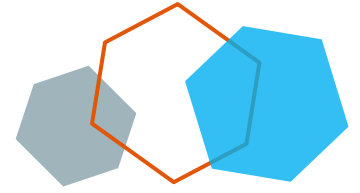


Organisers



AAIL FOUNDATION



# Sanctions and Foreign Direct Investment

**Mr Michael S. Casey**

Partner

Wilson Sonsini

WILSON  
SONSINI

# Recent Sanctions Developments

# **Overview of Russian Sanctions**

# Russia's Invasion of Ukraine



# Coordinated Action in Response to Russia's Invasion of Ukraine

- Western countries launched 'united and decisive' response to Russia's 'unprovoked and unjustified attack' on Ukraine
- Coordinated economic sanctions on Russian banks, State-owned enterprises, Russian elites, and others
- Measures are intended to constrain Russia's ability to raise capital and to 'impose immediate costs and disrupt and degrade future economic activity, isolate Russia from international finance and commerce, and degrade the Kremlin's future ability to project power'



# Specific Sanctions Programs Enacted by Western Governments

- Territorial Sanctions
- List-Based / Asset Freeze Sanctions
- Correspondent Account and Payable Through Account Sanctions
- Sectoral Sanctions / Lending Restrictions
- Russian Sovereign Debt Sanctions
- SWIFT Sanctions
- Russian Central Bank Sanctions
- Energy / Oil Price Cap
- Transport, Aviation, and Space
- Export Controls / Trade Controls
- Import Restrictions
- New Investment Restrictions
- State Support and Public Contracts

# **Jurisdictional Considerations**

# Jurisdictional Considerations

## UK FAQs

- **Are UK entities' subsidiaries located outside the UK expected to comply with UK sanctions?**
- UK financial sanctions apply to all persons within the territory and territorial sea of the UK, and to all UK persons wherever they are in the world. UK persons will include legal persons established under UK law, including their branches.

## EU FAQs

- **Where does Council Regulation 833/2014 apply?**
- EU Council Regulation 833/2014 applies within the territory of the EU; to any national of an EU member state wherever located; to any legal person, entity, or body incorporated or constituted under the law of an EU member state, or to any legal person, entity, or body in respect of any business done in whole or in part within the EU

## US FAQs

- **What persons or entities are obligated to comply with OFAC's sanctions regulations?**
- The US Russian Harmful Foreign Activities Sanctions apply to 'US Persons.' US Persons are defined as 'any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.'



# Non-US Persons are Prohibited from Causing US Sanctions Violations

**Executive Order 14024 of April 15, 2021**

**Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation**

**Sec. 4.** (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

# US Secondary Sanctions Triggers

Sanctionable Activity	Authority	Secondary Sanctions Measure	Agency
'Significant transactions' with Russian SDNs and SSI parties (and their close relatives). Includes deceptive or structured transactions	CAATSA Sec. 228	Designation on SDN List	OFAC
'Significant transactions' by financial institutions involving Russian defense- and energy-related activities	CAATSA Sec. 226	Menu-based sanctions measures	OFAC
'Significant' investment in special Russian crude oil project	CAATSA Sec. 225	Menu-based sanctions measures	State
'Investments' that directly and significantly enhance Russia's ability to construct energy export pipeline projects	CAATSA Sec. 232	Menu-based sanctions measures	State
Sale, lease, or provision of goods or services with a fair market value of \$1,000,000 or more or with a 12-month aggregate fair market value of \$5,000,000 or more, that directly and significantly facilitate the maintenance or expansion of the construction, modernization, or repair of Russian energy export pipelines	CAATSA Sec. 232	Menu-based sanctions measures	State
'Significant' transaction with defense or intelligence sectors of Russian government (State Department list)	CAATSA Sec. 231	Menu-based sanctions measures	State
Investment of US \$10M or more in privatization of state-owned assets by Russia that unjustly benefits Russian officials or their families	CAATSA Sec. 233	Menu-based sanctions measures	OFAC
Materially assisting or providing support or goods or services to Russian SDNs	Executive Order (various)	Designation on SDN List	OFAC

