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Compliance

China's Blocking Statute Counteracting Unjustified Extraterritorial Application of Foreign Laws

中国颁布阻断立法应对外国法律不当域外实施

As the first departmental legislation of the Ministry of Commerce (MOC) in 2021, Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (Blocking Rules) were published with immediate effect beginning Jan. 9, 2021. Given the trade, technology, and even diplomacy tensions between the United States and China, a series of legislations were promulgated starting in the second half of 2020. Apart from the Blocking Rules, the MOC also issued the Provisions on the List of Unreliable Entities on Sept. 19, 2020, and the National People's Congress issued the Export Control Law on Oct. 17, 2020. These new laws set out a preliminary framework for China's trade compliance regime. However, given the brevity of the 16-article Blocking Rules, clarification is needed in subsequent implementation.

1. Background and Target of the Legislation

The Blocking Rules apply where "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 organizations of China (Chinese Entities) from engaging in normal economic, trade and related activities with a third state (or region) or its citizens, legal persons or other organizations." According to a distinguished professor of Renmin University of China, Han Liyu, who was invited by the MOC to attend an official announcement on the new law, the Blocking Rules aim to block the application of "secondary sanctions." It is unclear whether the Blocking Rules are applicable to primary sanctions, where such laws prohibit or restrict a third-country party from trading with Chinese Entities. For example, a certain Chinese technology company is included on the Entity List of the United States and is therefore restricted from obtaining chip products manufactured by U.S.-originated equipment without a license or where a license restriction does not apply. Lawyers and scholars are debating this issue, and the MOC's subsequent practice may be the only solution to the disagreement. Either way, the Provisions on the List of Unreliable Entities could be a possible alternative for Chinese entities encountering suspension of transactions by a counterparty in a third state.

2. The Reporting Obligation of Chinese Entities and MOC Countermeasures

Chinese Entities must report to the MOC within 30 days foreign laws and measures prohibiting or restricting their business with third-party states or entities. It is implied that Chinese subsidiaries of foreign companies are also subject to this reporting obligation.

The Chinese government will establish a working mechanism (Working Mechanism) composed of various central government departments led by the MOC. The Working Mechanism may, in its own discretion, issue prohibition orders (Prohibition Orders) against recognition, enforcement, or compliance with such foreign laws and measures. A Chinese Entity may apply to the MOC for exemption from compliance with a Prohibition Order.

3. Penalties and Remedies

Chinese Entities' failure to comply with the reporting obligations or failure to comply with the Prohibition Orders may lead to administrative penalties such as warnings, orders of rectification, and fines.

If a party's compliance with foreign laws and orders infringes upon Chinese Entities' legitimate rights and interests, Chinese Entities may initiate litigation against such party (either a Chinese or a foreign entity) in a Chinese court for compensation. Similarly, if a party benefits from a foreign judgement or order rendered under the foreign laws and measures that cause damages to Chinese Entities, such Chinese Entities may initiate litigation in a Chinese court for compensation.

4. Repercussions for Multinational Companies

Multinational companies with presence in both China and the United States may have been placed in a dilemma of conflicting compliance requirements. If the MOC declares a Prohibition Order against certain U.S. sanctions, the Chinese subsidiary of a U.S. company will need to apply for an exemption to comply with U.S. sanctions without violating the Prohibition Order.

However, that leaves two questions unanswered: On what ground can the Chinese subsidiary apply for such exemption? It is possible that the MOC will not grant an exemption simply because the applicant may be penalized or sanctioned by the U.S. government for its violation of U.S. sanctions. Also, will the

foreign parent company be protected by this exemption? Under the Blocking Rules, only Chinese Entities may apply for an exemption.

Furthermore, if a multinational company is sued in Chinese court for violating the Blocking Rules, will the Chinese court frown upon its corporate veil given that the company owns nothing in China for the enforcement of the judgment? Will the Chinese court order recovery from the company's Chinese operations?

