



Newsletter No. 243 (EN)

**Liability of Foreign Directors
in a Chinese company
under Chinese law
Personal data protection and tax or duty
evasion**

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I. Regarding Chinese Data Protection

1. Cybersecurity Law

Cross-border transmission of personal information is regulated by the **Cybersecurity Law of the People's Republic of China (2017)** ("Cybersecurity Law"), concerning personal information of Chinese employees.

The critical information infrastructures, such as public communications and information services, energy, transport, water conservancy, finance, public services, and e-government affairs, are the key protection objects of information security. Compared with ordinary network operators, critical information infrastructure operators undertake more obligations and are subject to stricter regulations.

A foreign director always plays a role as a network operator in a company. He is not required to impose the "localized storage" obligations. However, when potentially personal or sensitive information is dealt with, stored or backed up, or directly transmitted to an overseas server, he should pay extra attention to the local laws.

2. Personal Information Protection Law

According to the **Law of the People's Republic of China on Personal Information Protection (2021)** ("Personal Information Protection Law") and the attitude of the relevant agencies, it reflects the trend that China is trying to restrict and limit sending out any personal information data abroad.

Therefore, given China's legislative trend, personal information data collected and generated within China shall not be allowed to leave the country. It is recommended that cross-border operating companies take a cautious attitude when transferring employees' personal information across the border. To be safe, the recommended approach is:

- (1) according to Article 37 of the **Cybersecurity law**, personal information and important data collected and generated by an internationally operating company should be stored in China, and should not be made available by remote access to the foreign HQs. If it is necessary to provide such information and data to overseas parties due to business requirements, a security assessment shall be conducted following the measures developed by the relevant authority. "Important data" is defined as "data closely related to national security, economic development, and social and public interests".¹
- (2) according to Article 39 of the **Law**, if an internationally operating company wants to make personal information available to the HQs or a third country, the management of the company must inform the Chinese employee first and ensure that it is authorized to do so. The information provided to the employees should include the overseas recipient's name and contact information, purposes and methods of

¹ Measures for the Exit Security Assessment of Personal Information (published on 07 July 2022; to be implemented on 01 September 2022), Art. 19.

processing, categories of personal information, the methods and procedures for individuals' exercise of the rights over the overseas recipient, and other matters. In each case, the separate consent of the data subject must also be obtained.

- (3) security assessments need to be organized. According to Article 38 of the **Law**, if an enterprise intends to transfer employee personal information out of the country, the enterprise should pass the security assessment, as organized by the national cyberspace administration, subject to the personal information protection certification by a specialized institution and enter into a contract with the overseas recipient.
- (4) where there is a risk that providing personal data abroad could infringe personal interests, it is not intended that these be provided.

II. Taxation

1. Tax Collection Administration Law of the People's Republic of China (2015 Amendment) (“Tax Collection Administration Law”)

According to **Article 63** tax evasion means that a taxpayer forges, asters, conceals or, without authorization, destroys accounting books or vouchers for the accounts, overstates expenses or omits or understates incomes in the accounting books, or, after being notified by the tax authorities to make tax declaration, refuses to do so or makes false tax declaration, or fails to pay or underpays the amount of tax payable. Where a taxpayer evades tax, the tax authorities shall pursue the payment of the amount of tax he fails to pay or underpays and the surcharge thereon, and

he shall also be fined not less than 50 percent but not more than five times the amount of tax he fails to pay or underpays; if a crime is constituted, he shall be investigated for criminal responsibility by law.

Where a withholding agent fails to pay, or underpays the tax which he withholds or collects by the means mentioned in the preceding paragraph, the tax authorities shall pursue the payment of the amount of tax he fails to pay or underpays and the surcharge thereon, and he shall also be fined not less than 50 % t but not more than five times the amount of tax he fails to pay or underpays. If a crime is constituted, he shall be investigated for criminal responsibility in accordance with the law.

Conclusion: The act of tax evasion can lead to two types of legal liabilities:

- (1) if the documents submitted by the parties do not constitute a criminal act, it might constitute “tax evasion” as regulated by Article 63 of the Tax Collection Administration Law and it needs to impose administrative punishment on the unit in accordance with Article 63 or Article 64.
- (2) When the behavior constitutes a criminal act, the application of the Criminal Law is opened up.

2. Criminal Law of the People's Republic of China (2020 Amendment) (“Criminal Law”)

Article 201 regulates, where a taxpayer files false tax returns by cheating or concealment or fails to file tax returns, and the amount of evaded taxes is relatively large and accounts for more than 10 percent of payable taxes, he shall be sentenced to fixed-term imprisonment not more than three years or limited incarceration, and be fined; or if the amount is huge and account for more than 30 percent of payable taxes, shall be sentenced to fixed-

term imprisonment not less than three years but not more than seven years, and be fined.

Where any withholding agent fails to pay or fails to pay in full the withheld or collected taxes by cheating or concealment, and the amount is relatively large, he shall be punished under the preceding paragraph.

Where either of the acts described in the preceding two paragraphs is committed many times without punishment, the amount shall be calculated on an accumulated basis.

Where any taxpayer who committed the act as described in paragraph 1 has made up the payable taxes and paid the late fine after the tax authority issued the notice of tax recovery according to law, and has been administratively punished, he shall not be subject to criminal liability, except that he has been criminally punished in five years for evading tax payment or has been, twice or more, administratively punished by the tax authorities.

