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# **Export Controls and Sanctions**

4 October - 8 October 2021

Annual Compliance Conference

# Key EU, UK and US Exports Controls Update

Wednesday 6 October

3.30 - 5.00 pm BST / 4.30 - 6.00 pm CEST / 10.30 am - 12.00 noon EDT

# Speakers



**Ben Smith**  
Partner,  
London (Chair)



**Paul Amberg**  
Partner,  
Madrid



**Vivian Wu**  
Senior Counsel,  
Beijing



**Ross Evans**  
Senior Associate,  
London

# EU Export Controls Developments



# New EU Dual-Use Regulation

## Overview

- On 11 June 2021 the Recast Dual-Use Regulation was published as Regulation 2021/821 after years of negotiation (to replace and recast Regulation 428/2009)
- The new Regulation took effect from 9 September 2021
- Intended to modernize the EU-wide dual-use export control regime
- Material changes, but short of the more controversial changes proposed in 2016 – e.g.,:
  - No standalone new Category 10 list
  - Watering down of originally very broad human rights "catch all" control
  - No circumvention control

# New EU Dual-Use Regulation

## Key changes



### Licensing changes e.g.,

- New GEA for Intra-group export of software and technology
- New GEA for Cryptography
- 2 year validity period for global/individual licenses
- Introduction of "large project authorization"
- **5 years** for record-keeping (Article 27)

# New EU Dual-Use Regulation

## Key changes continued

-  **Brokering**: brokering controls extended to non-EU established/resident parties who provide brokering services from EU customs territory
-  **Technical assistance**: new controls for technical assistance relating to dual-use items
-  **Cyber-surveillance**: new end-use control items for use in connection with internal repression or the commission of human rights or international law violations
-  **Transmissible member state controls**: for items not listed in Annex I (public security including prevention of acts of terrorism, or human rights considerations)

# New EU Dual-Use Regulation

## Cyber-surveillance “catch-all”



**Cyber-surveillance technologies and human rights:** new end-use control where the exporter is aware or has been informed that cyber-surveillance items for use in connection with internal repression or the commission of human rights or international law violations

- **cyber-surveillance items, defined as "dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems"**



Associated notifications where exporters are aware of such an end-use according to their "due diligence findings"



Potential for EU-wide restrictions for "essentially identical transactions"

# New EU Dual-Use Regulation

## EU007- Intra-group export of software and technology



The EU007 license for the intra-group export of software and technology is valid for **Argentina, Brazil, Chile, India, Indonesia, Israel, Jordan, Malaysia, Morocco, Mexico, Philippines, Singapore, South Africa, South Korea, Thailand and Tunisia**

- Covers exports by an EU exporter to a subsidiary or sister company (parent co must be in EU or EU GEA 001 country; requirement for binding guarantee from parent co)
- Commercial product development activities only; items must be returned to exporter/deleted when activities end or company leaves group
- Items cannot be shared with any entity outside group
- Registration requirement
- Annual reporting obligations

# New EU Dual-Use Regulation

## EU008 – Encryption



Covers certain encryption items (5A002a2/a3/b; 5D002a1/b; 5E002b) e.g., digital communication or networking systems, equipment or components; computers or software with the function of encryption; and certain 'cryptographic tokens' relating to the above



Exports cannot be made to the listed 'negative' countries, including: **China** (including **Hong Kong** and **Macao**), **Egypt**, **Israel**, **Malaysia**, **Pakistan**, **Qatar**, **Russia**, **Saudi Arabia** and the **UAE**, as well as all jurisdictions subject to an EU arms embargo or sanctions related to dual-use items, amongst others



Items can only use published or commercial cryptographic standards approved or adopted by internationally recognised standard bodies; cryptographic functionality used by the items cannot be easily changed by the user; certain end-use limitations



Registration, annual reporting and technical data reports required - more onerous than for other general export licenses

# New EU Dual-Use Regulation

## Focus on ICPs



### New requirements for internal compliance policies and due diligence:

- Introduction of EU-wide requirement for exporters to implement an Internal Compliance Programme in order to obtain global export authorizations and/or use EU007
- Reflects increased focus on ICPs
- ICP defined as "ongoing effective, appropriate and proportionate policies and procedures adopted by exporters to facilitate compliance with the provisions and objectives of [the] Regulation and with the terms and conditions of the authorisations implemented under [the] Regulation, including [...] due diligence measures assessing risks related to the export of the items to end users and end uses."