5. New Considerations for Contract Negotiation

To mitigate the impact of the Blocking Rules, parties to cross-border deals may consider adjusting certain customary clauses in their contracts. However, considering the unpredictable political environment and legal practice, it is impossible to propose a one-size-fits-all solution. Rather, the following issues are worth reconsidering in negotiation:

a. Representations and Warranties

It is common practice for transaction documents to include representations and warranties of compliance with foreign laws and sanctions. With the promulgation of the Blocking Rules, the parties may have been put in a dilemma, as they may either breach foreign laws or sanctions or breach the Blocking Rules (Chinese law). Therefore, the parties should reconsider the representations and warranties clause and probably make necessary carve-outs.

b. Dispute Resolution in Cross-Border Deals

Though Chinese Entities may bring lawsuits in Chinese courts for compensation for violation of the Blocking Rules, dispute resolution in a cross-border deal is typically governed by the contract. Parties may agree that foreign law governs the contract, and the venue of dispute resolution should exclusively be a tribunal or a court outside China. However, it is unclear if such agreement would prevail over the application of the Blocking Rules and Chinese court's jurisdiction. Furthermore, if a party does bring a lawsuit in a Chinese court despite the dispute resolution clause in the contract, it is hard to predict how the parallel litigations will develop.

6. Conclusion

The Blocking Rules create considerable uncertainty and obscurity. In the absence of further official explanation or practice, parties to cross-border deals may temporarily mitigate the risks through due diligence and well-drafted contracts.

The State Council Officially Publishes the Full Text of the Administrative Regulations on Pollutant Discharge Permits

国务院正式发布《排污许可管理条例》全文

In late December 2020, the State Council officially adopted the Administrative Regulations on Pollutant Discharge Permits (Administrative Regulations) and published the full text on Jan. 24, 2021. The Administrative Regulations took effect on March 1, 2021.

First, pollutant discharging entities with different amounts of pollutant production, emissions, and environmental impact are subject to varying levels of regulation (represented by different types of permits). The Administrative Regulations authorize the Ministry of Ecology and Environment (MEE) to formulate a detailed list of pollutant discharging entities subject to such varying levels of regulation. The table below may help to illustrate the regulatory framework:

Regulatory Requirement	**Amount of Pollutant Production**	**Amount of Emissions**	**Environmental Impact**
Discharge Permit under Critical Regulation	Comparatively Large	Comparatively Large	Comparatively Large
Discharge Permit under Simplified Regulation	Comparatively Small	Comparatively Small	Comparatively Small
Regulation by Filling a Registration Form	Very Small	Very Small	Very Small

In fact, this regulatory framework is the same as the one under the current Administrative Measures for Pollutant Discharge Permits (for Trial Implementation) (Administrative Measures) promulgated by the Ministry of Environmental Protection (predecessor of the Ministry of Ecology and Environment) and its supporting document, the List of Classification Management of Fixed Pollution Source Discharge Permits (2019 Edition) (2019 Edition List) promulgated by the MEE. The 2019 Edition List is a catalog of various pollution sources, such as mining, ink production, electrical appliance production, etc. Companies running plants classified as pollution sources according to the catalog must apply for pollutant discharge permits.

As mentioned above, the MEE will draft a similar catalog of pollutant discharging entities and pollution sources subject to different regulation, but the 2019 Edition List will continue to be in effect until the MEE publishes a new list. That is to say, after the Administrative Regulations come into effect and before the MEE publishes a new list, companies should refer to the 2019 Edition List to determine what level of regulation they are subject to and what types of permits they should apply for.

Compared with the Administrative Measures, the Administrative Regulations impose complicated and strict obligations on pollutant discharging entities. In addition to obtaining pollutant discharge permits, these entities are required to accurately and faithfully record their pollutant discharge. Violations of the Administrative Regulations will lead to punishment more severe than violations of the Administrative Measures. All data on pollutant discharging entities related to the pollutant discharge permits will be published on an online, public system maintained by the MEE. Such information includes the application for and approval of pollutant discharge permits, details of pollutant discharge, results of inspection by the MEE, and penalties imposed by the MEE, subjecting the pollutant discharging entities to extensive supervision.

