Attn. Legislative Affairs Commission, Standing Committee,
National People's Congress (NPC), People's Republic of China

From: Confederation of European Business (BusinessEurope)
Syndicat des Industries Exportatrices de Produits Stratégiques (SIEPS), France
The Export Group for Aerospace, Defence and Dual-Use (EGADD), United Kingdom
Network Against Proliferation (NAP)
Center for Information on Security Trade Control (CISTEC), Japan
Japan Business Federation (KEIDANREN)
The Japan Chamber of Commerce and Industry (JCCI)
Japan Machinery Center for Trade and Investment (JMC)
Japan Foreign Trade Council, Inc. (JFTC)
Japan Electronics and Information Technology Industries Association (JEITA)
Japan Business Machine and Information System Industries Association (JBMIA)
Japan Chemical Exporters and Importers Association（JCEIA）
Communications and Information Network Association of Japan（CIAJ）
Japan Chemical Industry Association (JCIA)

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Joint Comments by Industrial Associations of Europe and Japan on China's Draft Export Control Law (Second Review Draft) of July 2020

The industrial associations of Europe and Japan have previously submitted joint comments on China's Draft Export Control Law in response to (1) the Chinese Ministry of Commerce's draft of June 2017 and (2) the first draft by the Standing Committee of the National People's Congress (NPC) of December 2019 on the basis of our mutual interest in promoting trade and investment between China and the other foreign countries.

The second draft of July 2020 contains new language which reflects points raised in our above-mentioned joint comments on the first draft. It also retains existing language that we are still concerned is unclear, and new language that raises new concerns. We respectfully request that appropriate consideration be given to our comments below so that the Export Control Law can become universally accepted in the international community and help improve the investment and trade environment in and with China.

1. New Concerns

The following points have been added or modified in this second draft; however, there are major concerns regarding the clarity, predictability, scope and interpretation of these points in the draft legislation.

(1) Extraterritorial Application of Article 44

Article 44 has been newly added and stipulates that "Organizations and individuals outside the territory of the People's Republic of China that violate relevant export control provisions under this Law, obstruct performance of international obligations including non-proliferation, or endanger the national security and interests of the People's Republic of China, shall be handled in accordance with the law, and with legal responsibility pursued."

We understand that this provision would only be invoked if all three conditions were met: (1) "violations of export control provisions"; and (2) "obstruction of performance of international obligations" and (3) "endangering the national security and interests of China." (Chinese law firms have also offered similar interpretations on the published websites). However, if this is the case, there are several points which would benefit from clarification.

Firstly, regarding the above-quoted first condition that organizations and individuals outside the territory of the People's Republic of China violate "relevant export control

provisions" under this Law, it is not clear which provisions of the Law are being referred to. Even if there are cases involving "organizations and individuals outside of China," such cases would seem to be extremely rare.

For example, this could refer to potential violations of Article 16, such as violation of the end-user's commitment that it shall not alter the end-use of the underlying controlled item or transfer it to any third party and violation of the importer's reporting obligations. However, the penalties for these violations are already stipulated in Article 18 (1) and (3): specifically, importers and end-users would be listed on an export control list and exporters would be prohibited from conducting transactions with these importers and end-users.

Alternatively, it is conceivable that Chinese companies or individuals outside of China might provide controlled items to foreign companies or individuals overseas, as one type of deemed export in Article 2, but this case concerns Chinese companies or individuals and so it could mean a series of penalties may be applicable.

Other possibilities would appear to include the prohibition on providing services for export operators engaged in export control violations in Article 20. Or perhaps if the re-export rule in Article 45 contemplates the re-export controls (i.e., controls on the re-export from countries other than China of items previously exported from China), then this prohibition would be relevant. However, Article 20 should not go beyond the territorial principle in international laws, and it seems there is no precedent in the legal systems of export control around the world where such an aiding and abetting-type entity is penalized through the extraterritorial application of the law. As for Article 45, as explained in our previous joint comments, this is not a general system agreed by the international export control regime, and so is not appropriate.

The second question on the new Article 44 is that, while penalties for any violations are already stipulated, as described above, Article 44 stipulates that violators "of relevant export control provisions under *this Law*" "shall be handled in accordance with *the law*, and with legal responsibility pursued." In Article 44, "this Law" and "the law" are written differently, and so it is unclear what "the law" actually means and what "legal responsibility" specifically refers to. If there is a case where "the law" (rather than "this Law") is used to pursue "legal responsibility," then on the basis of criminal statutory principles one cannot be penalized for doing something that is not specifically prohibited by law. It needs to be made explicitly clear which types of legal responsibilities are to be pursued in which kinds of cases, and under which laws. (In Article 43 stipulating, "Where the violation of the provisions herein constitutes a crime, the criminal liability of the party concerned shall be investigated in accordance with the law," we assume that would encompass the offenses of smuggling or conducting illegal business. However, Article 44

does not bring to mind any specific cases or related laws connected with violations of the provisions of this Law.)