# ICP: Essential Elements of Trade Compliance

US OFAC Framework for Compliance	UK ECJU Code of Practice	US BIS Compliance Guidelines	EU Guidance on ICP	Check: national guidelines of EU MS
Management Commitment	Commitment to Compliance	Management Commitment	Top level management commitment to compliance	
Risk Assessment	Nomination of Responsible Personnel	Risk Assessment	Organisation structure, responsibilities and resources	
Internal Controls	Information and Training	Written EMCP	Training and awareness raising	
Testing and Auditing	Company and Compliance Procedures	Compliance Training	Transaction screening process and procedures	
Training	Suspicious Enquiries or Orders / End-Use Considerations	Cradle-to-Grave Export Compliance Security and Screening	Performance review, audits, reporting and corrective actions	
	Record Keeping	Adherence to Recordkeeping Regulatory Requirements	Recordkeeping and documentation	
	Provision for Audits	Compliance Monitoring and Periodic Audits/Assessments	Physical and information security	
	Integration with Quality Management Practices	Internal Program for Handling Compliance Problems, including Reporting and Escalating Export Violations		
		Completing Appropriate Corrective Actions in Response to Export Violations		





# UK Export Controls Developments

# Brexit

## Overview

-  The EU Dual-Use Regulation (428/2009) no longer has direct effect in the UK, following the end of the transition period on 31 December 2020
-  The UK transposed the EU Dual-Use Regulation into UK law as retained EU law
-  Under the Protocol on Ireland/Northern Ireland, the EU Dual-Use Regulation continues to apply directly in respect of Northern Ireland (**this is now the recast Regulation 2021/821 as of 9 September**)
-  Key dual-use export considerations:
  - Separate EU and UK dual-use export regimes
  - Initial alignment of regulations and dual-use lists; but now immediate divergence in light of recast Regulation (unclear to what extent UK will follow changes to the recast Regulation for Great Britain)
  - Immediate impact on dual-use licensing
  - Unique position for exports to/from Northern Ireland
  - No automatic exchange of information on dual-use exports between EU and UK authorities (e.g., information on licence denials; collaboration on enforcement)

# Dual-Use Exports Between GB and EU

The UK (except for NI) is considered a "third country" under EU dual-use export controls, and vice versa

1

Export of dual-use items **from GB to EU** (which would not previously have required a licence) now **require an export licence issued by the UK**

- UK ECJU published an EU-27 OGEL for exports of dual-use items to EU Member States (and the Channel Islands); 273 registrations in first quarter of 2021
- No need to apply for individual licences
- Register through the online export licensing system
- Beware: need to ensure full compliance with conditions

2

Export of dual-use items **from EU to GB** require **an export licence issued by a competent EU Member State**

- GB has been added to list of jurisdictions under EU General Export Authorisation 001



# Dual-Use Exports From EU/UK to RoW

1

Export licences issued in EU-27 Member States not valid for exports from UK

- UK has retained the existing (pre recast Regulation!) EU General Export Authorisations in UK law (rGEAs)

2

UK export licences not valid for exports from EU-27 Member States

3

"Exporter" must be "established" in the EU to export from the EU, and in the UK to export from the UK



# Northern Ireland and the IE/NI Protocol

## Dual-use exports to/from Northern Ireland

- 1** Rules that apply to transfers between two EU Member States also apply to exports between NI and an EU Member State, and vice versa (treated as an intra-EU transfer)
- 2** Exports from NI to rest of world (outside UK/EU) subject to recast EU Dual-use Regulation, with UK (ECJU) as competent authority (such licences valid for exports from NI, not any EU Member State)
- 3** For exports from GB to NI, UK guidance states that no export licence is required
- 4** For exports from NI to GB, the EU previously stated that such a movement is licensable, whereas UK guidance states that no export licence is required



# New UK Guidance: Exports of Controlled Technology

## Key features of the guidance



Greater focus on what activities take place in the UK, and the purpose behind them

- Is someone in the UK **granting access** to technology?
- Who and where is the **intended recipient** of the technology?