Anti-Monopoly

AMC Issues Anti-Monopoly Guide for the Platform Economy Sector

国务院反垄断委员会发布《关于平台经济领域的反垄断指南》

On Feb. 7, 2021, the Anti-Monopoly Commission of the State Council (AMC) issued the *Anti-Monopoly Guide (Guide),* which took effect on the same date. The Guide includes a total of 24 articles in six chapters, e.g., General Provisions, Monopoly Agreements, Abuse of Dominant Market Position, Concentration of Undertakings, Abuse of Administrative Power to Eliminate or Restrict Competition, Supplementary Provisions.

The *Guide* provides relevant definitions for "platform," "platform operators," and "platform-based operators" and sets the tone for conducting case-by-case evaluations on defining relevant commodity markets and regional markets in the platform economy sector because different types of monopoly cases have different actual demands for the definition of relevant markets. Further, the *Guide* adopts the definition of multiple relevant commodity markets based on multilateral commodities involved in a platform (interpreted as an introduction of the "two-sided markets" theory by the law review articles published by a Wechat post official account, "Wuhan University Competition Law"). The *Guide* also explains that the forms of collaborative practices involving substantive coordination and consensus by means of data, algorithms, or platform rules (notwithstanding that there is no explicit agreement reached or decision made by the operators) are deemed monopoly agreements in the platform economy, except for those parallel practices carried out by the relevant operators on the basis of independent declaration of intention.

The *Guide* appears to apply the approach, similar to the *Rule of Reason* (the legal doctrine used to interpret the U.S. Sherman Antitrust Act), of the case-by-case analysis, as the platform economy involves complicated business types and changeable competition dynamics. Article 4 of the *Guide* stipulates that defining the relevant market is generally required for the investigation of cases suspected of constituting a monopoly agreement and abuse of a dominant market position, and for the review of the concentration of undertakings in the platform economy sector. The basic method for defining the market (both the relevant commodity market and the regional market) is to adopt the substitution analysis – demand substitution and supply substitution analysis for different cases. Article 7 of the *Guide* stipulates that the following factors, among others, may be considered when analyzing whether a vertical monopoly agreement is made:

- market power of the platform operator
- status of competition in the relevant market
- degree of hinderance to other operators' access to the relevant market
- impact on the interests of customers and innovation.

As described below, the either-or practice is one factor in determining the presence of a restriction on transactions. Article 15 of the *Guide* provides that whether an operator requires its platform-based operators to "choose one from two" competitive platforms or limits its transaction counterparts to entering into transaction only with it may be considered when determining the constitution of transaction restrictions. The *Guide* further explains that two scenarios may be considered when analyzing the constitution of limitations on a transaction: (i) punitive measures such as shielding the store, degrading the right to be searched out [on the platform], restricting the network traffic [of the store], imposing

technology restriction [on the store], and deducting deposit [of the store], generally may be deemed restrictions on transactions (this appears to apply the approach similar to the *Per Se* Rule, i.e., certain categories of agreements are presumed to violate antitrust laws, regardless of other factors such as business purpose or competitive benefits); (ii) the incentive measures such as providing subsidies, discounts, preferential offers, and traffic resource support (which may have a certain positive effect on the interests of platform-based operators and consumers and the overall welfare of society) may still constitute a restriction on transactions if such measures have an obvious impact of eliminating or restricting market competition, as proved by evidence (this appears to apply the approach similar to the *Rule of Reason*). In addition, the *Guide* provides options for platform operators to defend and justify their measures as necessary to protect: intellectual property rights, trade secrets or data security; the interests of transaction counterparts and consumers; specific resource inputs for transactions; or a reasonable operation mode.

In April 2021, the State Administration for Market Regulation (SAMR), China's national antitrust enforcement agency, issued a penalty decision against a technology company that implemented the "choose one from two" practice by prohibiting platform-based operators from opening online stores or participating in promotional activities on competitor platforms and taking other punitive or incentive measures to restrict the platform-based operators to only transact with the company.

