the export control authorities if it is aware that the end-users or the end-uses may have changed. The end-users and importer breaching their obligations may be blacklisted by the export control authorities.
6. **Significantly increased administrative penalties:** As compared to the Foreign Trade Law and various implementing regulations, the Export Control Law significantly increases the penalties for export control offences. In particular, an administrative fine will be applicable to any violation under the Export Control Law, and the upper limit of the fine for a number of offences has been significantly increased to 10 or even 20 times the illegal “turnover” (compared to illegal “gain” set out in many current administrative regulations on export control), as set out below.

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<sup>12</sup> Although services may not be something new as it was covered by the Foreign Trade Law since 1994, it was never included in China's implementing regulations for export control and control lists. In other words, it was not treated as controlled items in practice in the past.

Violation Activities	Administrative Penalties	Administrative Fines	Further Restrictions
Export of controlled items w/o qualification	<ul style="list-style-type: none"> <li>– warning</li> <li>– order to stop illegal activities</li> <li>– confiscation of illegal income</li> <li>– fine</li> </ul>	<ul style="list-style-type: none"> <li>– if turnover equal to or more than RMB500K: up to 10 times the illegal turnover</li> <li>– if no turnover, or turnover is less than RMB500K: up to RMB5 million</li> </ul>	<ul style="list-style-type: none"> <li>– Export control authority will not accept violating exporter's licence application within five years from the administrative penalty order taking effect</li> <li>– Responsible person-in-charge and other direct responsible personnel of the violating exporter may be prohibited from relevant export business for five years, and will be banned from relevant export business for life if a criminal penalty is imposed</li> </ul>
Export of controlled items without licence	<ul style="list-style-type: none"> <li>– order to stop illegal activities</li> <li>– confiscation of illegal income</li> <li>– fine</li> </ul>	<ul style="list-style-type: none"> <li>– if turnover is equal to or more than RMB500K: up to 10 times the illegal turnover</li> </ul>	
Export of controlled items beyond licence scope	<ul style="list-style-type: none"> <li>– suspension of business</li> </ul>	<ul style="list-style-type: none"> <li>– if no turnover, or turnover is less than RMB500K: up to RMB5 million</li> </ul>	
Violation of export prohibition	<ul style="list-style-type: none"> <li>– cancellation of licence</li> <li>– revocation of export qualification of relevant controlled items</li> </ul>		
Obtain licence through fraud and bribery, illegal transfer of licence	<ul style="list-style-type: none"> <li>– cancellation of licence</li> <li>– seizure of licence</li> <li>– confiscation of illegal income</li> <li>– fine</li> </ul>	<ul style="list-style-type: none"> <li>– if turnover is equal to or more than RMB200K: up to 10 times the illegal turnover</li> <li>– if no turnover, or turnover is less than RMB200K: up to RMB2 million</li> </ul>	
Forgery, alteration and trading of licence	<ul style="list-style-type: none"> <li>– confiscation of illegal income</li> <li>– fine</li> </ul>	<ul style="list-style-type: none"> <li>– if turnover is equal to or more than RMB50K: up to 10 times the illegal turnover</li> <li>– if no turnover, or turnover is less than RMB50K: up to RMB500K</li> </ul>	
Knowingly provide services to facilitate export control violation	<ul style="list-style-type: none"> <li>– warning</li> <li>– order to stop illegal activities</li> <li>– confiscation of illegal income</li> <li>– fine</li> </ul>	<ul style="list-style-type: none"> <li>– if turnover is equal to or more than RMB100K: up to 5 times the illegal turnover</li> <li>– if no turnover, or turnover is less than RMB100K: up to RMB500K</li> </ul>	
Illegal transaction with importers and end-users on the blacklist	<ul style="list-style-type: none"> <li>– warning</li> <li>– order to stop illegal activities</li> <li>– confiscation of illegal income</li> <li>– fine</li> <li>– suspension of business</li> <li>– cancellation of licence</li> <li>– revocation of export qualification of relevant controlled items</li> </ul>	<ul style="list-style-type: none"> <li>– if turnover is equal to or more than RMB500K: up to 20 times the illegal turnover</li> <li>– if no turnover, or turnover is less than RMB500K: up to RMB5 million</li> </ul>	
Refuse or impede supervision and inspection	<ul style="list-style-type: none"> <li>– warning</li> <li>– fine</li> <li>– suspension of business</li> <li>– cancellation of licence</li> <li>– revocation of export qualification of relevant controlled items</li> </ul>	<ul style="list-style-type: none"> <li>– up to RMB300K</li> </ul>	

In addition, unlike what is commonly possible in other administrative regulations (e.g. in the Anti-Monopoly Law of China), the administrative penalty imposed under the Export Control Law does not appear to be appealable. Instead, the Export Control Law only offers the possibility of initiating administrative review proceedings if one intends to challenge a penalty decision.

7. **Extraterritorial jurisdiction:** Arguably, the Export Control Law appears to have extraterritorial jurisdiction, by providing that “organizations and individuals who violate the relevant export control provisions of this law, endangering the security and interests of China, or impeding the fulfilment of non-proliferation and other international obligations shall be pursued for legal liabilities in accordance with law”. However, to what extent extraterritoriality will apply is unclear at this moment, and it is subject to clarification by further implementing rules and regulators’ interpretation.

## Looking Forward

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While the Export Control Law has significantly broadened the scope of the regulatory measures and enhanced the power of the existing regime, at the same time, it also leaves many unanswered questions as to the specific application of various clauses. We expect China’s export control regime will continue to evolve with corresponding detailed implementing rules, as are anticipated to be promulgated as a next step.

Exporters, importers and possible end-users are advised to stay alert, and review, assess and adjust their export-related compliance strategies and practices in accordance with the Export Control Law.

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