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# Han Kun Newsletter

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# Legal Updates

1. CSRC Issued Rules to Fill in Gaps in Program Trading Regulation
2. China Issues New Provisions on Mutual Legal Assistance in Criminal Matters to Enhance Cross-Border Asset Tracing and Recovery

# 1. CSRC Issued Rules to Fill in Gaps in Program Trading Regulation

**Author: Yin GE**

On April 12, 2024, the China Securities Regulatory Committee ("**CSRC**") released a public consultation draft of the *Provisions on Program Trading Management in Securities Markets (for Trial Implementation)* (《证券市场程序化交易管理规定（试行）（征求意见稿）》, the "**Draft Provisions**"). On May 15, 2024, CSRC finalized the Draft Provisions and issued the official *Provisions on Program Trading Management in Securities Markets (for Trial Implementation)* (《证券市场程序化交易管理规定（试行）》, the "**Program Trading Provisions**"), which will take effect as of October 8, 2024. The finalized Program Trading Provisions are substantially the same as the Draft Provisions. The Program Trading Provisions are the first comprehensive rules on program trading issued at the central financial regulator level, which intend to address a series of critical issues relating to program trading in China's securities markets.

## Background

Despite its relatively late introduction in China, program trading has rapidly developed, now accounting for over 25% of the trading volume in the A shares market. The amended *PRC Securities Law* promulgated in 2019 expressly provides for program trading under the supervision of CSRC, establishing a legislative basis to further regulate program trading for ensuring systematic security and maintaining orderly markets. In September 2023, the three PRC stock exchanges, under CSRC's guidance issued their guidelines on program trading and reporting. The market has been awaiting CSRC's regulation in this area to provide traders with more certainty and transparency, thus industry players have welcomed the Program Trading Provisions as a positive regulatory development.

The Program Trading Provisions were formulated while recognizing both the benefits and downsides associated with program trading, drawing on practical experience and statistical analysis to create a framework that enhances the pertinence and effectiveness of relevant regulatory measures.

The Program Trading Provisions follow the State Council's issuance of the *Opinions on Strengthening Regulation, Forestalling Risks and Promoting the High-Quality Development of the Capital Markets* (《关于加强监管防范风险推动资本市场高质量发展的若干意见》), which outlines a strategic vision to develop a modernized, adaptive, competitive, and inclusive capital market by 2035. The Program Trading Provisions will form a critical component of this broader initiative, aimed at enhancing market stability and safeguarding investor interests through a robust system of monitoring and risk management.

## Key takeaways of the Program Trading Provisions

The Program Trading Provisions consist of 7 chapters and 32 articles, with the following key aspects worth noting among others:

### I. Definition of "program trading" and application scope

- Under the Program Trading Provisions, "program trading" is generally defined as trading on

securities exchanges via trade orders automatically generated or placed by computer programs.

- "Program traders" refer to investors engaging in program trading which may include (i) clients of securities firms, such as private fund managers and QFIs; (ii) securities firms that engage in proprietary trading, market making or asset management businesses; (iii) mutual fund managers, insurance institutions and other institutions trading through trading units of the exchanges; and (iv) other investors as identified by the exchanges.
- Overseas program traders under the Stock Connect Northbound trading link will be equally covered under the Program Trading Provisions. Detailed measures to facilitate this inclusion are pending further coordination and agreement between exchanges on both sides.

## II. Regulatory jurisdiction and authority delegation

- A multi-layer regulatory framework is intended, where CSRC will be the key regulator to supervise program trading related activities, and relevant exchanges and industry associations will formulate trading rules for self-regulation purpose and set up information and monitoring systems under CSRC's guidance.
- CSRC, relevant exchanges, and industry associations may conduct onsite and offsite examinations on relevant institutions and individuals involved in program trading, and the Program Trading Provisions would permit CSRC to impose penalties or discipline on traders who are found to be in violation.