In Chapter IV – Concentration of Undertakings, the *Guide* expressly includes the variable interest entities (VIE) into the scope of anti-monopoly review. On Dec. 14, 2020, SAMR issued three penalty decisions in three cases where the concentrations of undertakings were not declared in accordance with law. The entities involved were fined the maximum 500,000 Chinese yuan. Such cases share the common ground that the acquiring parties are internet platforms, and no effect of eliminating or restricting competition is found after the analysis of authority

Dispute Resolution

China's Supreme Court Publishes Provisions on Providing Online Case Filing Services for Cross-Border Litigants

最高人民法院发布《关于为跨境诉讼当事人提供网上立案服务的若干规定》

On Feb. 3, 2021, the Supreme People's Court published *Several Provisions on Providing Online Case Filing Services for Cross-Border Litigants (Provisions)*, which took effect on the same date. According to the Provisions, online registration, case filing services (along with guidelines and inquiry services for online case filings), and online video verification for appointment of attorneys must be provided for cross-border litigants, including foreigners, residents of the Hong Kong Special Administrative Region, Macao Special Administrative Region, Taiwan Region, and citizens of mainland China with their habitual domiciles located in foreign countries or Hong Kong, Macao, or Taiwan, and enterprises and organizations registered in foreign countries or Hong Kong, Macao, or Taiwan. The scope of cases that can be filed via the online service includes first-instance civil and commercial lawsuits.

The above services are provided under the "cross-jurisdiction case filing" function via the "China Mobile Micro Court," which can be accessed through an applet embedded in WeChat (China's most popular mobile social media platform). Therefore, the litigants first need to download and register with WeChat on their mobile phones if they want to use China Mobile Micro Court to file a case. Currently, WeChat is the only available way for cross-border litigants to file cases online (either through the applet or the web

version). The current version of the WeChat applet provides three language options (i.e., simplified Chinese, traditional Chinese, and English) and five identification types for the litigants (i.e., P.R.C. identification card, Mainland travel permit for Hong Kong and Macau Residents, Mainland travel permit for Taiwan Residents, passport for Chinese citizens residing abroad, or P.R.C. regular passport).

When a cross-border litigant first applies for an online case filing, the identity of the litigant must be verified. The online identification verification relies on platforms such as the National Immigration Administration and is confirmed based on the information retained in such identity verification platform. The result of the identification verification must be notified to the litigants within three working days. If the online verification fails, the litigant must submit the identification materials (including the materials related to the notarization, certification, transmission, and verification for delivery) for manual verification by the court that accepts the case. Therefore, online case filing affords convenience to those natural persons with their identity information already existing in the database/platform of the National Immigration Administration. Companies/enterprises still need to go through the formalities of notarization and certification.

After the identity verification, if the authenticated litigant entrusts a lawyer from mainland China as *agent ad item*, the litigant may apply to the court which accepts the case for an online verification. The online verification will be launched by a judge, and the online video verification meeting will include the cross-border litigant, the judge, the *agent ad litem* at the same time, and the interpreter if the common language of P.R.C. is not used by the litigant. During the online verification by the judge, the litigant and the *agent ad litem* must sign the relevant entrustment documents. They no longer need to go through the formalities of notarization and certification, or notarization and transmission (the transmission is conducted being affixed with the seal of the China Legal Service (H.K.) Ltd. or China Legal Service (Macao) Ltd. after the notarization of the identity certificates and such materials for the resident of the Hong Kong or Macao Special Administrative Regions or the company/enterprise or the representative of it in the Hong Kong or Macao Special Administrative Regions).

After the online verification meeting, the agent ad litem may, on behalf of the litigant, carry out online case filing (including the documents such as the statement of complaint, identity certificate of the litigant and materials related to the notarization, certification, transmission, verification by mail (if any), evidentiary materials), online payment and other matters. For the case applied online (a) which complies with the legal provisions, the court that accepts the case will register and file the case in a timely manner; (b) which does not comply with the requirements, the court that accepts the case will notify the litigant in a one-off manner to supplement and correct (which shall be done within 15 days); (c) which is difficult to immediately determine whether complies with the legal provisions, the court that accepts the case will decide within seven working days whether to register and file the case. The cross-border litigant can inquire online about the above-referenced progress.

E-Commerce

4 Cyberspace Administration Departments in China Jointly Release Rules on the Scope of Necessary Personal Information for Common Types of Mobile Internet Applications

国家四部门联合发布《常见类型移动互联网应用程序必要个人信息范围规定》

On Mach 12, 2021, four cyberspace administration departments in China (i.e., Cyberspace Administration of China, Ministry of Industry and Information Technology, Ministry of Public Security, State Administration for Market Regulation) jointly released the *Rules on Scope of Necessary Personal Information for Common Types of Mobile Internet Applications* (the Rules), which took effect May 1, 2021.

