

Client Alert

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China will release its "Unreliable Entity List"

The Ministry of Commerce of China (MOFCOM) announced on 31 May 2019 that the Chinese government will introduce an "Unreliable Entity List" regime, under which foreign entities or individuals that boycott or cut off supplies to Chinese companies for non-commercial purposes and causing serious damages to Chinese companies would be listed as "Unreliable Entities". The specific rules, including the list itself and the restrictive measures applicable to the listed entities, will be separately released in the near future. This new regime may be used by China as a countermeasure against export control measures of foreign governments targeting specific Chinese companies.

In an interview released shortly after this announcement, two senior MOFCOM officials commented that the government would consider the totality of the circumstances in black-listing a foreign business, including (i) the specific "discriminatory measures" taken by the foreign business against Chinese companies, such as boycotting or cutting off supplies to Chinese companies, (ii) whether these measures are taken for non-commercial purposes and against the market rules and contractual obligations, (iii) the material damage caused to the Chinese companies and the related industries, and (iv) the potential threat to China's national security.

According to the MOFCOM officials, the Unreliable Entity List may include "one entity or multiple entities" and will be subject to adjustment after its publication. Black-listing an entity would need to undergo the required legal procedures, including an investigation in which the interested parties will be given the right to argue their cases. On the other hand, a listed entity may be removed from the list based on the remedial actions taken by the entity.

Without specifying the actions that might be taken against the Unreliable Entities, the MOFCOM officials cited the Foreign Trade Law, the Antimonopoly Law and the National Security Law, and particularly emphasized Articles 17.3 and 17.6 of the Antimonopoly Law, which prohibit abuse of dominant market position through (i) refusal of transaction, or (ii) imposition of discriminatory conditions or prices. It was also highlighted that the measures taken against the listed foreign entities should be determined under the framework of the existing laws and regulations, and in the meantime, the Unreliable Entity List will also serve the purpose of a "warning list" to inform the public of the risks involved in dealing with the listed entities.

While further information may be released in the near future, the following are some takeaways from the announcement and the relevant comments made by MOFCOM so far:

1. On the face of it, the Unreliable Entity List regime seems to only target foreign legal entities and individuals, but one can not exclude the possibility of enforcement actions taken against the China subsidiaries of the listed foreign corporations for similar reasons.



2. There will be a new regulation published by the Chinese government stipulating the specific standards and procedures for black-listing foreign businesses as Unreliable Entities, but it appears unlikely that the Unreliable Entity List itself be released simultaneously with the new regulation, as the listing needs to undergo the legal procedures provided for by such regulation.
3. With respect to the enforcement actions taken against the listed entities, apart from the penalties for "abuse of dominant position" under the Antimonopoly Law as specifically mentioned by the MOFCOM officials, another possibility is the launch of a "national security review" mechanism against foreign investment, products, technologies, service or other business transactions considered as having national security implications. The legal basis for launching such a mechanism may be found in both the National Security Law and the Foreign Trade Law.
4. China is still in the process of formulating its first Export Control Law. Strictly speaking, it thus far does not have an "entity list" regime similar to that under the U.S. export control law, which may restrict exports of Chinese origin products or technologies to specified foreign entities. While the Export Control Law is generally expected to be enacted by the end of this year or early next year, it is unclear whether the Unreliable Entity List regime is intended to impose the same restriction that was originally expected to be included in the new Export Control Law.

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