## III. Reporting system

- A detailed program trading reporting system will be established by the exchanges under which all program traders would be subject. Generally, the key reportable items include account information, funding information, trade information, software information, etc.
- Brokers would be required to have their clients report relevant information to them, whereas institutions trading through trading units would report to the exchanges. Program traders would be allowed to engage in program trading only after receiving confirmation of the reported information from the brokers or the exchanges, as applicable.

## IV. Trade monitoring and risk management by exchanges

- The exchanges would need to pay more attention to certain abnormal trading activities, including rapid order placement, high frequency of cancellation, and those causing irregularities in multiple securities or the market.
- Brokers would enter into program trading entrustment agreements to specify brokers' risk management responsibilities and requirements. The exchanges would need to clarify the specific procedures and requirements for trading suspension, order cancellation, settlement delay, etc., to resolve market disruptions due to force majeure, accidents, major technical failures, human errors or other emergencies.

## V. Requirements for technical systems used in trading

- The technical system used for program trading would need to conform to the requirements of the exchanges, and feature effective functions such as capital and securities inspection, authorization control, threshold management, abnormality monitoring, error handling, and emergency disposal, etc.
- To ensure fair treatment among market players, a series of requirements with respect to trading unit, colocation service, system access and market information will apply to relevant parties including program traders, brokers, and the exchanges.

**VI. High Frequency Trading/HFT**

- HFT under the Program Trading Provisions refers to program trading activities that feature (i) high amount and frequency of order placement and cancellation within a short period of time; (ii) high amount and frequency of order placement and cancellation within a day; and (iii) other features identified by the exchanges.
- HFT would become a focus of regulatory monitoring and be subject to additional reporting requirements and differentiated fees imposed by the exchanges.

## Our observations

The Program Trading Provisions are formulated with the strategic approach of "drawing on advantages and avoiding risks", particularly considering the extensive presence of retail investors in China's market landscape. In principle, the Program Trading Provisions aim to leverage the benefits of program trading while rigorously standardizing trading behaviors and effectively curbing illegal or abnormal activities that could disrupt orderly markets. The Program Trading Provisions also seek to fill in existing regulatory gaps, thereby enhancing predictability and transparency for program traders and fostering a friendlier trading environment in the long run.

There are no major differences between the Program Trading Provisions and the program trading rules previously issued by the three PRC stock exchanges, which have already demonstrated the regulatory intention and effectiveness in guiding the practices. At the same time, the Program Trading Provisions are intended to be relatively high-level and have delegated authority to the relevant PRC exchanges to apply and implement the rules in practice. These exchanges have also echoed to emphasize their commitment to actively implementing the new regulation and we expect to see updated implementing rules issued by the exchanges soon, based on the finalized Program Trading Provisions.

During the consultation period of the Draft Provisions, Han Kun team worked with relevant industry associations (such as the Alternative Investment Management Association) to make formal submissions to CSRC and make industry players' voices heard properly. We will continue to make bridging efforts between the industry and the regulators and navigate our clients through this evolving regulatory environment. We have prepared an inhouse English translation of the Program Trading Provisions. Please do not hesitate to contact us if you have any questions or require a copy of the translation.

## 2. China Issues New Provisions on Mutual Legal Assistance in Criminal Matters to Enhance Cross-Border Asset Tracing and Recovery

**Author: Andy LIAO**

The methods employed by criminals to transfer and conceal proceeds of crime on a global scale are becoming increasingly sophisticated, making effective mutual legal assistance in criminal matters crucial for cross-border asset recovery. In response to this threat, the National Supervisory Commission, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly issued the Provisions on Several Issues Concerning the Implementation of the Law of the People's Republic of China on International Mutual Legal Assistance in Criminal Matters (for Trial Implementation) on April 22, 2024 (the "**Implementing Provisions**"). Since the issuance of the Law of the People's Republic of China on International Mutual Legal Assistance in Criminal Matters (the "**MLA Law**") in October 2018, this is the first set of implementing rules formulated in the field of international mutual legal assistance in criminal matters in China. In this article, we provide a review of the relevant content of the Implementing Provisions by combining the author's practical experience in the field of cross-border asset tracing and recovery while focusing on issues related to the tracing and recovery of cross-border criminal assets.

