

**Baker
McKenzie.**

Sanctions and export controls

26 - 28 September 2023

ANNUAL COMPLIANCE CONFERENCE

**Baker
McKenzie.**

**Geopolitical risk readiness:
learnings from the Russia sanctions,
export control developments and
focus on China**

Thursday 28 September, 2.00 - 3.00 pm BST

ANNUAL COMPLIANCE CONFERENCE

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Agenda

01 Exports, sanctions and other developments

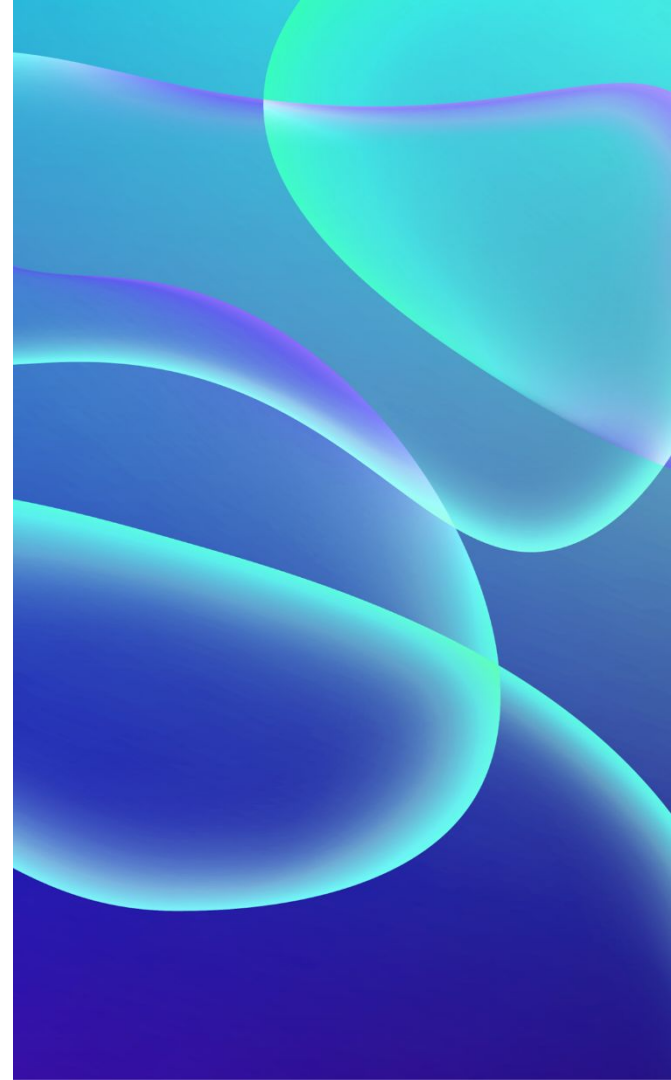
02 Approaches towards China – US

03 Approaches towards China – EU/UK

04 Approaches towards China – rest of APAC

05 China perspective

06 Top tips and planning for geopolitical risk





**0 Exports, sanctions and
1 other developments**

US recent developments

Iran

- What's going on with the US efforts to revive the JCPOA?
- New BIS export controls on parts found in drones

Venezuela

- More SDN designations
- A few narrow general licenses and a few SDN removals

Myanmar/Burma

- More SDN designations
- New OFAC authority to designate parties for operating in jet fuel sector

Sudan

- More SDN designations
- No return to embargo

South Sudan

- Business advisory issued by US Departments of State, Labor, Commerce

EU and UK recent developments

Iran

- Proliferation-related sanctions were originally due to be lifted on 18 October 2023 under the JCPOA (notwithstanding US withdrawal)
- Joint statement by UK, France and Germany on 6 July accused Iran of breaching ballistic missile-related commitments and making unauthorised transfers of weapons, including supplies of UAVs to Russia for use in Ukraine
- UK announced at the same time that it will introduce a new sanctions regime related to "hostile activities towards the UK and our partners"
- UK, France and Germany confirmed in September that they would retain the nuclear sanctions after 18 October

Myanmar/Burma

- 7th round of EU sanctions imposed July 2023 (designating 6 individuals and No 2 Mining Enterprise)
- Various UK amendments to the list of restricted parties

Nagorno-Karabakh

- No formal EU or UK sanctions as of yet, but longstanding OECD arms embargo against Armenia and Azerbaijan
- EU High Representative stated on 21 September that the EU "stands ready to take appropriate actions in the event of a further deterioration of the situation"



**0 Approaches towards
2 China – US**

US trade controls and China: Key themes

Advanced and Emerging Technologies

**Recent export controls on advanced semiconductors and advanced computing



Ongoing Restricted Party Designations

Across multiple USG lists; various policy bases



ICTS and Outbound Investment

Pending "reverse CFIUS"; investment and broader activities



Enforcement

Inc. backfilling for Russia, trade secrets, etc.