The Rules were made under the Cybersecurity Law, which requires that network operators who collect and use personal information (PI) follow the principles of legitimacy, rightfulness, and necessity. Any mobile internet applications (apps) running on a smart mobile terminal, including apps pre-installed or to be downloaded and installed on a smart mobile terminal as well as mini-programs developed to connect to an open platform of an app that can be used without being installed by users, should comply with the Rules.

The Rules specify the scope of necessary PI for 39 common types of apps as examples, e.g., maps and navigation apps, instant messaging apps, online shopping apps, food delivery apps, etc. The Rules also reveal that PI must not be required for use of basic functions and services in live streaming apps, short video apps, workout and fitness apps, etc. App types not included in the Rules may consider referring to a similar app type specified in the Rules. In principle, the app operators should ensure that such PI collected by them is necessary for running basic functions of apps.

The Rules emphasize that the collection of PI by apps is only allowed to the extent necessary to ensure the normal operation of any basic function or service of an app. For those users who do not consent to providing unnecessary PI, apps must still provide them basic functions and services. Any violations of the Rules are subject to administrative penalties.

SAMR Issues Measures for the Supervision and Administration of Online Transactions

国家市场监督管理局出台《网络交易监督管理办法》

On March 15, 2021, the State Administration for Market Regulation (SAMR) issued *Measures for the Supervision and Administration of Online Transactions* (the Measures), which took effect May 1, 2021. The Measures were made under the E-Commerce Law and will replace SAMR's 2014 Administrative Measures for Online Trading.

Highlights of the Measures are as follows:

- Online Transaction Operators

  According to the E-Commerce Law, online transaction operators (operators) must register with the

competent administration for market regulation, except for individuals using their own skills such as cleaning, hair-cutting, key-making, etc. to provide personal services and odd small-amount transaction activities that do not require any permissions under the law. The Measures specifically define these two types of exemption from registration, giving examples of "convenient service" (e.g., cleaning, washing, sewing, hairdressing, moving, key making, pipeline dredging, etc.) and clearly define "odd small amount transaction activities" (i.e., with the cumulative annual transaction amount of not more than CNY100,000 (approx. USD15,500).

Meanwhile, with the growth of livestreaming, selling products live online has become a new e-commerce mechanism. The Measures include such online transaction activities (based on online business premises that provide product browsing, order generation, and online payment services) into the regime of online transaction operators, which should fulfill obligations in accordance with the law.

- Personal Information (PI)

  The Measures re-emphasize that operators collecting and using PI should abide Cybersecurity Law principles of legitimacy, rightfulness, and necessity, and obtain informed consent from users. The Measures further specify that the requirements of obtaining consent, one-off general authorization, default authorization, bundled authorization, cessation of installation and use, etc. are not permitted for the purpose of preventing massive unnecessary PI being collected. As to sensitive information, including but not limited to personal biological characteristics, medical and health care, financial account and personal whereabouts, the operator must obtain consent separately.

- Consumer Rights and Interests

  The Measures highlight the growing field of online consumer rights, ensuring consumers' right to know and right to choose. Operators should remind consumers in a prominent manner if operators a) perform tie-in sales of any commodity or service to consumers by means of direct bundling or the provision of multiple options; b) provide any service by means of automatic extension or automatic renewal, etc. Standard terms should not contain any contents exempting or restricting a consumer's rights for after-sale services, rights to change or rescind a contract in accordance with the law, rights to lodge complaints, blow the whistle, request mediation, etc.

- Anti-Unfair Competition

  The Measures set forth substantial rules to regulate the practice of "choosing one from two" e-commerce platforms. Pursuant to the Measures, platforms may not abuse their dominant position to impose any unreasonable restriction or attach any unreasonable condition (e.g., block store of the operator, increase service charge, etc.) to interfere with the business of platform operators. Platform operators could independently choose to carry out business activities on multiple platforms at the same time as well as independently select express delivery for their transactions.