# **Facilitation and Circumvention**

# Facilitation and Circumvention

The UK, EU and US sanctions differ when it comes to facilitation and circumvention:

- **UK Circumvention and Facilitation:** The UK sanctions prohibit UK operators from ‘intentionally participat[ing] in activities knowing that the object or effect of them is (whether directly or indirectly):’ (a) to circumvent any prohibitions in the UK sanctions; or (b) to enable or facilitate the contravention of any such prohibition.
- **EU Circumvention and Facilitation:** The EU sanctions prohibit EU operators from ‘knowingly and intentionally’ participating ‘in activities the object or effect of which is to circumvent prohibitions’ in the Russian sanctions.
- **US Facilitation:** The US sanctions prohibit US persons from assisting, financing, approving, or otherwise supporting activities of a non-US person that would be prohibited if completed by a US person.



**Some countries (e.g. China, India, Turkey) have not implemented sanctions against Russia.**

- Given the circumvention and facilitation provisions in the UK, EU, and US sanctions, some transactions involving these countries can present issues for UK, EU, and US persons.

# The ‘Eurasian Roundabout’

A February 2023 European Bank for Reconstruction and Development working paper found:

- **UK and EU export volumes to Russia** from the UK/EU are **down by half** between March 2022 and February 2023.
- **But export volumes to bordering Armenia, Kazakhstan, Kyrgyzstan**—all of whom are in a customs union with Russia—are **proportionately up 15–90%** between March 2022 and February 2023.
- And these **trends are amplified for goods explicitly subject to sanctions:**
  - Exports of such goods to Russia are down 80% steeper than general trend.
  - Exports of such goods to Armenia, Kazakhstan, and Kyrgyzstan are up 30% steeper than general trend.



**Russia also continues to obtain goods and products directly from other countries (e.g. China, India, Turkey)**

# **Sanctions Enforcement**

# Civil and Criminal Penalties



## Civil Violations

- **UK:** Fines up to the greater of £1,000,000 or 50% of the value of the funds or resources
- **EU:** Fines (up to €5,000,000) vary by Member State
- **US:** Fines up to \$250,000 per violation or twice the value of the impermissible transaction (imposed on a strict liability basis)

## Criminal Violations

- **UK:** Unlimited fines; prison sentences of up to 7 years
- **EU:** Fines (€1200 to €5,000,000) and prison sentences (2 to 12 years) vary by Member State
- **US:** Fines up to \$1,000,000 per violation; prison sentences of up to 20 years

# ZTE/Huawei Enforcement Actions

The ZTE logo is displayed in a large, bold, blue sans-serif font.

**ZTE Corporation Agrees to Plead Guilty and Pay Over \$430.4 Million for Violating U.S. Sanctions by Sending U.S.-Origin Items to Iran**

**Combined Penalty of \$1.19 Billion with Department of Commerce and Department of Treasury Actions Shows All of Government Approach to Sanctions Enforcement**

Treasury Department Reaches \$100 Million Settlement With Zhongxing Telecommunications Equipment Corporation

**Secretary Ross Announces \$1.19 Billion Penalty for Chinese Company ZTE**



**Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged With Financial Fraud**

**Huawei Device USA Inc. and Huawei's Iranian Subsidiary Skycom Also Named Defendants**

**Other Charges Include Money Laundering, Conspiracy to Defraud the United States, Obstruction of Justice and Sanctions Violations**



# US Enforcement Actions Directed at Asian Companies

Company	DOJ	OFAC	BIS
<b>Sojitz (Hong Kong) Ltd.</b> <i>Hong Kong</i>		~\$5.2M penalty	
<b>PT Bukit Muria Jaya</b> <i>Indonesia</i>	~\$1.5M penalty (DPA)	~\$1M penalty	
<b>Yantai Jereh Oilfield Services Group Co., Ltd.</b> <i>China</i>		~2.8M penalty	~600K penalty
<b>DES International Co. Ltd.</b> <i>Taiwan</i>	~80K fine (guilty plea)		
<b>Soltech Industry Co. Ltd.</b> <i>Brunei</i>	~80K fine (guilty plea)		
<b>Avnet Asia Pte. Ltd.</b> <i>Singapore</i>	~1.5M penalty (NPA)		~\$3.2M penalty suspended to ~\$1.7M
<b>Industrial Bank of Korea</b> <i>South Korea</i>	~86M penalty (DPA)		