### The legislative status of China's mutual legal assistance in criminal matters before the issuance of the Implementing Provisions

Under domestic law, prior to the issuance of the Implementing Provisions, besides the MLA Law, other relevant provisions were scattered throughout the Criminal Procedure Law of the People's Republic of China (the "**Criminal Procedure Law**"), the Interpretation by the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China (the "**Interpretation of the Criminal Procedure Law**"), the Rules of Criminal Procedure for People's Procuratorates, the Procedural Rules for Handling Criminal Cases by Public Security Authorities, and the Supervision Law of the People's Republic of China (the "**Supervision Law**").

Specifically, under the MLA Law, China can provide the following mutual legal assistance to foreign entities: service of documents, taking of evidence, arranging for witnesses to testify or assist in an investigation, seizure, impoundment and freezing of property involved in a criminal case, confiscation and return of proceeds of crime and other property involved in a criminal case, and transfer of sentenced persons. The provisions concerning "seizure, impoundment and freezing of property involved in a criminal case" and "confiscation and return of proceeds of crime and other property involved in a criminal case" serve as crucial legal grounds and operational foundations for foreign entities to recover criminal assets in China.

Compared to the general provisions of the MLA Law, the Interpretations of the Criminal Procedure Law, the Rules of Criminal Procedure for People's Procuratorates, the Procedural Rules for Handling Criminal Cases by Public Security Authorities, and the Supervision Law primarily regulate and elaborate on international mutual legal assistance based on the roles of different entities, including the People's Courts, the People's Procuratorates, public security authorities, and the Supervision Commission.

Under international law, as of 2024, China has signed bilateral treaties of mutual legal assistance in criminal matters with over 60 states, treaties on the transfer of sentenced persons with 17 states, and nearly 30 international conventions that cover judicial assistance, extradition, and other related matters. The content related to the return of proceeds of crime and victim's property, as well as the confiscation of proceeds and tools of crime in these treaties and conventions can serve as the basis for relevant contracting states to request judicial assistance from China in recovering criminal assets.

## Status and challenges of cross-border criminal asset tracing and recovery in China prior to the issuance of the Implementing Provisions

### I. Current status of cross-border criminal asset tracing and recovery in China prior to the issuance of the Implementing Provisions

Cross-border asset tracing and recovery presents numerous obstacles in practice, whether China requests or provides assistance to a foreign country for this purpose; and the execution of these measures has often been less than ideal. The public record contains few instances in which China has assisted a foreign country in recovering criminal assets within its borders. Foreign requests for China's assistance often encounter procedural or substantive hurdles, leading to frequent delays or complications. Countries that have not signed multilateral or bilateral international treaties with China may only resort to diplomatic channels to seek China's assistance. Public disclosure of these cases is also scarce, given the appreciable impact of reciprocal commitments under diplomatic channels and political considerations.

### II. Challenges of cross-border criminal asset tracing and recovery in China prior to the issuance of the Implementing Provisions

#### 1. Uncertain time limits for assistance

Prior to the issuance of the Implementing Provisions, general time limits related to international mutual legal assistance in criminal matters could be found in Article 379 of the Procedural Rules for Handling Criminal Cases by Public Security Authorities: "For the execution of mutual legal assistance in criminal matters and police cooperation, if the request includes a time limit, the request should be completed within that period. If no time limit is specified, the taking of evidence should be completed within three months, and the service of criminal procedural documents should be completed within ten days. If the time limit cannot be met, reasons must be provided and reported to the Ministry of Public Security hierarchically." However, the departments involved in international mutual legal assistance in criminal matters are not limited to the Ministry of Public Security, nor are the matters confined to the taking of evidence or the service of criminal procedural documents. Therefore, the Procedural Rules for Handling Criminal Cases by Public Security Authorities do not fully clarify the time limits for international mutual legal assistance in criminal matters.

