

China Export Controls: Did Beijing Block the TikTok Deal?

[CHINA REGULATION WATCH](#)¹

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1. Introduction

On August 28, 2020, China released an updated Catalogue of Prohibited and Restricted Export Technology (中国禁止出口限制出口技术目录) (the “Export Restrictions Catalogue”).² The updated Export Restrictions Catalogue includes several new items, two of which might impose a requirement for ByteDance (字节跳动), owner of the popular short video-sharing mobile application TikTok, to obtain an export license from the appropriate provincial office of China’s Ministry of Commerce (商务部) (the “MOC”) in order to sell TikTok’s U.S. operations. The recent announcement that Microsoft Corp. lost to Oracle Corp. in the bidding war for TikTok’s U.S. operations, and that the Oracle deal might not involve an outright sale of those operations,³ suggests that in releasing the new Export Restrictions Catalogue, Beijing might have effectively blocked the Microsoft deal.

On August 6, 2020, the U.S. President issued the Executive Order on Addressing the Threat Posed by TikTok (the “TikTok Order”), which asserted that TikTok’s data capture policies threaten U.S. national security and that TikTok reportedly censors content that the Communist Party of China deems politically sensitive.⁴ To address these threats, beginning September 20, 2020, the TikTok Order prohibits any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance or any of its subsidiaries, thereby effectively setting a deadline for ByteDance to sell its U.S. operations. On August 14, 2020, the U.S. President issued the Order Regarding the Acquisition of Musical.ly by ByteDance Ltd, which set a new deadline of November 12, 2020 for ByteDance to

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² The Catalogue of China’s Prohibited and Restricted Export Technology (中国禁止出口限制出口技术目录) issued jointly by the Ministry of Commerce (商务部) and Ministry of Technology (科技部) on August 28, 2020.

³ See “[Oracle Wins Bid for TikTok in U.S., Beating Microsoft](#)”, posted by the Wall Street Journal on September 13, 2020.

⁴ See “[Executive Order on Addressing the Threat Posed by TikTok](#)”, posted by the White House on August 6, 2020.

divest all of its U.S. operations.⁵

The recently announced Oracle deal is under review by the Committee on Foreign Investment in the U.S. (“CFIUS”), and may still require an export license from China’s MOC. As a result, the fate of TikTok remains very much in the hands of governments on both sides of the Pacific Ocean.

2. China Technology Import and Export Rules

The Export Restrictions Catalogue is issued and updated in accordance with the requirements of China’s Foreign Trade Law (中国对外贸易法)⁶ and the Regulations on the Administration of Technology Import and Export (技术进出口管理条例) (the “Export Regulations”).⁷ This latest update to the Export Restrictions Catalogue added five new items to the category of information processing technology, two of which might restrict a sale of the core content recommendation algorithm used in TikTok, namely item 18 – artificial intelligence interactive interface technology (人工智能交互界面技术) and the item 21 – personalized recommendation service technology based on data analysis (基于数据分析的个性化信息推送服务技术).

The Export Regulations prohibit the export of any restricted technology without first obtaining an export license from China’s MOC.⁸ The term export is defined broadly, and includes assignment of patent rights or rights to apply for patents, licensing of rights to implement patents, assignment of technical know-how, provision of technical services, and other forms of technology transfer.⁹ As a result, any TikTok deal involving the transfer or license of the core content recommendation algorithm might require obtaining an export license from China’s MOC before the deal can be completed.

Technically, under the Export Regulations a potential exporter of restricted technology should first apply to the appropriate provincial office of the MOC in order to obtain a preliminary export permission before beginning any substantial negotiation with the potential buyer or licensee.¹⁰ It is unclear whether or not ByteDance has obtained or even requested a preliminary export permission. After the parties sign a contract that involves the export of restricted technology from China, the exporting company must submit the required materials, including the contract, to the appropriate provincial office of the MOC to apply for an export certificate that would permit

⁵ See “[Order Regarding the Acquisition of Musical.ly by ByteDance Ltd](#)”, posted by the White House on August 14, 2020.