# US and European Enforcement Initiatives

## *United States*

- Deputy AG: ‘Sanctions are the new FCPA.’
- DOJ Projects and Reshuffling:
  - KleptoCapture Task Force
  - Russian Elites, Proxies, and Oligarchs Task Force (REPO)
  - Chief Counsel for Corporate Enforcement, National Security Division

## *United Kingdom*

- Economic Crime (Transparency and Enforcement) Act
  - Civil monetary penalties now available on a strict liability basis for violations that occur after June 15, 2022
- Expanding headcount at OFSI
- Increased coordination with OFAC

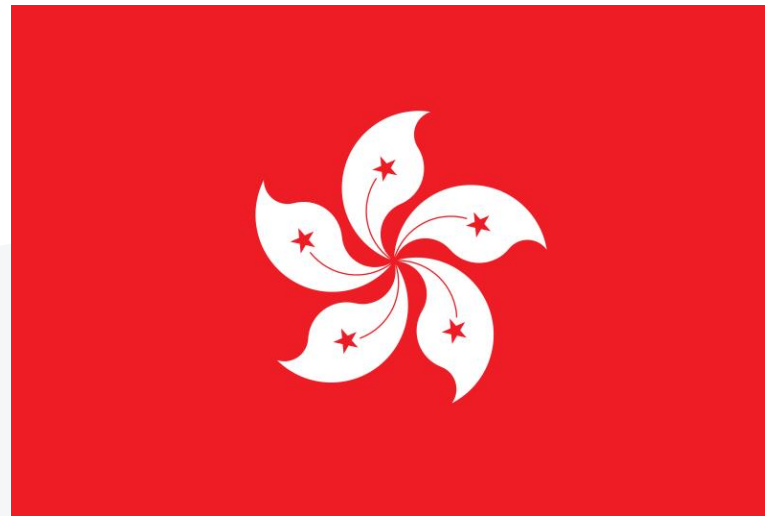
## *European Union*

- Sanctions currently enacted by European Commission but enforced by member states
- Appointment of David O’Sullivan as EU Sanctions Envoy, effective January 2023



# Litigation/Arbitration Considerations

- Western sanctions have created various commercial disputes related to contractual performance and other issues
- Many of these disputes will be resolved through litigation and arbitration.
- Hong Kong will be a natural venue for these proceedings given its location and status.



# Foreign Direct Investment Developments

# **FDI Review Regimes**

# United States: CFIUS Overview

**CFIUS always has jurisdiction over investments that grant 'foreign persons' 'control' over 'US businesses'**

- A 'foreign person' includes any entity over which a foreign national or entity can exercise control (e.g. US-based investment funds controlled by foreign parties are considered to be foreign)
- 'Control' is an amorphous standard left largely to CFIUS's discretion (e.g. CFIUS may find control when a foreign person holds more than a 10% voting stake, a board seat, or event significant veto rights)
- A 'US business' can include any entity engaged in commerce in the US

**In 2018, CFIUS's powers were expanded through the so-called FIRRMA legislation.**

- Parties are now required to make CFIUS filings for some transactions
- CFIUS has become increasingly active in enforcement