In general, there is no clearly defined time limit for China to provide international mutual legal assistance in criminal matters, resulting in long case processing times. Practitioners have noted that it typically takes around six months to a year to complete a case of international mutual legal assistance in criminal matters, and in some cases, assistance will not be completed for several years.

### 2. Unclear competent authorities for assistance of asset recovery

According to the MLA Law, China's authorities responsible for international mutual legal assistance in criminal matters are divided into foreign liaison authorities, competent authorities, and case handling authorities. However, the MLA Law stipulates several competent authorities without clarifying the responsible body for various situations, which leads to ambiguity and overlap. Article 6 of the MLA Law stipulates that "the National Supervisory Commission, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and other departments are the competent authorities for execution of international mutual legal assistance in criminal matters". Article 43 provides that "Where the competent authority deems upon examination that the following conditions are met, it may approve the seizure, impoundment or freezing requested, and arrange for execution by the relevant organ". Article 51 states that "Where the competent authority deems upon examination that the following conditions are met, it may approve the requested assistance in confiscating proceeds of crime and other property involved in a case and arrange for execution by the relevant organ". Article 53 stipulates that "Where a foreign state requests the return of proceeds of crime and other property involved in a case and has provided reliable and sufficient evidence, the competent authority may approve such request and arrange for execution by the relevant organ if it deems upon examination that the conditions prescribed in laws of the People's Republic of China are met."

Therefore, when a foreign country requests China's assistance in asset recovery, the National Supervisory Commission, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of State Security are all considered competent authorities, potentially leading to a certain degree of ambiguity and overlap in responsibilities. Given that foreign liaison authorities are not hierarchically superior to competent authorities and lack the authority to order the competent authorities to handle requests, this ambiguity and overlap in responsibilities may result in communication difficulties among departments, affecting the conduct of the procedures.

### 3. Unclear procedures for domestic entities, organizations, or individuals providing assistance abroad

Article 4 of the MLA Law stipulates that "Except as approved by relevant authorities of the People's Republic of China… no entity, organization or individual in the territory of the People's Republic of China may provide to a foreign state evidentiary materials or assistance as prescribed in this Law." However, as previously mentioned, there are multiple potential competent authorities in China. It is not clear through what specific procedural or which authority a domestic entity, organization, or individual should apply to for approval. This ambiguity could lead to confusion for Chinese domestic entities, organizations, or individuals when faced with foreign requests that do not follow the established channels for international criminal judicial and legal assistance.

## Key articles of the Implementing Provisions and their impact on cross-border asset tracing and recovery in criminal cases

The Implementing Provisions mainly refine, supplement, and improve the procedural aspects of the MLA

Law as follows:

## I. Clarifying processing time limits to provide foreign parties with a clear expectation

Articles 6 and 7 of the Implementing Provisions specify time limits for handling international mutual legal assistance in criminal matters by the foreign liaison authorities, competent authorities, and case handling authorities for the first time. Article 15 specifies the review period for the office of the working mechanism. These relevant provisions differentiate between general matters and priority matters, setting distinct time limits for each category handled by the foreign liaison authorities, competent authorities, and case handling authorities, with flexible exceptions provided for "major and complicated" cases. Specifically:

- According to Article 6 of the Implementing Provisions, priority matters primarily include those classified as "urgent" and those involving "significant impact" or "other special circumstances". For these priority matters, processing shall be completed within 30 days of receiving the request.
- For general matters, different categories of requests shall be processed within 45 days or 90 days, depending on the specific nature of the matter.
- For major and complicated matters, there are no fixed time limits imposed by the regulation.

The office of the working mechanism shall review the application for the cross-border transfer of evidence and inform the applicant of the results within 60 days of receipt, as stipulated in Article 14 of the Implementing Provisions.