Numerous case studies



Detailed consideration of cloud computing



Still a nuanced approach on routing of technology



UK guidance indicates that provision of SaaS is not treated as an export

# Other Recent UK Export Developments

1

Export control considerations in respect of new UK National Security & Investments Act; impact on corporate transactions

2

Continued focus on use of open licensing at audits; items held at border

- strict approach by UK authorities
- compliance with all licensing conditions essential, including all paperwork

3

Consider overlap to trade sanctions regimes (including in light of developments re Belarus, Myanmar)

4

Afghanistan - removed from certain open licences; certain licences revoked

5

China/Hong Kong/Macao added to UK OGEL for Information Security Items (but scope of products reduced)

6

New online export licensing system in trial phase (LITE)



## UK Enforcement Statistics for 2020

- 51 ECJU warning letters
- 3 suspensions
- 67 HMRC warning letters
- Several ongoing criminal investigations
- £622,868.01 in compound penalties
- 160 seizures of dual-use goods
- 103 end-use cases, where non-listed items stopped from leaving UK

The background features a complex, abstract pattern of glowing, wavy lines in shades of blue, purple, and magenta. These lines flow and curve across the dark background, creating a sense of motion and depth. The lines are most concentrated in the lower right and upper right areas, with some looping back towards the left.

# US Export Controls Developments

# EAR Military/Military Intelligence Rules 2021

## Recent Developments

- ▶ Dec 2020 BIS added **non-exhaustive** military end user list to EAR
- ▶ Jan 2021 BIS FAQs on military end user/end use rule in EAR Part 744.21 updated
- ▶ Jan 2021 new military **intelligence** end user/end use interim rule published – snuck into effect March 16, 2021
- ▶ March 2021 and April 2021 Burma added to MEU and later MIEU rule

# Military vs. Military Intelligence End User/Use Rule

## A Comparison

	MEU Rule (EAR §744.21)	MIEU Rule (EAR §744.22)
<b>Covered Items</b>	Only those in Supp 2 to Part 744	Any item subject to EAR (inc. EAR99)
<b>Destinations</b>	Burma, PRC, Russia, Venezuela	Burma, PRC, Russia, Venezuela, or Country Group E:1 or E:2 (Cuba, Iran, DPRK, Syria)
<b>Who?</b>	Any exporter, reexporter, transferor	Any exporter, reexporter, transferor *AND restrictions on activities of <b>US persons</b> under General Prohibition Seven
<b>Licensing Requirement</b>	"Knowledge," that the item is intended, entirely or in part, for a 'military end use,' as defined in para (f) of this section, or 'military end user,' as defined in para (g)	"Knowledge" that the item is intended, entirely or in part, for a 'military-intelligence end use' or a 'military-intelligence end user'
<b>License Exceptions?</b>	GOV 740.11 (b)(2)(i) and (ii)	GOV only