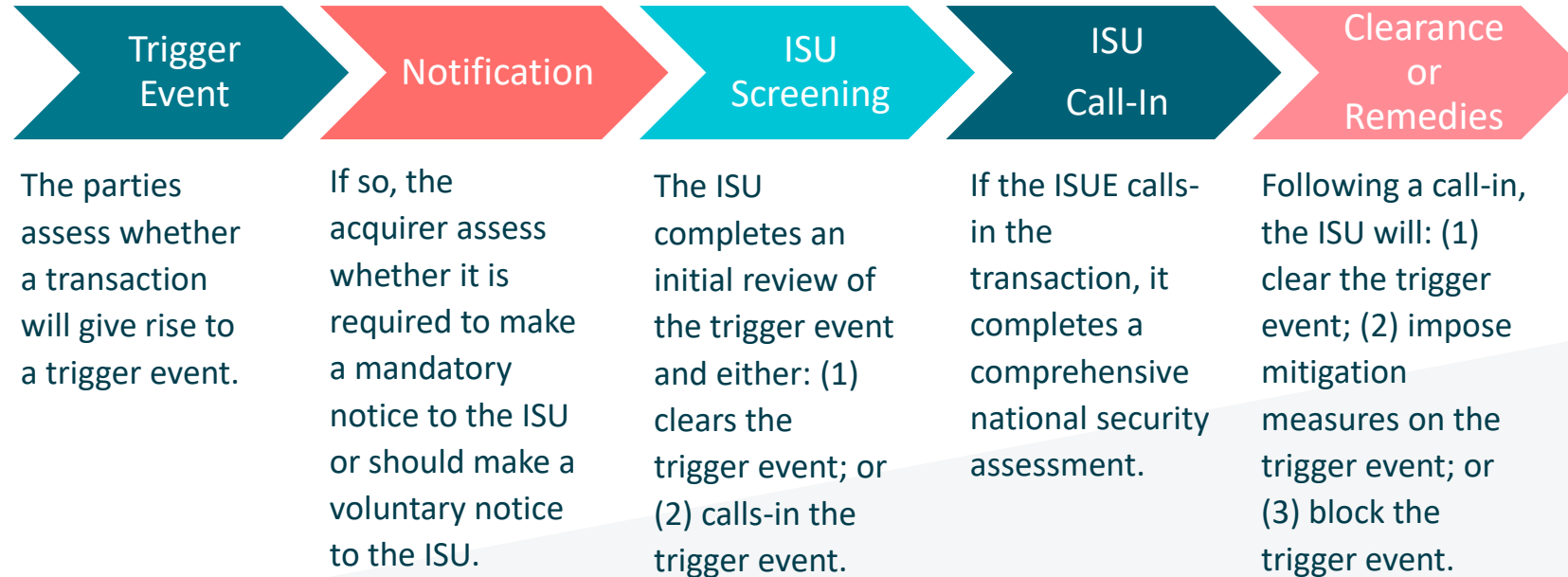
## Other Countries Have Adopted FDI Regimes



- In recent years, a number of countries — including the United States, Germany, France, Australia, and Japan — have implemented or strengthened national security reviews of foreign investment.

The National Security and Investment Act

# UK National Security and Investment Act





# EU Framework for Screening Investments

**SCREENING OF FOREIGN DIRECT INVESTMENT - AN EU FRAMEWORK**

Europe must always defend its strategic interests and that is precisely what this new framework will help us to do. This is what I mean when I say that we are not only free traders. We need to be free traders, but we also need to be smart. We need to be smart about our investments, that means we need to be smart about our strategic assets.

The Regulation shows the willingness of Europe to deliver and attract investment from our citizens and businesses, to an economy, technological and technological world we need to be secure, resilient and secure, and we need to be smart about our investments.

**Welcoming foreign direct investment while protecting essential interests**

Foreign direct investment from third countries is a source of growth and jobs. The EU has one of the world's most open investment regimes, as acknowledged by the OECD. The EU wants to and will remain the most attractive destination for foreign direct investment in the world. However, in exceptional cases, foreign investments may represent a risk for security or public order in Member States or in the whole Union. This could be the case for example when a foreign investor seeks to acquire control of European companies whose activities affect critical technologies, infrastructure, equities or sensitive information. In some cases, the risk may be exacerbated by the fact that investment are owned or controlled by the state of a third country.

