

CHINA'S MILESTONE IN COUNTERACTION AGAINST UNILATERAL FOREIGN SANCTIONS: ANTI-FOREIGN SANCTIONS LAW

On an urgent necessity to mainly counter the interference with China's internal affairs and unilateral sanctions on China imposed by some foreign countries, the PRC Standing Committee of the National People's Congress ("**NPC**") adopted on 10 June 2021 the *Anti-Foreign Sanctions Law of the People's Republic of China* ("**AFSL**") which was rushed into force on the same day.

BACKGROUND

For a long period, China had not developed any unilateral sanction system other than adherence to the sanction regime and resolutions of the United Nations and general principles set forth in the *Constitution Law of the People's Republic of China*. For example, in the most recent years (especially since 2020), the Ministry of Foreign Affairs ("**MFA**") announced a series of counter-sanctions against specific foreign individuals, entities and organisations.

China initiated to take legislative actions and speeded up the legislative works to counteract and oppose unilateral sanctions imposed by certain foreign countries on Chinese enterprises, state organs and officials over the past two years, in particular:

- In June 2020, the Standing Committee of the NPC issued the *Legislating Plan for 2020* specifying that China will strengthen the research work of speeding up the construction of the legal system applicable outside China's jurisdiction, blocking and counteracting the legal system of "long arm jurisdiction".
- In September 2020, the Ministry of Commerce ("**MOFCOM**") issued the *Provisions on Unreliable Entity List* to establish a list-based sanction regime to protect the legitimate rights and interests of Chinese individuals, enterprises and other organisations in response to actions taken by foreign individuals, enterprises and other organisations in international economic, trade and other relevant activities.
- In January 2021, the MOFCOM issued the *Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures* to fight against the effect of foreign rules or measures that prohibit or restrict Chinese individuals, enterprises and other organisations from conducting transactions with parties of a third country or region.
- In March 2021, the Work Report of the Standing Committee of the NPC explicitly addressed that within one year, China shall "enrich the legislative toolkit" in the field of anti-sanction, anti-interference and anti-long-arm jurisdiction.

In this context, and "in respect of China's independent foreign policy of peace and Five Principles of Peaceful Co-Existence as well as the international system with the United Nations as its core and the international order based on international laws" (as repeated in its *Article 2*), the AFSL was deliberated and adopted in June 2021 with immediate effect since its promulgation. As a higher level legal document (compared to MOFCOM's measures) and wide-ranging law, the AFSL provides clear legal basis and defensive support and measures to respond to sanctions adopted by foreign countries unilaterally in violation of international laws.

HIGHLIGHTS

What are the punishable trigger conducts?

China is entitled to take countermeasures in response to:

- Discriminatory restrictive measures against Chinese citizens or organisations or interference of China's internal affairs made by foreign states in violation of international laws and basic norms of international relations using various pretexts or based on their own laws to contain and suppress China (*Article 3*); or
- Conducts of foreign states, organisations or individuals committing, assisting or supporting any acts endangering China's interests in terms of sovereignty, security or development (*Article 15*).

The AFSL does not define the scope of "discriminatory restrictive measures", "interference of China's internal affairs" or "acts endangering China's interests in terms of sovereignty, security or development", which leaves extensive room for further interpretation by the competent authorities on a case-by-case basis. However, taking account of the legislative background, it seems that the countermeasures provided in the AFSL are particularly directed against various sanctions and measures (e.g. US blacklists such as OFAC Sanctions List) imposed by the United States and other foreign Countries on the alleged issues relating to Taiwan, Hong Kong, Xinjiang, Tibet, South China Sea, COVID-19 as well as potentially other types of restrictive measures (e.g. export control).

Who is targeted?

China may take countermeasures against the following individuals and organisations ("**Targeted Persons**") (*Articles 4 and 5*):

- Any individuals or organisations directly or indirectly involved in formulating, deciding or implementing any discriminatory restrictive measures against China ("**Listed Persons**"), who are placed on the list of persons subject to countermeasures ("**List of Countered Persons**");
- Spouses and lineal relatives of the Listed Persons;
- Senior management personnel or actual controllers of the Listed Persons;
- Organisations in which the Listed Persons serve as senior managers; or
- Organisations actually controlled by, established or operated by the Listed Persons.

What are the countermeasures?

Countermeasures include (*Article 6*):

- On entry into and exit from China: refusal of issuing visa, prohibition on the entry into China, revocation of visa or deportation;
- On assets: sealing up, seizing and freezing all types of assets owned by the Targeted Persons in China;
- On transactions: prohibiting or restricting any organisation and individual within the territory of China from engaging in relevant transactions, cooperation or other activities with the Targeted Person; and

- Other necessary measures (including any countermeasures specified in other laws, administrative regulations, rules of departments of the State Council, etc.).

