

China Passes Anti-Foreign Sanctions and Data Security Laws

15 June 2021

On June 10, 2021, China's legislature passed a variety of new laws, including the Anti-Foreign Sanctions Law¹ and the Data Security Law.² The Anti-Foreign Sanctions Law marks an addition to China's anti-sanctions toolkit, which already includes the Provisions on the Unreliable Entity List from September 2020³ and the Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures promulgated by the Ministry of Commerce (the "PRC Blocking Rules") from January 2021.⁴ The Data Security Law expands China's regulations relating to the internet and data storage, building on the 2017 Cybersecurity Law.⁵ Further regulation in this area is expected soon, as the second draft of a proposed Personal Data Protection Law was published on April 29, 2021.⁶

We review the two new laws in detail below.

¹ 《中华人民共和国反外国制裁法》, Chinese version available at

<http://www.npc.gov.cn/npc/c30834/202106/d4a714d5813c4ad2ac54a5f0f78a5270.shtml>.

² 《中华人民共和国数据安全法》, Chinese version available at <http://app.westlawchina.com/maf/china-cn/app/document?&docguid=i0aceb00700000179f8ec3c29ad5a7933&hitguid=i0aceb00700000179f8ec3c29ad5a7933&sruid=i0ad82b4400000179f9790615e1ea98ee&spos=1&epos=1&td=5&crumb-action=append&context=22&lang=cn&crumb-label=%E6%96%87%E4%BB%B6>.

³ See more details in "China's Ministry of Commerce Establishes Framework for Sanctions Against 'Unreliable Entities,'" Debevoise Update, September 28, 2020, <https://www.debevoise.com/insights/publications/2020/09/chinas-ministry-of-commerce-establishes-framework>.

⁴ See more details in "China Establishes Blocking Mechanism Aimed at Extraterritorial Foreign Laws," Debevoise Update, January 14, 2021, <https://www.debevoise.com/insights/publications/2021/01/china-establishes-blocking-mechanism>.

⁵ Unofficial English translation available at <http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i00000000000000158419794ee47c2ec4f&lang=en&crumb-action=append&crumb-label=%E6%96%87%E4%BB%B6>.

⁶ Unofficial English translation available at <http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i0aceb0070000017922081b6167ead2a6&lang=en&crumb-action=append&crumb-label=%E6%96%87%E4%BB%B6>

Anti-Foreign Sanctions Law

The Anti-Foreign Sanctions Law became effective as of June 10, 2021. Unlike many other laws in China, it was only announced in the days before its passage and was not made available to the public in draft form for comment before its passage. Under the Anti-Foreign Sanctions Law, China has the right to take counter-measures when a foreign country “adopts discriminatory measures against Chinese entities and individuals,” “suppress[es] China,” or “interfere[s] with China’s domestic affairs” (collectively referred to herein as the “Discriminatory Measures”).⁷

While the law does not directly sanction specific persons or entities, it does provide that “relevant departments of the State Council [the PRC government]” have the right to designate a “counter measures list” comprised of entities and individuals (“Covered Persons”) which are directly or indirectly involved in the adoption or implementation of the Discriminatory Measures.⁸

Available counter measures against Covered Persons include: rejection of visa issuance, denial of entry into China, deportation from China, seizure and freezing of assets in China, prohibition or restriction of transactions between the Covered Persons and entities and individuals in China, as well as “other necessary measure[s],” which is a typical catch-all clause common in many Chinese laws (collectively referred to herein as the “Counter Measures”).⁹

In addition to Covered Persons, their spouses, immediate family members, as well as the senior management or de facto controllers of entities that are Covered Persons and entities in which Covered Persons act as senior management, or which are controlled, established or operated by Covered Persons, may also be subject to the Counter Measures.¹⁰

The Anti-Foreign Sanctions Law does not specify the procedure for designation of Covered Persons and determination of corresponding Counter Measures. The law does state that determination made by the “relevant departments” in accordance with the Anti-Foreign Sanctions Law will be final. It is also unclear whether the Covered Persons will have the right to challenge any such determinations through Chinese court

⁷ Art. 3 of the Anti-Foreign Sanctions Law.

⁸ *Id.*, Art. 4.

⁹ *Id.*, Art. 6.

¹⁰ *Id.*, Art. 5.

proceedings. That being said, the “relevant departments” may suspend, modify or terminate the Counter Measures from time to time.¹¹

The Anti-Foreign Sanctions Law provides that “entities and individuals in China” shall comply with the Counter Measures, while “any entities or individuals” that fail to do so will bear corresponding liabilities.¹² However, liabilities for non-compliance with the Counter Measures are not specified in the law. The Anti-Foreign Sanctions Law further provides that “any entities and individuals” may not implement or assist with the implementation of Discriminatory Measures adopted by a foreign country against Chinese entities and individuals. “Any entities or individuals” doing so in a manner that leads to damages to the interests of Chinese entities and individuals may be sued for damages in Chinese courts by the damaged Chinese parties.¹³ It is unclear whether the difference in wording between “entities and individuals in China” and “any entities or individuals”¹⁴ in the Anti-Foreign Sanctions Law indicates that China intends to grant extra-territorial application to the second provision.