In any case, the purpose and specific contents of this newly created Article 44 are unclear, and this article is questionable under the territorial principle in international law, and also under the general legal principle that there should be no penalty imposed without a specific prohibition under the law. Moreover, since we believe this article will make the position of foreign companies doing business with China extremely unstable and will have a massively negative impact on business with China, we request that this article be re-examined, including by considering removing it from the draft.

(2) Supervision and Inspection Rules for Export Activities

Article 17 states, "National Export Control Authorities establish end-user and end-use risk management systems to evaluate and verify end-users and end-uses of controlled items, and strengthen end-user and end-use management." However, in the first draft of December 2019, Article 19 stipulated "National Export Control Authorities shall establish end-user and end-use risk management systems to evaluate end-user and end-use certification documents submitted by export operators." The phrase "evaluate end-user and end-use certification documents" has been amended and expanded in the second draft to "evaluate and verify end-users and end-uses."

Since the purpose and impact of this text change is unclear, its interpretation is quite confusing. Some published interpretations from law firms view it as a reinstatement of the rule in the Ministry of Commerce's draft of June 2017 to conduct on-site inspections at end-user offices in the country or region of the end-user. We understand the reason is likely as follows: Article 30 of the first draft of December 2019 stipulates the National Export Control Authorities shall supervise and audit citizens, legal persons and other organizations engaged in the export of controlled items; however, Article 28 of the second draft of July 2020 stipulates the National Export Control Authorities shall supervise and inspect the export activities of controlled items. Therefore, we assume those involved in export activities might include the offices and factories of end-users and importers under the second draft of July 2020.

The necessity of conducting appropriate checks to validate and resolve any potential red flags over the end-user and end-use is a fundamental principle of export controls and naturally understood. However, the method for implementing such checks could be problematic. If there is any doubt about the authenticity of the end-use, it would be usual international export control practice for competent authorities to make necessary inquiries to the end user (usually by asking the end user to submit a written certification). Export control authorities' conducting on-site inspections at the end-user's site in the

importing country is not appropriate because it would be the exercise of public powers outside of their jurisdiction, and is not a generally accepted international export control practice. It is our understanding, on the basis of the above, that the wording "on-site inspection" in the Ministry of Commerce's draft of June 2017 was in fact deleted in the first draft of December 2019.

We understand that Article 28 concerns export operators only and does not include on-site inspections of end-users or importers in the importing country for the details above and the following reasons:

1) It is export operators who carry out the export activities that are subject to supervision and inspection and Article 38 stipulates that if an export operator refuses or obstructs the supervision and inspection, it shall be fined.
2) It appears that if the Chinese authorities have doubts about the end-user or end-use, they will request confirmation from the importing country's government agency as follows:
   - In Article 15, end-use certificates can be requested to be issued by the government agency of the country and region where the end-user is located.
   - The newly added Article 32 stipulates "National Export Control Authorities shall carry out collaboration and communication on export control with other countries, regions and international organizations, in accordance with the international treaties they signed or joined, or the principles of equality and reciprocity."

In any case, whether or not on-site inspections of end users are included is a major concern, and we respectfully request clarification that such inspections are not within the scope of Article 28.

2. Points We Would Like To Reiterate

The following points continue to be of great concern, and we have been asking for them to be examined since the Ministry of Commerce's draft of June 2017.

Since these concerns are related to the fundamental principles of export control laws and represent a divergence from the general framework of the international export control regime, we have been deeply concerned about them from the very beginning. As such, we would like to explain the problems once again and request that they be taken into due consideration.

(1) Re-export Controls

The same language set out in Article 45 of the first draft of December 2019 has been retained in the second draft of July 2020, and it still remains unclear whether the

wording of "re-export" in this Article means only "re-export from China of items exported to China" (i.e. reshipment / transshipment), or "re-export" stipulated in Article 64 of the Ministry of Commerce's draft of June 2017. Article 64 of the Ministry of Commerce's draft of June 2017 stipulated re-export controls (i.e., controls on the re-export from countries other than China of items previously exported from China) and it was understood that a *de minimis* rule applied.

Our understanding is that "re-export" in Article 45 in the first draft of December 2019 and the second draft of July 2020 does not mean the above-mentioned re-export controls, but rather refers to "re-export from China of items previously exported to China" (i.e. reshipment / transshipment) because the above-mentioned Article 64 of the Ministry of Commerce's draft of June 2017 was deleted and because of the wording which appears before and after Article 45.