Others

Data security/access (consumer data); surveillance; territorial expansions; forced labor

US targeting of Chinese companies

BIS Entity List –

- Human rights abuses as a foreign policy basis
- Contributions to Russia's military/defense industrial base
- Contributions to Chinese military modernization/surveillance, inc. cloud companies, server companies

BIS MEU List – but parties meeting the regulatory definition of “military end-users” captured even if not listed

BIS Unverified List – now risk of Entity List designation if host government does not allow timely end use checks

OFAC SDN designations: including for human rights (Global Magnitsky), first NASDAQ-listed SDN designation

OFAC Chinese Military-Industrial Complex ("CMIC") List

US BIS October 2022 Rule

Overview of the semiconductor and advanced computing rules

New ECCNs controlled to China

- **3A090:** high performance integrated circuits, with (i) an aggregate bidirectional transfer rate of 600 Gbytes/sec or more; and (ii) processors or primitive computation units with a processor performance rate of 4,800 TOPS
- **3B090:** semiconductor deposition (metal layer) equipment not controlled by ECCN 3B001
- **4A090:** computers, electronic assemblies (PCBAs) and components containing integrated circuits that exceed the limits of 3A090
- **4D090:** software specially designed or modified for the development or production of the items controlled under ECCN 4A090.

Expansion of US export control jurisdiction (items "subject to the EAR") under the "foreign direct product" (FDP) rules in EAR § 734.9

- **Background:** Huawei-specific FDP rule: A foreign-made product is subject to the EAR if (i) the "product scope" element and the "end-user" element are both satisfied
- **New FDP rules:**
 - Entity List FDP rule for parties on the Entity List with a Footnote 4 designation
 - Advanced computing FDP rule
 - Supercomputer FDP rule

US BIS October 2022 Rule

Overview of the semiconductor and advanced computing rules

New End-Use/End-User Controls (Licensing Requirements): EAR § 744.23

Restricted End-Use		In-Scope Items
EAR § 744.23(a)(2)(iii)	Development or production of any integrated circuits (IC) at PRC-located semiconductor facility that fabricates advanced technology ICs	Any items subject to the EAR (including EAR99 items)
EAR § 744.23(a)(2)(iv)	Development or production of any ICs at PRC-located semiconductor facility, where you do not know if the facility fabricates advanced technology ICs	Any items subject to the EAR AND classified in an ECCN in Product Groups B, C, D, or E in Category 3
EAR § 744.23(a)(2)(v)	Development or production in China of any "parts," "components," or "equipment" specified under ECCN 3B001, 3B002, 3B090, 3B611, 3B991, or 3B992.	Any items subject to the EAR (including EAR99 items)
EAR § 744.23(a)(2)(i)	Development, production, use, operation, installation, maintenance, repair, overhaul, or refurbishing of a supercomputer located in or destined to China	<ul style="list-style-type: none">■ An IC subject to the EAR and specified in ECCN 3A001, 3A991, 4A994, 5A002, 5A004, or 5A992
EAR § 744.23(a)(2)(ii)	Incorporation into, or the development or production of any component or equipment that will be used in a supercomputer located in or destined to China	<ul style="list-style-type: none">■ A computer, electronic assembly, or component subject to the EAR and specified in ECCN 4A003, 4A004, 4A994, 5A002, 5A004, or 5A992

US BIS October 2022 Rule

Overview of the semiconductor and advanced computing rules

Prohibitions on certain supporting activities of US persons with respect to **items that are not subject to the EAR** - EAR § 744.6(c)(2)

- US persons:
 - US citizens and permanent resident aliens
 - Entities organized under US, including foreign branches; and
 - Any person in the United States
- Supporting activities: shipment, transmission or transfer to or within China, facilitating the shipment, transmission or transfer, or servicing of non-EAR items
 - For use in the (1) development or production of ICs at an advanced technology semiconductor foundry in China or (2) development or production of ICs at any semiconductor foundry in China, where you do not know if that foundry produces advanced technology ICs
 - That meet the parameters of ECCNs 3B090, 3D001, or 3E001 regardless of the end use or end user.
- US person due diligence obligation:
 - Assess whether a semiconductor foundry in China fabricates advanced technology ICs
 - Be careful when dealing in 3B090, 3D001, or 3E001 items.