The specific time limits for assistance matters handled by foreign liaison authorities, competent authorities, and case handling authorities are outlined in the following table:

| Authority | Matter | Time limit |
|---|---|---|
| **Foreign liaison authority** | Receipt of a foreign request for mutual legal assistance in criminal matters | To be processed within 45 days |
| | Receipt of the execution result from the competent authority | To be processed within 45 days |
| | Circumstances described in Article 6 of the Implementing Provisions:<br>(a) It is necessary to seize, impound or freeze property involved, or confiscate proceeds of crime and other property urgently<br>(b) It is necessary to handle the request urgently based on the time limit for investigation, criminal investigation, prosecution, or trial<br>(c) The case involved has a significant impact or falls under other special circumstances | To be processed within 30 days |
| | Urgent need for measures such as asset freezing | To be processed within 15 days |

| Authority | Matter | Time limit |
|---|---|---|
| **Competent authority** | Receipt of a foreign request for mutual legal assistance in criminal matters transferred by the liaison authority | To be processed within 45 days |
| | Receipt of the execution result from the case handling authority | To be processed within 45 days |
| | Circumstances described in Article 6 of the Implementing Provisions | To be processed within 30 days |
| | Urgent need for measures such as freezing | To be processed within 15 days |
| **Case handling authority** | Receipt of a foreign request for mutual legal assistance assigned by the competent authority | To provide an opinion or complete execution within 90 days |
| | Circumstances described in Article 6 of the Implementing Provisions | To provide an opinion or complete execution within 30 days |
| | Urgent need for measures such as freezing | To provide an opinion or complete execution within 15 days |
| **The office of the working mechanism** | Processing applications from domestic entities, organizations, or individuals for voluntarily providing evidence to foreign entities to protect their rights and interests | To notify the applicant the result within 60 days |
| **Complicated cases requiring coordination** | | Not subject to the above time limits |

## II. Strengthening procedural coordination between foreign liaison agencies, competent authorities, and case handling authorities to enhance procedural feasibility

### 1. Clarification of competent authorities

The Implementing Provisions provide detailed guidelines for determining the competent authorities in Articles 4, 16, and 17. Article 4 serves as a general provision, requiring consideration of factors including "the division of responsibilities prescribed by the relevant laws, the nature of the requests, and the stage of proceedings of the case" to determine the competent authority. Article 16 addresses "foreign requests for assistance in seizing, impounding or freezing property involved in a case", reiterating that the case should be referred to the appropriate competent authority based on the nature of the case and its stage in the proceedings. Article 17 specifies that, in the context of "foreign requests for assistance in confiscating and returning proceeds of crime and other property involved", the case should be referred to the Supreme People's Procuratorate and the Supreme People's Court when a foreign entity provides copies of effective confiscation orders or similar legal documents issued by its judicial authorities.

Currently, under Chinese domestic law, people's courts, people's procuratorates, public security agencies, supervisory commissions, and state security agencies all possess the authority to seize, impound or freeze property involved in a case. Concerning foreign requests for assistance in seizing, impounding or freezing property involved in a case, the Implementing Provisions do not explicitly designate a fixed competent authority. Instead, the factors to be considered are outlined, which provide guidance for determining the competent authority while aligning with the specific circumstances of international mutual legal assistance and China's domestic procedural norms. Based on the factors specified in the Implementing Provisions, we understand that, if the relevant criminal case is at the trial stage, it may fall under the jurisdiction of the Supreme People's Court. If the case is in the investigation stage and has not yet proceeded to trial, it may be under the jurisdiction of the Ministry of Public Security or other relevant authorities. If the criminal case involves corruption or bribery by public officials, it may be under the jurisdiction of the National Supervisory Commission.

The Implementing Provisions address different scenarios regarding foreign requests for assistance in confiscating and returning proceeds of crime and other property involved in a case. These scenarios are based on whether the foreign country provides a confiscation order or other legal documents issued by its judicial authorities. If the foreign country provides such documents, the Implementing Provisions clearly designate the Supreme People's Court and the Supreme People's Procuratorate as the competent authorities. However, if the foreign country does not provide a confiscation order or other legal documents, the Implementing Provisions leave open who is to be designated as the competent authority. Under current Chinese domestic law, multiple departments have the authority to confiscate property, as well as the authority to seize, impound, or freeze property involved in a criminal case. Based on the general guidelines in Article 4 of the Implementing Provisions regarding the determination of competent authorities, we understand that when a foreign country does not provide a confiscation order or other legal documents, the competent authority should also be determined by considering factors including the nature of the criminal case and its stage in the legal proceedings.