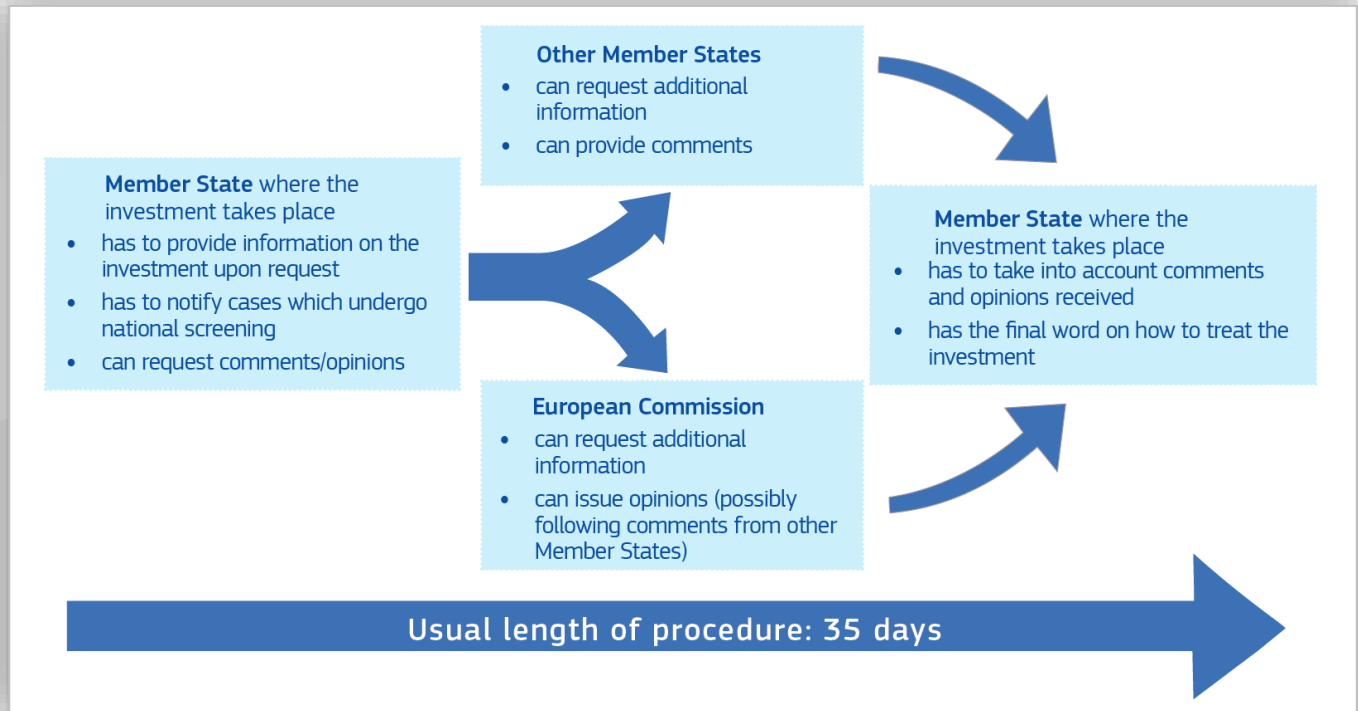
**THE EU IS THE WORLD'S LEADING SOURCE AND DESTINATION OF FOREIGN DIRECT INVESTMENT**

The companies controlled by third country investors are still small in number in the EU, but they have a significant economic impact because of their larger than average size and their focus on high-technology sectors.