CHIPS Act Guardrails

Provides roughly \$280 billion in new funding to boost domestic research and manufacturing of semiconductors in the United States

Commerce published final guardrails on September 22

The guardrails restrict:

- prevents recipients of funding from using the money to invest in most semiconductor manufacturing in foreign countries of concern for 10 years after the date of award
- limits recipients conducting certain joint research or technology licensing with a foreign entity of concern (Entity List, others)



0 Approaches towards
3 China – EU/UK

EU and UK sanctions and export controls concerning China

Generally a more measured approach, and no wide-ranging restrictions

Formal sanctions/export controls limited

- Limited designations of individuals and entities viewed as involved in human rights violations (e.g., Xinjiang Production and Construction Corps Public Security Bureau, designated in 2021)
- China (incl. HK and Macao) added to the UK's list of arms embargoed territories in May 2022

Netherlands introduced a national licensing requirement for exports of advanced semiconductor manufacturing equipment from 1 September 2023, by adding new ECCNs in category 3B to complement the EU Dual-Use List. This measure applies to all exports from the EU, but anticipated to principally impact exports to China

Use of other economic tools in Europe

Despite the lack of formal sanctions/export control measures, the EU and UK are using other economic tools. While not formally acknowledged, China is generally viewed as a key target

Inbound foreign investment screening – EU-wide framework came into operation in October 2020, and UK NSIA came into effect January 2022.

- In the UK, only 4% of UK NSIA notifications in 2022-23 concerned China
- However, 42% of all call-ins in the UK involved Chinese-associated acquisitions
- 53% of final orders (blocking or imposing remedies) involved Chinese-associated acquisitions

EU issued a Communication on European Economic Security Strategy in June 2023 indicating that the Commission will propose an outbound investment screening mechanism by the end of the year

EU Foreign Subsidies Regulation has progressively entered into force over 2023, with the screening mechanism going live on 12 October



**0 Approaches towards
4 China – rest of APAC**

Approaches towards China – rest of APAC

Overview

Specific export controls and sanctions measures targeting China have not been tools deployed extensively in APAC

Many APAC jurisdictions rely heavily on China trade and aid

Some enhanced export control screening

Foreign investment rules utilised

Diversifying trade and in some cases defence partners has been a recent response to geopolitical tensions

- Vietnam, Philippines, Thailand, Indonesia

Other trade tensions in APAC also need to be considered

- Myanmar
- North Korea
- Different views in the region towards India

Some of the key commodity trade-tension issues do not only involve China – e.g., semi-conductors

Approaches towards China – rest of APAC

Specific measures

Dumping disputes and diplomacy

- Barley dumping measures were applied by China from May 2020
- Australia sought resolution through the WTO
- Recently resolved with China in August 2023 reviewing and removing its measures
- Wine and other goods from Australia also subject to dumping duties or other measures restricting their import into China
 - Seems to be some momentum to resolve via diplomatic means in part due to mutual trade dependencies e.g., lithium and solar

National security / foreign interference

- Bans on Chinese-owned company applications e.g., 2020 India ban on citizens accessing 59 Chinese mobile applications
- Several governments have bans on Chinese-owned company applications on government devices or ban equipment in telecommunications networks
- Government foreign interference reviews focusing on Chinese-owned technology e.g., Australian Parliamentary Committee reviews
- Australia new SAMS Bill (September 2023) prohibiting sharing military controlled content with certain countries



0 **China perspective**
5

Overview of China's Countersanctions / Countermeasures

- **Anti-foreign Sanctions Law ("AFSL")** (deals with the formulation and implementation of foreign restrictive measures or those who endanger China's national security)
- **Unreliable Entities List Regulations** (targets foreign entities that endanger China's national sovereignty, security and development, or damage the rights and interests of Chinese persons)
- **Blocking Rules** (restricts compliance with foreign measures which restrict Chinese persons from engaging in normal economic, trade and related activities with a third country or region)
- **Announcements (including press releases)** of sanctioned parties by the Ministry of Foreign Affairs
- **Foreign Relations Law** formalizes the above regimes



- **Export control laws**
 - Export of gallium and germanium related items
 - "Catch-all" provision, "entity list" equivalent, retaliatory measure
- **Cybersecurity review**
 - Micron ban
 - Certification regime for cybersecurity products
- **Trade barrier investigation** (including the one initiated against Taiwan)
- **Trade remedies** (anti-dumping, anti-subsidy etc.)
- **Non-tariff barriers to trade** – e.g., labelling rules, *ad hoc* import bans
- **Cross-border data transfer and anti-espionage law** to frustrate compliance with foreign laws

Development in export control regime

Export restriction for gallium and germanium related items



- On 3 July 2023, China announced new export control measure on certain semiconductor materials. Starting from 1 August 2023, export of the in-scope items requires an export dual-use license issued by MOFCOM.
- Scope of items subject to control: gallium and germanium related items, as well as certain compounds of the two metals in various forms (for e.g., single crystal, crystal plate, epitaxial slice, etc..).
- The new export control measure is not an export ban.
- The new export control measure is aimed at safeguarding China's national security and interests:
 - China is likely to use the same as leverage or deterrence in addressing threats of current and future foreign trade measures targeting China; and
 - China is unlikely to publish details of the licensing conditions or officially designate any countries of destination or end-users which are particularly targeted under the export control measure, to allow room for the exercise of discretion.