# Military vs. Military Intelligence End User/Use Rule

	MEU Rule (EAR §744.21)	MIEU Rule (EAR §744.22)
<b>End User?</b>	<ul style="list-style-type: none"> <li>National armed services (army, navy, marine, air force, or coast guard), national guard and national police</li> <li>Government intelligence or reconnaissance organizations</li> <li>Any person or entity whose actions or functions are intended to support 'military end uses'</li> </ul>	<ul style="list-style-type: none"> <li>Any intelligence or reconnaissance organization of the armed services (army, navy, marine, air force, or coast guard)</li> <li>National guard</li> <li>Specific entities for each country, e.g., GRU for Russia</li> </ul>
<b>End User List?</b>	Yes – MEU List Supp 7 to Part 744 = <b>non-exhaustive list</b>	None
<b>End Use?</b>	<ul style="list-style-type: none"> <li>Incorporation into a USML military item</li> <li>Incorporation into items classified under "A018" or "600 series" ECCNs</li> <li><b>Any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, "development," or "production," of such items*</b></li> </ul>	<ul style="list-style-type: none"> <li>"development," "production," operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of, <b>or incorporation into</b>, USML items or items classified under ECCNs ending in "A018" or "600 series" ECCNs, <b>which are intended to support the actions or functions of a 'military-intelligence end user'</b></li> </ul>

# Hong Kong, Huawei



## Hong Kong

- Executive Order 13936 directed the suspension or elimination of special and preferential treatment for Hong Kong under a wide range of US laws results in Hong Kong being treated the same as China under US export controls
- In December 2020, BIS removed Hong Kong from the EAR's Commerce Country Chart
- Hong Kong's EAR Country Group changed from A:6 and B to D:1, D:3, D:4, and D:5
- Country Group changes affected Hong Kong's eligibility for various EAR license exceptions
- In August 2020, CBP required goods produced in Hong Kong to be marked as originated in China
- No sign of change on Hong Kong policy by Biden Administration



## Huawei

- Numerous updates in 2020 (e.g., Foreign-Produced Direct Product Rule Expanded in May and August 2020, entities added to Entity List) but no recent changes or relaxations to those restrictions
- Continue to see reverberations through Supply Chains including continued submissions for licenses
- 5G capability is key factor in BIS assessment of license applications
  - Condition – may not be used with 5G → practical issues for this

# Entity List – One-Two Punch

## Increasingly Liberal Usage of Entity List

- Increasingly broad conception of "activities that are contrary to the national security or foreign policy interests of the United States"
- In past few months, designations of parties in Pakistan, UAE, China, Myanmar
- Sanctions-related designations followed or preceded by Entity List designations
- US CBP withhold release orders (WROs) now regularly followed by Entity List designations
- KEY: being prepared for the "one-two punch" by broadly evaluating exposure across supply chain

# March 29, 2021 BIS Final Rule – MM Encryption

## Changes to Mass Market Encryption Rules from 2019 WA Plenary

- Mass market encryption products under ENC (b)(1) can still be self-classified, but **no longer need to be included in annual self-classification reports**
- Mass market components and related executable software moved from ENC (b)(3)(i) to ENC (b)(1) and can now generally be self-classified with annual self-classification report
- Mass market crypto SDK toolkits and toolsets moved from ENC (b)(3)(i) to ENC (b)(1) and can now be self-classified **without** self-classification reporting
- Publicly available encryption source code and beta test code no longer needs notification to BIS under EAR §742.15(b) and §740.9(c)(8), respectively
- Expanded exclusion for wireless PAN
- **No changes for non-mass market encryption or any non-standard cryptography**

# America's Supply Chains Executive Order



June 2021 Reports: Policy Recommendations re Semiconductor Export Controls



Reports recommend that the US Government:

- Target and implement export controls that can support policy actions to identify and address vulnerabilities in the semiconductor manufacturing and advanced packaging supply chain;
- Target and implement export controls on critical semiconductor equipment and technologies to address supply chain vulnerabilities; and
- Collaborate and coordinate with key supplier allies and partners on effective multilateral controls.