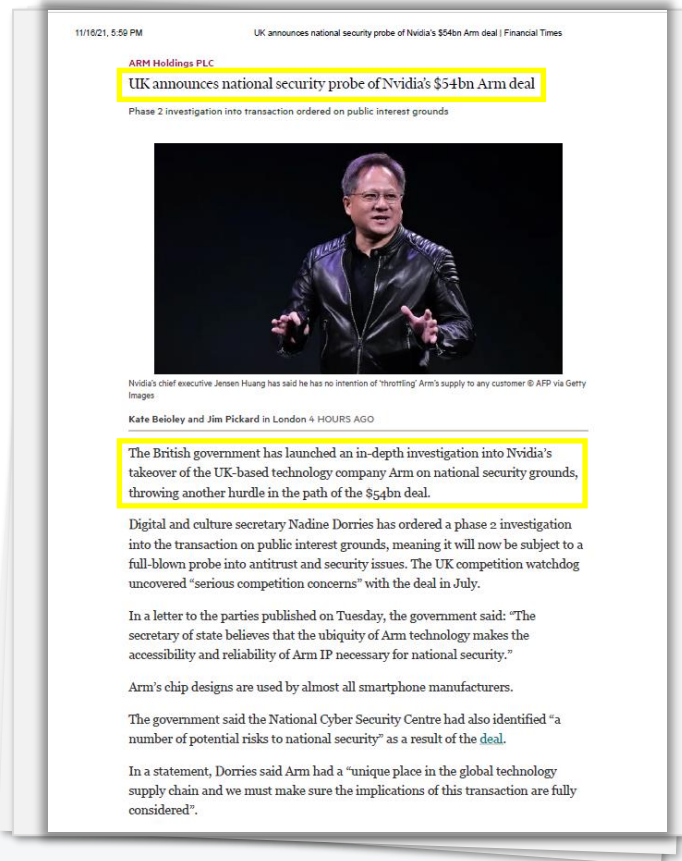
New investment needs are appearing with some emerging economies, playing an increasing role as providers of foreign direct investment.

There are growing concerns in Europe about the impact that certain foreign investments may have on security and public order.

Region	FDI Inflows (billion USD) in 2022
EU	5.7
USA	5.1
CHINA (including Hong Kong)	1.5



# National Security Reviews Have Become Front Page News



**UK announces national security probe of Nvidia's \$54bn Arm deal**


The British government has launched an in-depth investigation into Nvidia's takeover of the UK-based technology company Arm on national security grounds, throwing another hurdle in the path of the \$54bn deal.

# National Security Reviews Have Become Front Page News

◆ WSJ NEWS EXCLUSIVE | WORLD

## China Bought Italian Military-Drone Maker Without Authorities' Knowledge

Sale illustrates Europe's weak rules on purchases of sensitive technology



Chinese President Xi Jinping at the Aviation University of the Air Force in Jilin, China, in 2020.  
PHOTO: LI GANG/ZUMA PRESS

By [James Marston](#) in Brussels and [Giovanni Legorano](#) in Rome  
Nov. 15, 2021 5:35 am ET

In 2018, a Chinese state-controlled company bought an Italian manufacturer of military drones. Soon after, it began transferring the company's know-how and technology—which had been used by the Italian military in Afghanistan—to China.

The Italian and European authorities had no knowledge of the move, revealing how Beijing is skirting weak investment-screening in Europe to acquire sensitive technology.

Italian authorities are investigating the 2018 takeover of Alpi Aviation Srl by a Hong Kong-registered company that they say is a front for the Chinese state and was in the process of transferring the company's technical and intellectual property to a new production site in China.

The takeover fits a pattern, analysts say, of Chinese state firms using ostensibly private shell companies as [fronts to snap up firms with specific technologies](#) that they then shift to new facilities in China.

**China Bought Italian Military-Drone Maker Without Authorities' Knowledge**

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# Outbound Screening

# Outbound Screening – a ‘Reverse CFIUS’?

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from *Renewing America*

## Outbound Investment Screening Waits in the Wings

The thousand-page CHIPS bill avoided a new screening procedure for U.S. investments abroad, but it signals how industrial policy will likely be used to discourage American companies from investing in China.



U.S. President Biden signs the CHIPS and Science Act of 2022, in Washington. Evelyn Hockstein/Reuters

## Possible outbound investment screening rules in the US have taken many different forms as proposals have proliferated

- The US government would review investments US investors into selected overseas nations if the investee companies are engaged in specified activities (e.g. AI, genetic engineering, etc.)
- Draft legislation related to outbound screening is still circulating
- The Biden Administration reportedly is considering an executive order that would implement a version of the same screening regime

## Various European countries are considering adopting outbound screening restrictions as well