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New Encryption Law — An Administrative Reformation of Commercial Encryption

By Xun Yang

The Standing Committee of the National People's Congress has adopted the *PRC Encryption Law* (the "*Encryption Law*") on 26 October 2019, which will become effective on 1 January 2020. This is the first law of this country in the area of encryption administration. Although the Encryption Law has only 44 provisions, which are largely principles in nature, it, read jointly with other laws, regulations, and ministerial measures, will have significant and long-term influence on commercial activities in the area of encryption manufactures and services.

I. A Historical View of Administration on Commercial Encryption

Before the promulgation of the Encryption Law, in the area of encryption administration, there is merely one piece of legislation which is a formal source of law, that is an administrative regulation named *Administrative Regulation on Commercial Encryption* issued in 1999. This regulation provides for the licensing requirements for entering into the commercial encryption market, for the import control,

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and for the use of encryption products and technologies. Although it, to certain degree, functions to regulate the commercial encryption market, it has a gap, both from legislative hierarchy and enforcement aspects, from meeting the demand resulting from the technical and social development. Such gap exists in the following three aspects:

Firstly, the sole law enforcement body fails to meet the demand for comprehensive supervision in the encryption industry. Under the Administrative Regulation on Commercial Encryption, the State Commercial Encryption Administrative Office (“SCEA”) is the main law enforcement body. In theory, it is not only responsible for certification and approval of commercial encryption products and technologies, but also for supervision over the business activities involving commercial encryption products and services. In reality, however, SCEA has limited effective means or capacity to supervise the importing and market sales sectors.

Secondly, the Administrative Regulation on Commercial Encryption has adopted a strict licensing system, by which the R&D and manufacture of encryption are subject to licensing requirement, encryption products are subject to certification requirements, import and use of overseas encryption products by foreign-invested companies are required to be filed with the government. Onerous examination and approval procedures impede the development of encryption technology and its applications, and in fact, such procedures are difficult to be effectively enforced.

Moreover, with the promulgation or issuance for public consultations of the *Cyber Security Law* and its supporting laws and measures, Administrative Regulation on Commercial Encryption appears to be inconsistent with the overall framework of the cyber security legal regime. In particular, in the area of security assessments and certifications for network products and services, encryption products and services, as a type thereof, need to have a clear picture as to how they are supposed to undergo a security assessment and certification procedure.

II. Legislative Review of Commercial Encryptions

In light of the said gap in the administration of commercial encryption, and in response to the development of encryption technology and its applications, after a three-year legislative progress and twice public consultations, the Encryption Law has finally been promulgated.

The Encryption Law for the first time has divided encryption into three levels, being core encryption, normal encryption, and commercial encryption. Among them, core encryption and normal encryption are used for protecting state secrets; and citizens and companies are allowed to use commercial encryption to protect information other than state secrets. The Encryption Law has five chapters, i.e., 44 provisions, among which Chapter 3 (totally 11 provisions) deals with R&D, manufacture, use, sales, and services in relation to commercial encryption.

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Literally speaking, most provisions in the Encryption Law are principles or referring to other legislations and the Encryption Law contains very few provisions which directly create rights and obligations. This is intended. The legislative intends appear to be: on one side, to retain flexibility *vis-à-vis* fast developing encryption technology and its applications; and on the other, to harmonize the administration of encryption with the security assessment and certification requirements under the Cyber Security Law.

III. Highlights of Commercial Encryption Administration under Encryption Law

The development of commercial encryption administration under the Encryption Law includes the following:

Firstly, the Encryption Law removed the licensing requirements for entering into commercial encryption business. The original Administrative Regulation on Commercial Encryption and its implementing rules provides for strict examination and approval requirements for R&D, manufacture, import, and use of encryption products, which requirements do not fit for the needs brought from the development of information networks and the applications thereof. The State Encryption Administration (“**SEA**”) issued a notice to cancel a majority of these examination and approval requirements in December 2017. The Encryption Law further opens up the encryption market by converting a licensing system into quality certification system. In particular,

- foreign-invested companies will enjoy national treatment and are allowed to engage in R&D, manufacturing, sales, services, and import and export of commercial encryption products;
- licensing requirements will apply to import and export of the encryption products concerning national security and public interest as well as to perform the country’s duty under international treaties whilst commercial encryption used for consumer products is not subject to licensing requirements for importation or export controls;
- the licensing requirements in the area of R&D, manufacturing, import, and use of commercial encryption products are cancelled and replaced by security assessment and certification requirements for encryption products in the areas concerning national security, national economy, and public interest.

Secondly, the Encryption Law is linked to the security assessment and certification requirements under the Cyber Security Law and its supporting regulations (as well as drafts for consultations thereof). The encryption products and services which fall within the scope where security assessments and certifications are required under the Cyber Security Law and its supporting regulations (as well as drafts for consultations thereof) must perform the security assessment and certification accordingly, including:

- linked to the *Security Assessment Measure for Network Products and Services*, the commercial encryption products concerning national security, national economy, or public interest will be included

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in the Network Critical Equipment and Network Security Special Equipment Catalogue under the *Security Assessment Measure for Network Products and Services*, and are not allowed to be sold unless and until they are certified by qualified certification institutions. Meanwhile, provision of commercial encryption services by using network critical equipment and network security special equipment must be certified by qualified certification institutions as well;

- linked to the *Security Protection Regulation for Critical Information Infrastructure (draft)*, the procurement of commercial encryption products and services by the operators of critical information infrastructure must undergo a security assessment organized by the cyberspace administration and SEA, as far as national security is concerned;
- linked to the *Network Security Multi-level Protection Regulation (Draft)*, if commercial encryption is required for protecting critical information infrastructure, the operator must adopt encryption solutions and must perform security assessment *vis-à-vis* such encryption solutions, either alone or jointly with qualified certification institutions, which assessment must be harmonized with the security assessment for critical information infrastructure and under multi-level protection schemes.

Thirdly, in response to foreign investors' concerns about leakage of technical secrets during examination, approval, and filing of commercial encryptions, the Encryption Law explicitly protects the technology in encryption products and services from the following aspects:

- to encourage Sino-foreign cooperation in developing encryption technology and to prohibit forced transfer of encryption technology by using administrative powers;
- to impose statutory confidentiality obligations on testing and certification institutions for commercial encryption not to disclose the technology which they become aware of during performance of testing and certifications;
- to prohibit encryption administrations and the personnel thereof from forcing testing and certification institutions for commercial encryption to disclose relevant proprietary information such as the source code to them and from disclosing the technical secrets which they become aware of during performing their administrative duties.

IV. Indications

The promulgation and enforcement of the Encryption Law is generally a good news for enterprises involving commercial encryptions, including, in particular, foreign-invested companies. Specifically,

- the import of consumer products containing encryption components and encryption technology (e.g., various electronic apparatus having communication functions) will no longer subject to onerous encryption certification procedures so that the products can be launched in the China market simultaneously with the market in other countries.;

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- foreign-invested companies are allowed to use overseas encryption products or encryption technologies for intra-group communications as well as communications with business partners without onerous examination, approval, or filing procedures; and
- foreign companies which have capacities to perform R&D and manufacture of encryption products can invest into and participate in China encryption market either alone or jointly with Chinese companies.

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