

## SANCTIONS WITH CHINESE CHARACTERISTICS: PRC GOVERNMENT THREATENS TO BRAND "UNRELIABLE" FOREIGN COMPANIES

China's Ministry of Commerce (MOFCOM) introduced a new layer of complexity for companies doing business with Chinese companies with the announcement of its new "Unreliable Entity List" (UEL) on 31 May 2019. According to the announcement, the UEL will include foreign enterprises, organizations or individuals that fail to abide by market rules and discriminate against Chinese companies for non-commercial purposes. Examples given include boycotts, cutting off supplies, or restricting or blocking trade transactions in ways that cause serious damage to Chinese enterprises.

The names of the UEL entities and the specific restrictions applicable to them have not yet been published. To export control practitioners, the UEL might sound similar to the US Entity List, with a less ambiguous nomenclature and purpose. For foreign companies put on the UEL, impact will no doubt be immediately felt.

### Official statements about the UEL

While official regulations spelling out the UEL procedures and the actual list are not yet public, MOFCOM's spokesperson explained in a press conference on 1 June 2019 that the agency would take into account the totality of the circumstances in adding an entity to the UEL. Factors would include, *inter alia*, the specific measures taken by the foreign entity against the Chinese companies, the underlying purpose for the discriminatory measures, the damage caused to Chinese companies and related industries, and the actual or potential threat to Chinese national security.

MOFCOM is expected to undertake an investigative procedure before adding companies to the UEL. While companies will have the opportunity to object to a UEL listing, it is not clear whether that will occur prior to the listing or as an "off-ramp" for delisting. According to statements made during the press conference, companies will have an opportunity to defend themselves and present arguments to MOFCOM about the possible consequences that a UEL listing would have on their and their Chinese counterparties' businesses. It is most likely that companies threatened with listing will need to offer compromises to avoid being designated as unreliable.

### Key issues

- The newly announced UEL could restrict access to the Chinese market for foreign companies participating in boycotts or other measures against Chinese firms.
- Early indications suggest the UEL could resemble the US Entity List, although UEL procedures and the actual list are not yet public.
- Questions remain about the contents of the UEL or its specific effects, but the impacts could be significant for targeted companies.

A company on the UEL will be subject to "any necessary legal and administrative measures" that MOFCOM imposes, while the public will be advised to be cautious to avoid risks associated with the designated foreign entities.

### **Official policy**

In case the motivation and target of the UEL were not clear from its name and terms, the PRC government also issued an accompanying background statement.

China decided to establish the UEL because "certain countries have been abusing the concept of national security, the measures of export control and their long-arm jurisdictions, which actions have severely harmed the security and stability of the global industrial chain, supply chain and value chain, destroyed the international economic orders and multilateral trading rules, and caused injuries to the global economy and national interests of countries including China." The phrase "long-arm jurisdiction," in particular, has been used by the PRC government to challenge the use of extraterritorial sanctions by the United States against Chinese companies.

### **Impact**

Whether the list will be a long one and work to essentially shut off trade with companies, particularly from the United States, is a matter of speculation. The initial UEL might also be short, consisting of companies that have publicly announced they have stopped doing business with US listed entities. In that case, the UEL may have little additional impact. In any event, companies contemplating business in China and with Chinese companies will need to factor in the UEL, ensuring commercial rather than regulatory reasons guide their decisions not to do business with other Chinese entities, subject US restrictions with which China disagrees and considers discriminatory and abusive.

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