

China's "Blocking Statute" – New Chinese Rules to Counter the Application of Extraterritorial Foreign Laws

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On January 9, 2021, the Ministry of Commerce of the People's Republic of China (the "MOFCOM") issued the MOFCOM Order No. 1 of 2021 on Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (the "Chinese Blocking Statute"). The Chinese Blocking Statute establishes the first sanctions blocking regime in China to counteract the impact of foreign sanctions on Chinese persons.^[1] While the law is effective immediately, as noted below, it currently only establishes a legal framework. The law will become enforceable once the Chinese government denotes the specific extraterritorial measures—likely sanctions and export controls the United States is increasingly levying against Chinese companies—to which it then will apply.

The European Union has a comparable set of rules – known as the "EU Blocking Statute" – which seeks to restrict the impact on EU parties of unilateral, extraterritorial U.S. sanctions.^[2] The new Chinese rules appear to borrow much from the European model.

There are several core components to the new Chinese rule:

Reporting Obligation: The Chinese Blocking Statute creates a reporting obligation for Chinese persons and entities impacted by extraterritorial foreign regulations. Under the new rules, when "a [Chinese] citizen, legal person or other organization ... is prohibited or restricted by foreign legislation and other measures from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations," the Chinese person or entity is required to report such matters to China's State Council within 30 days.^[3] Critically, this reporting obligation is applicable to Chinese subsidiaries of multinational companies.

A comparable reporting requirement, including the 30-day reporting obligation, is also found in the EU Blocking Statute.^[4]

Implicated Foreign Laws: Unlike the EU Blocking Statute, the specific laws and measures covered by the Chinese Blocking Statute have yet to be identified. Specifically, the Chinese Blocking Statute establishes a mechanism for the government to designate specific foreign laws as "unjustified extraterritorial applications," and subsequently issue prohibitions against compliance with these foreign laws. Under the Chinese Blocking Statute, a "working mechanism" led by the State Council is responsible for assessing and determining whether the foreign sanctions laws constitute "unjustified extra-territorial application of foreign legislation and other measures." The law sets out an open-ended and largely undefined list of factors for the State Council to consider, including whether the law represent "a violation of principals of international relations," impacts China's "national sovereignty, security and development interests," or effects the "legitimate rights and interests" of Chinese persons and entities, as well as "other factors that shall be taken into account."^[5] If the working mechanism confirms the existence of an "unjustified extraterritorial application" of a foreign law, it will direct the State Council to issue an order

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prohibiting parties in China from complying with the law.^[6]

The EU Blocking Statute, in comparison, applies only to a specific set of laws specified in its Annex^[7]—which presently consists principally of certain U.S. sanctions on Cuba and Iran. While the Chinese model may appear to provide individuals and entities with time to adjust and comply as the Chinese government will only list laws and measures in the future, the Chinese rules might eventually target substantially more foreign laws and measures.

Exemption Process: A Chinese person or entity will be able to apply for an exemption from compliance with the prohibition by submitting a written application to the State Council. Such request will need to provide the reasons for and the scope of the requested exemption. The State Council will then decide whether to approve such application within 30 days or less.^[8] The format for applying for an exemption is not yet clear.

The EU Blocking Statute has a similar exemption mechanism. However, the EU Blocking Statute provides for approval “(...) *without delay*”^[9]—which in practice can mean significantly more than 30 days.

Private Right of Action: Like the EU Blocking Statute, the Chinese rule creates a private right of action for Chinese persons or entities to seek civil remedies in Chinese courts from anyone who complies with prohibited extraterritorial measures, unless the State Council has granted an exemption to the prohibition order.^[10] Under the EU Blocking Statute, EU entities are also entitled to sue for damages, including legal costs, arising from the application of the extraterritorial measures (enforcement of which claims may extend to seizure and sale of assets).^[11]

A Chinese person or entity who suffers “significant losses” due to a counterparty’s compliance with a prohibited law may also obtain “necessary support” from the Chinese government^[12].

Consequences of Non-Compliance: A Chinese person or entity who fails to comply with the reporting obligation or the prohibition order may be subject to government warnings, orders to rectify, or fines.^[13] Under the EU Blocking Statute, individual member states exercise enforcement authority. In several such states, entities have been threatened with fines, and have even been subject to mandated specific performance of contractual obligations which may expose them to risk of liability under U.S. sanctions.

While the Chinese regulations remain nascent and the initial list of extra-territorial measures that the Blocking Statute will cover has yet to be published, the law marks a material escalation in the longstanding Chinese rhetoric threatening counter-measures against the United States (principally) by establishing a meaningful Chinese legal regime that will challenge foreign companies with operations in China. If the European model for the Blocking Statute continues to be Beijing’s inspiration, we will likely see both administrative actions to enforce the measures as well as private sector suits to compel companies to comply with contractual agreements, even if doing so is in violation of their own domestic laws.

U.S. authorities recognize the challenge posed by the EU Blocking Statute, and the recent increasingly robust public and private sector enforcement of it. However, the U.S. Government has not formally adjusted U.S. sanctions programs to account for the legal conflict faced by U.S. and European companies eager to remain on the right side of both U.S. and European regulations. The question for the United States with respect to this new Chinese law will be how to balance the progressively aggressive suite of U.S. sanctions and export control measures levied against China—which the U.S. Government is unlikely to pare back—against the growing regulatory risk for global firms in China that could be caught between inconsistent compliance obligations.

As has long been the case, international companies will continue to be on the front lines of

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Beijing-Washington tensions and they will need to remain flexible in order to respond to a fluid regulatory environment and maintain access to the world's two largest economies.

[1] MOFCOM Order No.1 of 2021 on Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (January 9, 2021) ("**Chinese Blocking Statute**"), <http://www.mofcom.gov.cn/article/b/c/202101/20210103029710.shtml> (Chinese), <http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml> (English)

[2] <https://www.gibsondunn.com/new-iran-e-o-and-new-eu-blocking-statute-navigating-the-divide-for-international-business/>

[3] Chinese Blocking Statute (Article 5)

[4] Article 2 of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

[5] Chinese Blocking Statute (Articles 4 & 6)

[6] Id. (Article 7)

[7] Id. (Article 5); Annex of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom. Under Article 11a, the European Commission has power to adopt legislation adding further foreign extraterritorial laws to the Annex to the EU Blocking Statute.

[8] Chinese Blocking Statute (Article 8)

[9] Article 5 of Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

[10] Chinese Blocking Statute (Article 9)

[11] Article 6 of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

[12] Chinese Blocking Statute (Article 11)

[13] Chinese Blocking Statute (Article 13)

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