⁶ China’s Foreign Trade Law (中国对外贸易法) issued by the Standing Committee of the National People’s Congress (全国人大常委会) on November 7, 2016.

⁷ Regulations on the Administration of Technology Import and Export (技术进出口管理条例) issued by the State Council on March 2, 2019.

⁸ Article 31 of the Export Regulations (技术进出口管理条例).

⁹ Article 2 of the Export Regulations (技术进出口管理条例).

¹⁰ Article 34 of the Export Regulations (技术进出口管理条例).

completion of the transaction.¹¹

3. Was the Updated Export Restrictions Catalogue Issued to Block the TikTok Deal?

Feng Gao (高峰), the public spokesperson for China's MOC, said on September 4, 2020, that the updated Export Restrictions Catalogue was not issued to target ByteDance or the TikTok deal. Mr. Gao indicated that China has been working on an update to the technology import and export rules for years, ever since the last Export Restrictions Catalogue was issued back in 2008.¹²

On July 23, 2018, however, China's MOC released for public comment a draft of the Export Restrictions Catalogue. That draft did include the restriction on artificial intelligence interface technology (item 18), but it did not include any restriction on personalized recommendation technology (item 21), which was a new addition to the final version released on August 28, 2020.¹³

In addition, on August 24, 2020, ByteDance announced that it had filed a lawsuit accusing the U.S. government of interfering with negotiations between private businesses.¹⁴ Just several days later, China's government released the updated Export Restrictions Catalogue, which became effective immediately. The addition of the new restriction on personalized recommendation technology, and the release timing for the final updated Export Restriction Catalogue, suggests that China's government did intend to influence the TikTok deal.

4. Does the Oracle TikTok Deal Require Beijing's Consent?

Given the very broad definition of export in China's Export Regulations, and the stated U.S. goals in the TikTok Order, it does appear that any Oracle TikTok deal that satisfies the U.S. Committee on Foreign Investment in the United States as well as the U.S. President will likely require an export license from China's MOC.

Under the Export Regulations, the term technology export includes provision of technical services and any form of technology transfer including a license, which means that irrespective of how a TikTok sale is structured, as long as the sale involves the core content recommendation algorithm, approval from China's MOC will be

¹¹ Article 35 of the Export Regulations (技术进出口管理条例).

¹² See "[Ministry of Commerce: Not for Specific Enterprises \(商务部: 不针对具体企业\)](#)" (Chinese), posted by First Financial (第一财经) on September 4, 2020.

¹³ See "Seeking Public Comment on the Revision of the 'China Catalogue of Prohibited and Restricted Import Technology' and the 'China Catalogue of Prohibited and Restricted Export Technology'" (关于《中国禁止进口限制进口技术目录》和《中国禁止出口限制出口技术目录》修订公开征求意见) (Chinese), posted by the Ministry of Commerce (商务部) on July 23, 2018.

¹⁴ See "[TikTok's Parent Company Announces Lawsuit Against U.S. Government](#)", posted by the People's Daily (人民日报) on August 24, 2020.

needed. If the proposed Microsoft acquisition of TikTok’s U.S. operations involved the acquisition or licensing of TikTok’s core content recommendation algorithm, then a negative view of the deal from China’s government likely would have caused the transaction to falter.

According to the Wall Street Journal, the proposed Oracle deal does not involve the sale of any significant TikTok assets, and instead Oracle will cooperate with TikTok to attempt to address U.S. national security concerns.¹⁵ As a result, if the Oracle deal doesn’t include a license or other transfer of TikTok’s content recommendation algorithm, an export license from China’s MOC might not be required. But if Oracle doesn’t control the content recommendation algorithm, will that satisfy U.S. national security concerns, which include not only personal data issues but also content censorship issues? If ByteDance does find a deal structure that satisfies both Washington and Beijing, that structure will be worth studying as the U.S. – China technology tensions are unlikely to end any time soon.

¹⁵ See “[Oracle Wins Bid for TikTok in U.S., Beating Microsoft](#)”, posted by the Wall Street Journal on September 13, 2020.