Whether a foreign request pertains to assistance in seizing, impounding, and freezing, or to confiscation and return of property, the criminal cases or specific circumstances involved may be complicated. As this may implicate multiple competent authorities, and it may be challenging to reach a clear conclusion regarding the appropriate authority, the foreign liaison authority can consult with all potential competent authorities in accordance with Article 4 of the Implementing Provisions to determine the appropriate authority.

**2. Clarifying review standards for the foreign liaison authority**

Article 13 of the MLA Law stipulates the contents that must be included in the request when a foreign state requests mutual legal assistance. Article 15 outlines how the foreign liaison authority handles requests based on whether the request meets the required conditions. Articles 2 and 5 of the Implementing Provisions further refine these stipulations by defining the foreign liaison authority's primary review criteria and the specific scenarios corresponding to different situations, which explicitly shows the "formal review" responsibilities of the foreign liaison authority. Specifically, according to Article 2 of the Implementing Provisions, the primary review criteria for the foreign liaison authority are:

(i) whether the request specifies the matters required by the MLA Law; (ii) whether the request is based on a mutual legal assistance treaty or the principle of reciprocity; (iii) for requests based on the principle of reciprocity, whether the request includes a concrete and explicit reciprocity assurance from a competent authority of the requesting state; and (iv) whether the request and attached materials include the translations required by the MLA Law or relevant treaties, as well as a catch-all clause.

According to Article 5 of the Implementing Provisions, China's foreign liaison authorities may request the requesting state to resubmit the request or provide supplementary materials based on different circumstances. Specifically, resubmission of the request is required in situations including: the request contains major errors in expression that affect its execution; the request has not been properly signed or stamped; the entity making the request or the subject of the request does not comply with the laws of the People's Republic of China or the provisions of the relevant treaty; and other similar circumstances. Supplementary materials are required in situations including: (i) the request or the attached materials contain insufficient or unclear statements about the facts of the case or the matters requested, which may affect the execution of the request; (ii) the request or the attached materials lack translations as required by the laws of the People's Republic of China or the provisions of the relevant treaty; or (iii) the translations are inaccurate, making it impossible to ascertain the content of the request; and other similar circumstances.

Additionally, Article 5 of the Implementing Provisions also specifies that if the competent authority considers that assistance should be fully or partially refused, or if the request does not meet other formal or substantive requirements, it should provide a written explanation and respond to the requesting state through the foreign liaison authority.

Requests from foreign states for China's assistance in asset tracing and recovery fall under the scope of international mutual legal assistance in criminal matters. Therefore, whether the request involves assistance in seizure, impoundment, or freezing of property involved in a criminal case, or confiscation or return of proceeds of crime and other property involved, the foreign liaison authority and other relevant authorities in China will adhere to the review standards outlined in the Implementing Provisions.

## III. Establishing an office of the working mechanism to fill procedural gaps in providing mutual legal assistance in criminal matters and the cross-border transfer of evidence by domestic entities, organizations, or individuals in China

### 1. Filling in procedural gaps for domestic entities, organizations, or individuals in China in providing mutual legal assistance in criminal matters