Anti-espionage Law

Key provisions

Expanded definition of espionage activities

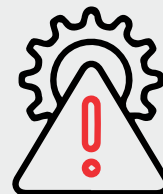
- Stealing, prying into, purchasing or **illegally providing** state secrets, intelligence, and **other documents, data, materials, or items related to national security**
-

Amended on April 24, 2023

Effective on July 1, 2023

Potential high-risk activities

- PRC-located entities/individuals sharing **sensitive** data, documents, materials, or items with foreigners or foreign entities.
- Foreign entities or their agents performing due diligence, background search, or other market research on Chinese entities and industries.
 - **Higher risk entities:** state-owned companies, military entities, research institutes, universities, entities related to Xinjiang
 - **Higher risk sectors:** advanced semiconductor manufacturing, military



Restrictions under the Chinese data protection regime

- Under the Data Security Law of China, there is a prohibition on the transfer of data by any person or entity in China to foreign judicial or law enforcement agencies without first obtaining approval (in the form of a "risk assessment") by competent Chinese authorities.
- Scope of sensitive data subject to the risk assessment for cross-border transfer.
 - Personal information reaching certain volume or other thresholds.
 - "Important data" (of which the scope remains broad and vague) without any *de minimis* threshold.

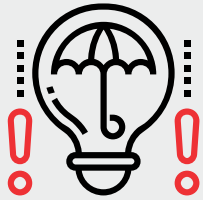
Example of "important data" in the draft guidance (particularly relevant to trade due diligence)

- "Information that...can be leveraged to frustrate China's normal international trade and economic activities...or **implement prohibitive or restrictive trade measures that are discriminatory against China**, including without limitation the information regarding the production or transaction of special items in international trade, as well as the usage and availability of specialized equipment."
- "Information that can be leveraged to sabotage critical infrastructures or the supply chains of their components through advanced persistent cyberattacks, including without limitation, **information regarding the list of government or military customers, as well as their unpublished procurement of products and services** and unpublished cyber loopholes."



Mitigation strategies for companies operating in China

In the context of trade due diligence required by US/EU trade laws



- Understand legal obligations and risks in cooperating with data request for compliance with foreign trade regulations, and ensure safeguards for local employees are in place.
- Develop holistic data/trade compliance policy as evidence of due diligence to ensure compliance and establish mitigation factor in the event of enforcement action, e.g.:
 - **policy to justify the purpose** of sharing the information with an overseas party; and
 - **self-censoring** of the data before transferring across the borders.
- Conduct self-assessment to inform the decision as to whether a further escalation to a Chinese regulator is required to seek approval for the data transfer.
- Communication strategy if a "red flag" is identified in the information gathered.



0 **Top tips and planning for**
6 **geopolitical risk**

Planning for geopolitical risk

Plan for uncertainty

- Assess controllable and uncontrollable exposures – contract and regulatory
- What levels and types of risk are acceptable?
- Consider different supply / in-market models to suit different jurisdictions
- Utilise learnings from supply chain disruption of recent years
- Where can the business diversify in supply inputs and customers?
- Be prepared to be flexible / consider new arrangements

Do consider worse case scenarios

- What is exit strategy from jurisdiction? Short-term and longer-term
- Monitor for trigger points in geo-political developments
- Risk mitigations may take some years to implement
- Consider exploring (but do not rely on) government diplomacy / trade dispute options

Tackling the confluence of risks

Cross-Functional Project Team

Include board, external resources



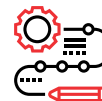
Holistic Risk Ranking of Counterparties

Harness internal and external data to heatmap



End-to-End Assessment

Operational structures
Governance and decision-making
Local risks



Test and Monitor

Desktop exercises
Playbook
Harness data



Mitigations & Opportunities

Business restructuring, e.g. split listings, "x-shoring"
Management and decision-making
Legal, contractual mitigations





Questions

Geopolitical risk in transactions: developments in foreign investment control and national security interventions

Thursday 28 September

3.45 - 4.45 pm BST

4.45 - 5.45 pm CEST

10.45 - 11.45 am EDT

Next session

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