We ask that this issue be clarified. As we have repeatedly explained, if the above-mentioned re-export controls are introduced into the provisions, it will have a very negative effect. We therefore would like to request again that no such system be put in place.

(2) Deemed Export Controls

Deemed export controls are stipulated in Article 2 and the provisions remain basically unchanged from the first draft of December 2019. However, deemed export controls are not stipulated in any of international export control regimes, and Japan, Europe and the United States have all adopted distinct and more limited deemed export control systems and practices.

Regarding the deemed export controls set out in Article 2, they apply not only to technologies but also to all controlled items, including controlled commodities, and also apply to sharing technologies with foreign national employees within a company, etc. As a result, there is a concern that this will deviate greatly from international practices and may interfere with daily corporate activities.

In our joint comments on the first draft of December 2019, we requested that the scope of deemed export controls be limited and we would like to ask once again that the following limitations be stipulated:

- Excluding employees of companies and organizations in China (this means limiting the deemed export controls to foreign students, contractors, independent researchers, etc.);
- Restricting controls to the provision in China only of technologies and source code

controlled by international export control regimes (not commodities);

- Developing comprehensive license systems and license exception systems.

We are not sure whether these requests will be reflected in the law itself or in the subordinate regulations; however, we do hope that these requests will be reflected in the China Export Control Law itself as much as possible in order to prevent widespread concerns among overseas companies doing business in or with China.

(3) Other Points

The following points were raised in our joint comments on the first draft of December 2019. They are important and so we would like to repeat our requests once again.

1) Curbing unreasonable demands for technology disclosures in export reviews and protecting confidential business information
2) Relaxing the obligation to uniformly submit documents in license applications (practices on the basis of the sensitivity of controlled items)
3) Avoiding the cycle of opposition and retaliation based on the "Equality Principle" provision of the Foreign Trade Law
4) Avoiding the use of export controls as a political means, such those of "important strategic rare materials," etc.

3. Points Now Reflecting Our Previous Joint Comments

We understand that the following development reflects our previous joint comments on the first draft of December 2019 and would like to express our gratitude.

- The removal of the legal obligation for exporters to establish an internal compliance program (ICP), and instead, encouraging them to establish an ICP and stipulating that export control authorities may grant more favorable treatment, such as general licenses to exporters establishing appropriate ICPs.

4. Requests Regarding Subordinate Regulations and their Application

(1) Publishing Submitted Comments and Issuing Guidance

Regarding China's Draft Export Control Law, we have submitted joint comments on three separate occasions in response to requests for public comments on the Ministry of Commerce's draft of June 2017, and the Standing Committee's first draft of December 2019 and second draft of July 2020.

However, we are unsure how our submitted joint comments are being addressed and what or how the authorities seeking such public comments are thinking about them. This has led us to become somewhat confused.

With respect to the interpretation of the text of the draft law, even law firms in China cannot always agree on the same view among themselves, often expressing contradictory views on important parts of the text on their websites.

Of those comments submitted by various parties, we assume that a considerable number of them are not suitable to be reflected in the law itself but rather are suitable to be reflected in the subordinate regulations and their application. However, for those companies engaged in business with China, their approach to complying with the law would differ greatly depending on whether or not these comments are reflected in the subordinate regulations and their application. As they prepare for the future, they need to be able to fully understand the authorities' policies and plans.

Therefore, we would like to request that the relevant authorities answer the inquiries in the submitted comments as to whether they will reflect the comments in the law or subordinate regulations, and on the other points that remain unclear. We also would like to request the authorities to publish guidance on these issues as soon as possible.

(2) Ensure Opportunities to Submit Comments on Subordinate Regulations, etc.

In addition to the above-mentioned requests, we also made a number of other requests in our previous joint comments on the first draft of December 2019. We understand that a considerable number of these requests are more suited to being reflected in the subordinate regulations. Even if our joint comments are included in the subordinate regulations, they should be stipulated in detail and so these regulations are very important.

Therefore, we would like to request that the authorities seek public comments on the subordinate regulations so that we may have the opportunity to submit comments on them, as is conducted in other major countries.

(3) Ensure Sufficient Period of Time For Preparation Before The Effective Date of The Law

The enactment of the Export Control Law would change the legal environments for investment and trade related to China. In order to appropriately comply with the law, it would be necessary for companies to fully understand the law and its subordinate

regulations and to develop corporate compliance systems.

We therefore would request that the authorities ensure several years are provided before the law's effective date to allow sufficient time for companies to adequately adjust, prepare for and comply with the law.