Similar to the PRC Blocking Rules (which are aimed at non-UN sanctions against third countries), the Anti-Foreign Sanctions Law is ambiguous in a number of ways. First and most importantly, the Anti-Foreign Sanctions Law appears to provide a private right of action that is almost identical to the one provided by the PRC Blocking Rules. As with the PRC Blocking Rules, it remains unclear whether a Chinese person may sue a foreign person (who is not present in China) for damages arising out of such foreign person’s cooperation with the Discriminatory Measures while abroad. To date, we are not aware of any lawsuits based on the private right of action provided under the PRC Blocking Rules.

Second, defining the scope of the Discriminatory Measures is left to the discretion of the State Council, so it is not entirely clear what will constitute, for example, “suppression” or “interference of China’s domestic affairs.” In a press release issued after the enactment of the Anti-Foreign Sanctions Law, an official of the Rule of Law Committee of the National People’s Congress (China’s legislature) mentioned several “hot spots” to which the Discriminatory Measures have been connected, including matters related to Hong Kong, Taiwan, the Chinese territorial sea and Covid-19.¹⁵

Third, it is also unclear whether a prior notice or grace period will be available to the Covered Persons before they are designated by the “relevant departments,” and whether

¹¹ *Id.*, Art. 7 and 8.

¹² *Id.*, Art. 11 and 14.

¹³ *Id.*, Art. 12.

¹⁴ “我国境内的组织和个人” and “任何组织和个人”

¹⁵ See “全国人大常委会法工委负责人就反外国制裁法答记者问,” June 11, 2021, http://www.gov.cn/xinwen/202106/11/content_5616932.htm.

the Covered Persons may take any remedial actions after they are listed in the “counter measures list.”

Data Security Law

The Data Security Law will take effect on September 1, 2021, and will cover all “data activities” within the territory of China and “data activities” outside of China that may harm China’s national security, public interests or rights of Chinese persons. Data activities include the collection, storage, using, processing, transfer, provision and disclosure of data.¹⁶

The Data Security Law will establish a “tiered protection” regime for China’s data security in which data will be categorized in accordance with its importance and the severity of the consequences of potential data breaches. “Relevant departments” will be responsible for the making of an “important data list,” which is data that will be subject to enhanced protection measures. Furthermore, the Data Security Law creates a new term “state core data,” which refers to data that are relevant to national security, key sections of the national economy and material public interests. “State core data” will be subject to even stricter regulation than “important data.”¹⁷ However, the Data Security Law does not specify the protection measures for “state core data.”

Apart from the “tiered protection” regime, other data security measures under the Data Security Law include:

- New data security review, which will be performed on data activities that may implicate China’s national security;¹⁸
- Export control on data that are relevant to China’s national security and interests, as well as China’s performance of its “international duties”;¹⁹ and
- Counter measures against countries that take discriminatory measures against China in relation to data-related investment and transactions.²⁰

¹⁶ Art. 2 and 3 of the Data Security Law.

¹⁷ *Id.*, Art. 21.

¹⁸ *Id.*, Art. 24.

¹⁹ *Id.*, Art. 25.

²⁰ *Id.*, Art. 26.

Data processors' obligations under the Data Security Law include:

- Establishing internal control regimes on data security;²¹
- Conducting periodic training on data security;²²
- Adopting technical measures for data protection;²³ and
- Taking remedial actions upon the occurrence of data breaches, and reporting such data breaches to the “relevant departments.”²⁴

In addition to the above, important data processors must institute a specific data security management body and corresponding personnel in charge, so as to undertake their data security duties.²⁵ Furthermore, important data processors must perform periodic risk assessment on their data activities and submit a report of such risk assessment to the “relevant departments.”²⁶

The Data Security Law expands the data localization requirement under China's Cybersecurity Law, which limited the export of “important data” processed by critical information infrastructure (“CII”) operators. The Data Security Law further limits the export of “important data” by non-CII operators, which will be regulated by rules to be promulgated by “relevant departments.”²⁷ Somewhat expanding on the 2018 International Criminal Judicial Assistance Law,²⁸ which set forth state-to-state methods for criminal judicial assistance and prohibited other forms of cooperation with foreign criminal authorities, the Data Security Law specifically prohibits the provision of all data to foreign judicial authorities or law enforcement agencies by entities or individuals within the territory of China without approval by “relevant departments” or without other legal basis such as international treaties to which China is a party, or reciprocity.²⁹

Non-compliance with the Data Security Law may lead to administrative penalties, including: the issuance of a warning letter, an order for the rectification of misconduct, fines against entities up to RMB 10 million and against individuals up to RMB 1 million,

²¹ *Id.*, Art. 27.

²² *Id.*

²³ *Id.*

²⁴ *Id.*, Art. 29.

²⁵ *Id.*, Art. 27.

²⁶ *Id.*, Art. 30.

²⁷ *Id.*, Art. 31.

²⁸ Unofficial English translation available at

<http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i0000000000000166bdbf004910c893e3&lang=en&crumb-action=append&crumb-label=%E6%96%87%E4%BB%B6>.

²⁹ *Id.*, Art. 36.

suspension of business, or revocation of business licenses. Non-compliance with the Data Security Law may also give rise to criminal liabilities.³⁰

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Please do not hesitate to contact us with any questions.

Debevoise & Plimpton LLP, like other international firms in China, is not admitted to practice PRC law. Our views are based on our general experience in dealing with similar matters and consultation of published compilations of Chinese law. We would be pleased to arrange for assistance from licensed Chinese counsel should you require a formal opinion as to any of the matters set forth in this update.

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³⁰ *Id.*, Art. 44-52.