As mentioned above, Article 4, Paragraph 3 of the MLA Law explicitly prohibits entities, organizations, and individuals within China from providing assistance related to criminal activities to foreign entities, organizations, and individuals without the consent of the competent Chinese authorities. However, the MLA Law does not specify the form or the competent authority through which domestic entities, organizations, and individuals should seek such consent. Therefore, Article 13 of the Implementing Provisions stipulates that "when entities, organizations, and individuals within the territory of the People's Republic of China receive direct requests from foreign entities, organizations, or individuals,

bypassing the channels of international criminal judicial cooperation and execution cooperation, for assistance in criminal litigation activities or for other forms of assistance as provided by the MLA Law, they should, within 30 days of receiving the request, submit a written report to the office of the working mechanism to outline the relevant circumstances. The report should include a detailed description of the situation and attach copies of relevant legal documents or other supporting materials… Upon receiving the report, the office of the working mechanism should consult with members of the mechanism. If a formal request for mutual legal assistance from a foreign state is required, the relevant foreign liaison authority should make the request to the foreign state." This provision designates the office of the working mechanism as the liaison for entities, organizations, and individuals within China. Based on this provision, we understand that in cross-border asset tracing and recovery, if a foreign party or their attorney directly requests assistance from a domestic bank or other financial institution in China to freeze funds in a specific account, the financial institution must report the request to the office of the working mechanism within 30 days, which will then consult with its members to determine the subsequent action.

According to Article 12 of the Implementing Provisions, the office of the working mechanism is established within the judicial administrative department of the State Council (the Ministry of Justice), with its members consisting of the foreign liaison authorities and the competent authorities, potentially including the seven departments involved in the formulation of these Implementing Provisions. However, as the Implementing Provisions have been recently issued, there is currently no further concrete information available regarding the office.

### 2. Filling procedural gaps for the cross-border transfer of evidence

In addition, Article 14 of the Implementing Provisions also regulates the cross-border transfer of evidence from domestic entities, organizations, and individuals to foreign parties for purposes of protecting their own rights and interests or other purposes. Specifically, entities, organizations, and individuals within China must comply with relevant laws concerning the protection of state secrets, data security, and personal information. Furthermore, they are required to submit a written application to the office of the working mechanism[1].

### 3. Articles 13 and 14 of the Implementing Provisions align with China's positions on judicial sovereignty and information security protection

Articles 13 and 14 of the Implementing Provisions almost function as "blocking statutes" in the field of international mutual legal assistance in criminal matters. Whether entities, organizations, and individuals within China can provide assistance related to criminal matters or proactively furnish

[1] Article 14 of the Implementing Provisions: "Where an entity, organization, or individual within the territory of the People's Republic of China needs to voluntarily provide evidence to a foreign state for the purpose of protecting its rights and interests or other purposes, it shall comply with the provisions of laws on the protection of state secrets, data security, and personal information, and submit a written application to the office of the working mechanism. The written application shall include but not be limited to: (1) information on the applicant's identity, basic circumstances of the case, and scope, content, and reasons for providing the evidence, among others; (2) opinions from the relevant competent departments if the applicant has an administrative or industry competent department; (3) statements on the compliance of the evidence with the provisions of laws on the protection of state secrets, data security, and personal information, as well as secrecy obligations specified in the contract; (4) explanation of the purpose and use of the evidence, the measures for secrecy and security protection, among others; and (5) other materials required for the application."

criminal evidence and other information to foreign entities is ultimately subject to approval by Chinese authorities. This not only embodies China's principle of national judicial sovereignty but also aligns with China's legal position on information security protection. It reflects China's cautious approach and strict protection of data security interests regarding the cross-border transfer of evidence.

Prominent examples of China's position on judicial sovereignty and information security protection include Article 41 of the Personal Information Protection Law of the People's Republic of China and Article 36 of the Data Security Law of the People's Republic of China (the "**Data Security Law**"). These articles provide that the competent authorities of the People's Republic of China will handle foreign judicial or law enforcement authorities' requests for personal information and other data stored within China in accordance with relevant laws and the international treaties and agreements concluded or acceded to by the People's Republic of China, or under the principle of equality and reciprocity; without the approval of the competent authorities of the People's Republic of China, no organization or individual may provide data stored in the territory of the People's Republic of China for any foreign judicial or law enforcement authority. Other regulatory documents also contain administrative and restrictive provisions on the cross-border data transfer, including the Measures for Security Assessment of Cross-Border Data Transfer, the Application Guidelines for Security Assessment of Cross-border Data Transfer, the Measures for Standard Contract of Personal Information Outbound, the Guidelines for Filing Standard Contract for the Outbound Transfer of Personal Information, the Cybersecurity Law of the People's Republic of China, and the Practice Guidelines for Cybersecurity Standards - Technical Specification for the Certification of Cross-Border Processing of Personal Information.