  If platforms act against the above rules, they will receive administrative penalties of up to CNY2,000,000 (approx. USD311,000).

Securities

CSRC Promulgates Revised Administrative Measures for Information Disclosure by Listed Companies

证监会发布修订后的《上市公司信息披露管理办法》

On March 19, 2021, the China Securities Regulatory Commission (CSRC) promulgated the *Revised Administrative Measures for the Information Disclosure by Listed Companies* (Revised Measures), which took effect May 1, 2021. Following the 2019 revision of the Securities Law, the Revised Measures add and modify the rules regarding information disclosure.

- Information Disclosure Obligor

  The Revised Measures add the definition of information disclosure obligors (IDO), which refer to listed companies and their directors, supervisors, senior executives, shareholders, actual controllers, acquirers, as well as all parties related to material asset restructuring, refinancing and material transactions, and other natural persons, entities and relevant personnel thereof, bankruptcy administrators and their members, and other entities assuming the information disclosure obligation as prescribed by laws, administrative regulations, and the provisions of the CSRC.

- Content of Information Disclosure

  The Revised Measures encourage IDOs to voluntarily disclose information other than contents required to be disclosed in accordance with the law. The information being disclosed should maintain continuity and consistency; making selective disclosures and using the disclosed information to exert undue influence on the trading price of any company's securities or derivatives are not allowed.

- Methods of Information Disclosure

  Periodic reports and ad-hoc reports are important documents for investors obtaining company information. In the Revised Measures, periodic reports only include annual reports and interim reports and exclude quarterly reports, which will be governed by other laws and regulations. At the same time, the Revised Measures further specify 17 material events that need to be disclosed to investors through ad-hoc reports, except for situations specified in Article 80 of the Securities Law, including but not limited to any large-amount compensation liability incurred by the company, any provision made by the company for large-amount asset impairment, etc.

  In order to make sure the information disclosed by a company is true and accurate, the Revised Measures require that the periodic report be adopted by the listed company’s board of directors. Where directors are unable to guarantee the authenticity, accuracy and completeness of the periodic report, they must vote again and not affix their signatures to written confirmation comments on the periodic report. New requirements for conciseness, distinctness, and clarity have been added in the Revised Measures to improve the principle of fair disclosure. At the same time, the responsibilities of directors, supervisors and officers have been further emphasized.

CSRC Issues Decision on Revising the Provisions on the Equity Management of Securities Companies

证监会发布《关于修改<证券公司股权管理规定>的决定》

To better implement the Securities Law, on March 19, 2021, the CSRC issued its *Decision on Revising the Provisions on the Equity Management of Securities Companies* (Equity Management Rules) and *Decision on Revising the Provisions on Issues Concerning the Implementation of the Provisions on the Equity Management of Securities Companies* (Implement Rules). Both rules took effect April 18, 2021.

The following chart summarizes the main changes included in the decisions:

	Before being revised	**After being revised**	**Comments**
Definition of major shareholder	Holds over 25% of a securities company's equity or the biggest shareholder that holds over 5% of the equity.	Holds 5% or more of a securities company's equity.	To address the developing trend of shareholders of securities companies being dispersed.
Requirements for major shareholder	Net assets are not less than CNY200 million.	Net assets are not less than CNY50 million.	Major shareholder of securities company has lower thresholds, with lower requirements on net assets and is not required to have sustained profitability.
	-	The first major shareholder must have experience in finance-related business that matches the securities company's business scope and have developed a risk disposal plan.	The first major shareholder must have same requirements as actual control shareholder.
Bet-on agreement	-	Any bet-on agreement regarding the equity of securities company is prohibited.	
Actually held by non-financial enterprise	The equity of a securities company actually held by a single non-financial enterprise must be up to 50% in principle.	Exceptions including the circumstance recognized by the CSRC for disposal of the securities company's risks.	

Filing and approval procedure	Where a securities company intends to increase its registered capital, it must report to the CSRC for approval.	A securities company that intends to change its registered capital must file with the CSRC in principle.	Simplify corresponding administrative procedures.

** This GT Newsletter is limited to non-U.S. matters and law.*

Read previous issues of GT's China Newsletter.

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