The competent authority may decide to take one or more countermeasures against the Targeted Persons on a case-by-case basis, and the list provided in the AFSL is not exhaustive. Decisions on placing on the List of Countered Persons or taking any countermeasures will be final (*Article 7*); however, if the specific circumstances change, the relevant authority may suspend, alter or cancel the countermeasures subject to its discretion (*Article 8*).

Who is competent to determine the List of Countered Persons and countermeasures?

The MFA and other relevant departments of the State Council (such as MOFCOM, Ministry of Public Security) are authorised by the AFSL to determine, suspend, modify or cancel the List of Countered Persons and countermeasures in accordance with their respective responsibilities and tasks (*Article 9*).

China sets up a work coordination mechanism for anti-foreign sanctions to be responsible for the overall planning and coordination, in particular for example with respect to the cooperation and information sharing between the relevant authorities (*Article 10*).

A strict mandatory compliance obligation will be imposed on:

- **All organisations and individuals located within China to execute the countermeasures imposed by the competent authorities**, the failure of which will trigger penalties, including restricting or prohibiting them (including foreign-invested enterprises, representative offices or branches of foreign entities, foreigners residing or travelling within China) from engaging in the relevant activities (*Article 11*);
- **All organisations and individuals (irrespective of their location) NOT to implement or assist in implementing any discriminatory restrictive measures against Chinese citizens or organisations**, the violation of which will hold the relevant organisations or individuals (inside or outside China) liable for cessation of infringement and compensation for losses: (i) if such violation infringes upon the legitimate rights and interests of any Chinese citizen or organisation and (ii) based on claims of the affected Chinese citizen or organisation filed with a Chinese court (*Article 12*): This provision aims to provide remedies for Chinese citizens and entities affected by discriminatory foreign sanctions mainly in terms of civil compensations, but the AFSL itself does not exclude that the relevant organisations or individuals may also assume other liabilities (for instance administrative penalties); and
- **All organisations and individuals (irrespective of their location) to execute or cooperate in implementing the countermeasures**, the failure of which will engage the legal liability for the relevant organisation or individual (inside or outside China) in accordance with law (*Article 14*).

Although the statutory obligation of compliance is obvious, the AFSL is not clear enough on certain matters, such as the nature of liabilities for failing to execute or cooperate in implementing the countermeasures (civil, administrative or even criminal), the definition of “assisting in the implementation of discriminatory restrictive measures”, the extent of the relevant liabilities, and etc..

If taking an extensive interpretation, a foreign company terminating transaction with a Chinese company or a foreign financial institution shutting down a Chinese company's bank account opened outside China due to unilateral foreign sanctions in accordance with local compliance regulations may all be deemed to have assisted in the implementation of discriminatory restrictive measures. How these articles will be interpreted and could be enacted, especially for entities outside China, remain unclear at this stage. To this extent, the AFSL extends extra-territorial jurisdiction of PRC laws (as a protective and retaliatory measure) to counter the extraterritorial effect of decisions unilaterally made by foreign countries.

OUTLOOK

Compared to the former measures issued by MOFCOM as indicated above, the AFSL is stricter and more straight against unilateral foreign sanctions directly targeting Chinese entities or individuals, especially the AFSL does NOT:

- Require a mandatory pre-investigation and assessment procedure (i.e. first identifying the trigger conducts and making a comprehensive assessment before deciding on imposing the countermeasures); in contrast, the AFSL is worded in a general way that it may apply to any unilateral foreign sanctions China considers to constitute discriminatory restrictive measures or endangerment of its sovereignty, security or development interests.
- Grant a correction period during which the Targeted Person may make rectifications so as to avoid the implementation of the countermeasures; instead, the countermeasures are to be executed immediately upon the competent authority's decision on imposing such countermeasures which shall be final and legally binding.
- Provide a delisting procedure by which the Targeted Persons may apply for a withdrawal; instead, the AFSL delegates the authority to the competent authority to assess whether to remove any Targeted Persons from the List of Countered Persons or to suspend, change or cancel any countermeasures.
- Set forth any exception or exemption from complying with and executing the countermeasures imposed by the competent authority; instead under the AFSL, any non-execution or non-compliance will trigger legal liabilities of the related persons.

Most provisions of the AFSL are principles. Many questions (such as the procedure for inclusion on the List of Countered Persons, adoption and cancellation of countermeasures) are still left open for official interpretations, further supplement by detailed implementing regulations, rules or other specific measures as well as the implementation of the AFSL in practice.

Given the extra-territorial impact of the AFSL, foreign entities and individuals having business relations with China may initiate reviewing their global compliance system to check and confirm if any mechanism or process thereunder may constitute a potential punishable conduct provided in the AFSL. At the same time, foreign-invested enterprises in China should also supplement their local internal rules in terms of compliance with the AFSL and any related countermeasure programs to be issued from time to time.

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