**4. Deficiencies in the Implementing Provisions regarding cross-border transfer of evidence**

At present, the Implementing Provisions do not clearly define specific standards for review. We understand that, in response to the diverse factual circumstances that may arise in the case of mutual legal assistance, the office of the working mechanism may adopt a case-by-case approach based on the actual circumstances of each case, conducting assessments and reviews of the specific conditions of evidence intended for cross-border transfer, promoting a more flexible review mode and more targeted conclusions.

Moreover, the Implementing Provisions do not stipulate procedures and remedies for cases where an application has not been approved following review. They only specify that the office of the working mechanism should inform the applicant of the results. When the office of the working mechanism receives an application and decides not to approve it after review, the decision does not itself directly determine whether the criminal evidence can be transferred abroad; rather, it merely influences the practical outcome of whether such evidence can be transferred. Therefore, whether for the protection of the applicant's legitimate rights and interests or the adherence to procedural justice, the office of the working mechanism should provide the applicant with corresponding remedies after making a review decision and informing the applicant of the results.

Furthermore, the Implementing Provisions do not stipulate the legal consequences for entities, organizations, and individuals in China who provide evidence to foreign countries without reporting to

the office of the working mechanism. We understand that the aforementioned legal provisions in China concerning the protection of personal information security and the cross-border transfer of data may apply in this context. Specifically, according to relevant provisions such as those of the National Security Law, the Data Security Law, and the Measures for Security Assessment of Cross-Border Data Transfer, not reporting or applying by relevant entities, organizations, or individuals as required by the Implementing Provisions may be deemed a failure to fulfill statutory obligations for data security protection in the mutual legal assistance. This may lead to administrative or even criminal liabilities.

Specifically, for example, Article 48 (2) of the Data Security Law stipulates that "whoever, in violation of Article 36 of this Law, provides data to an overseas judicial or law enforcement body without the approval of the competent authorities, shall be given a warning by the competent department, and may be concurrently fined not less than RMB 100,000 but not more than RMB 1,000,000, and the directly liable persons in charge and other directly liable persons may be fined not less than RMB 10,000 yuan but not more than RMB 100,000. If serious consequences are caused, the violator shall be fined not less than RMB 1,000,000 but not more than RMB 5,000,000 and may be ordered to suspend the relevant business or suspend operations for rectification, or have relevant business permits or the business license revoked. The directly liable persons in charge and other directly liable persons shall be fined not less than RMB 50,000 but not more than RMB 500,000." This clearly defines the penalties on entities who fail to fulfill their reporting obligations and provide data from China to foreign countries through unofficial channels.

Lastly, the primary authority in China responsible for security assessments of cross-border data transfer is the Cyberspace Administration of China. However, the Cyberspace Administration of China is not a co-issuer of the Implementing Provisions, so it is currently unclear whether the Cyberspace Administration of China will become a member of the office of the working mechanism as defined in the Implementing Provisions. It is also unclear whether the cross-border transfer of criminal evidence will require compliance with the security assessment procedures of the Cyberspace Administration of China.

## Conclusion and outlook

The Implementing Provisions fill the gaps left by the existing MLA Law and other legal provisions on international mutual legal assistance, thereby enhancing the operability of the procedure. From specifying processing timelines to refining coordination procedures and establishing the office of the working mechanism, the issuance of the Implementing Provisions ensures that China's approach to cross-border criminal asset tracing and recovery is more standardized and well-founded. This not only helps establish China's image as a responsible major country but also aids in forming beneficial reciprocal relationships with other states and improving the status of cross-border criminal asset tracing and recovery in China.

## *Important Announcement*

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