Conclusion: If the submitted and signed documents by the CEO or acting managing director (even if he cannot read Chinese) constitute a criminal act, it falls under the "crime of tax evasion" regulated by Article 201 of the **Criminal Law**. If a company commits a crime, the company shall be fined according to Article 31 of the Criminal Law, and the person in charge and other persons who are directly responsible for the crime shall be sentenced to criminal penalties.

However, the crime of tax evasion on the part of the company does not mean that the legal representative (or other person in charge) must bear personal responsibility. This depends on whether the legal representative (or other persons in charge) has participated in the action of tax evasion or knew it or not.

If it is a foreigner who signed the document in Chinese without knowing the actual meaning, and there is evidence that he did not actively participate or subjectively intend to do

so, and he was unaware of this, he can use this for defence, while the court still has discretion on whether to impose personal responsibility.

III. Regarding Customs Declaration

Customs Law of the People's Republic of China (2021 Amendment)

Article 82 states, that any of the following acts of evasion of Customs control, Customs duties, and the prohibition or restriction of State import and export control in violation of this law and other related laws and administrative regulations shall constitute an act of smuggling:

- (1) to transport, carry or send by post into or out of the territory goods and articles which are prohibited or restricted by the State from being imported or exported, or which are subject to duty;
- (2) to sell within the territory, without Customs permission and without payment of the duties or without producing relevant licenses, for goods, goods listed for specific duty reduction or exemption and other goods, articles or inbound offshore conveyances under Customs control; or
- (3) to commit other acts by evading Customs control that constitute smuggling.

Where any of the acts listed in the preceding paragraph does not constitute a crime, Customs shall confiscate the smuggled goods, articles and illegal gains and a fine may be imposed. Customs shall confiscate the goods or articles that are specially or repeatedly used for shielding smuggling and the means of transport that are specially or repeatedly used for smuggling. Specially-made equipment used for concealing smuggled goods or articles shall be ordered to be demolished or confiscated.

Anyone who commits any of the acts listed in the first paragraph, which constitutes a crime, shall be investigated for criminal responsibility in accordance with laws.

IV. Regarding State Secret

1. Law of the People's Republic of China on Guarding State Secrets (2010 Revision) (Guarding State Secrets Law)

The following matters related to national security and any interests that may harm the country's security and interests in its political, economic, national defence, diplomatic and other fields after being leaked shall be determined as state secrets in accordance with **article 9**:

- (1) Secret matters in major national affairs decisions.
- (2) Secret matters in **national defence** construction and armed forces activities.
- (3) Secret matters in diplomatic and foreign affairs activities, and secret matters under the obligation of keeping confident.
- (4) Secret matters in **national economic** and social development.
- (5) **Secret matters in science and technology**.
- (6) Maintaining national security activities and tracing secret matters in criminal offences.
- (7) Other secret matters determined by the State Secrecy Administration Department.

The secret matters of a political party that meet the provisions of the preceding paragraph are state secrets.

2. Criminal Law

Whoever steals, spies into, buys or unlawfully supplies State secrets or intelligence for an organ, organization or individual outside the territory of China shall, in accordance with **article 111**, be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment; if the circumstances are minor, he shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights.

Conclusion: Submitting plans and drawings of **high-end technical developments** that may be deemed as state secret or intelligence that may endanger national safety by email, mail or make them available by other remote access to the headquarters in Switzerland or Germany may violate the **People's Republic of China on Guarding State Secrets (2010 Revision) (Guarding State Secrets Law)**.

Technology development plans and drawings and materials may fall within the scope of Articles 9 (4) and (5) of the **Guarding State Secrets Law**.

High-end technology development plans and drawings related to state secrets and national economic information security shall not be carried out, sent or transmitted abroad without the approval of relevant competent departments, otherwise, the personnel will constitute a criminal act under Article 111 and Article 398 of the **Criminal Law**.

V. Regarding the Foreign Investment Law in China

Since the implementation of the **Foreign Investment Law of the People's Republic of China** on 01 January 2020 (“Foreign Investment Law”), a large number of Sino-foreign joint ventures and some Wholly Foreign Owned Enterprises (WFOE) will need to adjust their governance structure. A Sino-foreign joint ventures company needs to complete the compliance transformation of the corporate governance structure and complete the registration of transformation within 01 January 2025. If failure to meet the transformation registration within 01 January 2025, a Sino-foreign joint ventures company’s or a WFOE’s application of registration of other matters at the admin authority shall be rejected.

According to the **Foreign Investment Law**, Sino-foreign joint ventures should focus on the analysis of the organization, distribution of power, constitution development and rules of procedure, and make corresponding adjustments, so as to adapt to the legal environment in the new era as soon as possible,

which is more conducive to the future development of enterprises.

The foreign directors of joint ventures need to pay close attention to the promulgation of the supporting management regulations and specific rules of the **Foreign Investment Law** by the Ministry of Commerce and relevant departments. In addition, its impact on the enterprise should be timely assessed.

VI. Summary

The liabilities of a foreign director of a Chinese company are governed by various legal and administrative provisions. A foreign director shall pay attention to not only the responsibilities listed in the Civil Code of China, but also laws in the perspectives of cross-border transfer of employee information and high-end technical developments information, tax payment, Customs clearance, etc. These laws regulate civil liability, administrative penalties or criminal liability to a company’s personnel in China. In this regard, foreign directors should undertake regular checks and improvement of legal and tax compliance, including directors' responsibilities.

*We hope that the information provided in this brochure was helpful for you.
If you have any further questions please do not hesitate to contact us.*

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