# Emerging and Foundational Technologies



## Emerging Technology Controls

- BIS began process in November 2018 with ANPRM
- Process has been focused on a preference for multilateral controls (but unilateral controls always possible)
- Examples of recent Emerging Technology controls
  - precursor chemicals, equipment capable of use in handling biological materials, and human and animal pathogen toxins, through Australia Group (June 2020)
  - machine tools with additive manufacturing, computational lithography software, silicon wafer technology, software designed for monitoring or analysis, digital forensics or investigative tools, and sub-orbital craft, through Wassenaar Arrangement (Oct. 2020)
- BIS is facing criticism on Capitol Hill for slow implementation of these controls



## Foundational Technology Controls

- BIS began process in August 2020 with ANPRM, soliciting comments through November 2020
- ~50 public comments submitted to BIS for consideration



# China's Countermeasures

# Legislative Development



## Regulations on Unreliable Entity List

- Application scope
  - Foreign persons that endanger the national sovereignty, security, and development of China
  - Damage the rights and interests of Chinese persons (cut off supply, discriminate, etc.)
- Unreliable Entity List
- Sanctions measures
  - Fines; restriction/prohibition of import/export, investment, entry border; restriction/disqualification of residence

## Blocking Rules\*

- Application scope
  - Foreign measures prohibit/restrict activities of Chinese persons with third country persons
- Prohibition orders
- Reporting obligation
- Compensation claims

## Anti-Foreign Sanction Law (ASL)

- Application scope
  - where foreign states violate international law and basic norms of international relations to suppress China under any kind of pretext or based on their domestic laws;
  - to employ discriminatory restrictive measures against PRC citizens and organizations, and
  - to interfere with China's internal affairs
- China Sanction List
- Compensation claims

\* Full name: Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures

# China Sanctions Enforcement Update



No Unreliable Entity List has been issued



No Prohibition Order on foreign sanction measures has been released



PRC Ministry of Foreign Affairs announced a few sanctions against foreign enterprises, organizations or individuals that seriously infringed China's sovereignty and interests but there are limited news reports on the enforcement status of those sanctions



A China Sanction List has been released in accordance with the ASL against some US individuals and entities involved in the US Hong Kong-related sanctions



Other practical implications

# Recommendations

-  Conduct screening on potential business partners against applicable sanction lists.
-  Conduct case-by-case risk assessment when determining whether to avoid or cease business cooperation with existing/potential Chinese business partners sanctioned by foreign countries.
-  Properly manage external and internal communications on politically sensitive matters.
-  Closely monitor regulatory and enforcement development and revisit compliance approach as needed.

# China's Export Control Law – Key Concepts

## Controlled items

Controlled items include dual-use items, military products, nuclear and other goods, technologies, services and items that relate to fulfilment of international obligations and national security protection.

## Deemed export

Include "deemed export" concept which can apply to in-country transfer to non-Chinese persons

## Re-export

Previously include "re-export" concept which can apply to transfer between two non-Chinese jurisdictions, based on the origin of goods/technology (now removed).

## Licensing Considerations

Include (a) international obligations and commitment, (b) national security, (c) type of export, (d) sensitivity of item, (e) destination, (f) end-use and end-user, (g) credit record of the exporter and (h) other factors provided under law

## Prohibitions & Temporary Measures

Power to prohibit the export / supply of controlled items to specified countries, regions and persons. Additional power to impose temporary controls on goods, technologies and services that are not prescribed.

## Black-listing control

Provides black-listed control for importers and end-users who fail to fulfil their end-user or end-use commitments, may pose threats to national security or use the items for terrorist purposes.

## Internal compliance program

Encourages enterprises to establish internal compliance program ("ICP") for export control, and may grant licensing facilitations to enterprises which adopt ICP



Effective 1 December 2020

The background features a complex, abstract pattern of glowing, wavy lines in shades of blue, cyan, and purple. These lines flow across the frame, creating a sense of motion and depth. The lines are most concentrated on the right side, where they form a dense, textured wall, and become more sparse and curved on the left side. The overall effect is reminiscent of a digital or data landscape.

**Questions**



# Tomorrow's sessions

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**Thursday 7 October,  
2.00 - 3.00 pm BST  
3.00 - 4.00 pm CEST  
9.00 - 10.00 am EDT**

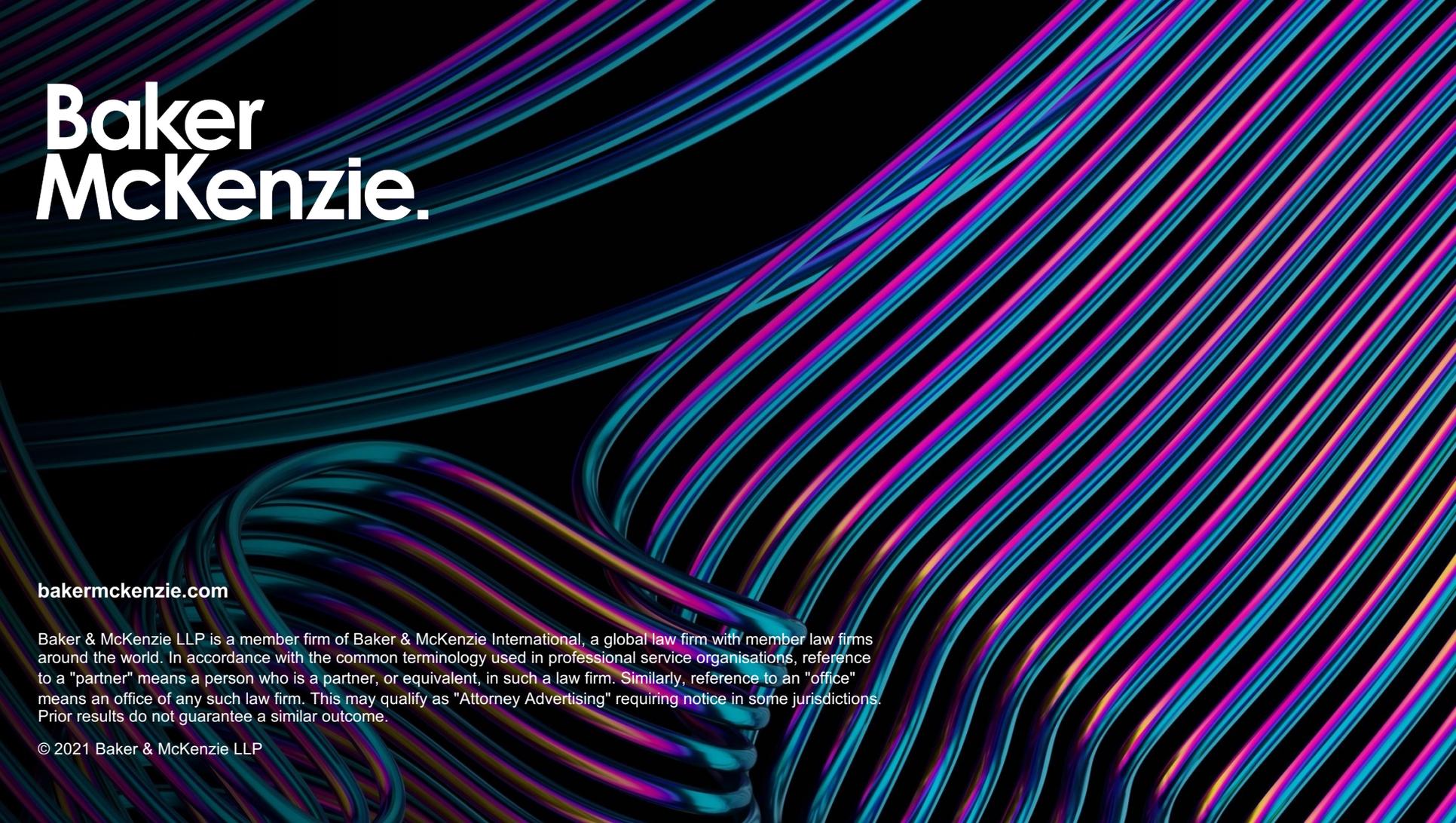
**Foreign Investment Review: The  
New UK National Security &  
Investment Act**

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**Thursday 7 October,  
4.00 - 5.30 pm BST  
5.00 - 6.30 pm CEST  
11.00 am - 12.30 pm EDT**

**Foreign Investment Review:  
Global Developments**

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