

# EU Takes Time to Ready Outbound Investment Control Toolkit

February 1, 2024

On January 24, 2024, the European Commission (“EC”) adopted five initiatives as part of the European Economic Security Strategy unveiled in June 2023.<sup>1</sup> The initiatives are aimed at bolstering the EU’s economic security interests. Their main focus is a proposal for a new EU FDI Screening Regulation aimed at inbound investments.<sup>2</sup> But the package also includes a white paper on *outbound* investment control (the “White Paper”),<sup>3</sup> launching a debate on whether and how to scrutinize investment outflows from the EU for the first time in the Union’s history.

## Filling the Gaps in the EU FDI Control Regime

The White Paper aims at addressing a double regulatory vacuum: neither the dual-use export control system nor the EU FDI Regulation (and the domestic FDI regimes) govern outbound investments, which entail the risk of leakage of “*emerging and sensitive technologies*”.<sup>4</sup> The White Paper kicks off a long consultation and assessment phase

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<sup>1</sup> European Commission, Commission proposes new initiatives to strengthen economic security, 24 January 2024, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_24\\_363](https://ec.europa.eu/commission/presscorner/detail/en/IP_24_363)

<sup>2</sup> See our upcoming summary on the proposed revised FDI Screening Regulation

<sup>3</sup> European Commission, White Paper on Outbound Investments, 24 January 2024, COM(2024) 24 final, available at: <https://circabc.europa.eu/ui/group/aac710a0-4eb3-493e-a12a-e988b442a72a/library/51124c0d-58d8-4cd9-8a22-4779f6647899/details?download=true>

<sup>4</sup> In a speech delivered in Brussels on [30 March 2023](#), EC President Ursula von der Leyen already stated that “*we have to look at where there are gaps in our toolbox which allow the leakage of emerging and sensitive technologies through investments in other countries. This is why we are currently reflecting on if and how – Europe should develop a targeted instrument on outbound investment. This would relate to a small number of sensitive technologies where investment can lead to the development of military capabilities that pose risks to national security.*”



recognizing the “complex and sensitive nature of the issue”:

- **January to April 2024.** A public consultation will take place on the “*proposed monitoring and review of certain existing outbound investments*”.
- **Summer 2024.** The EC will assess the consultation results and adopt a Recommendation to EU Member States to monitor and review certain outbound transactions in sensitive technologies.
- **Summer 2025.** Risk assessment on the EU Member States’ monitoring and review of certain outbound investments.
- **Autumn 2025.** The EC will publish its assessment and proposal for a policy response.

The White Paper and the consultation are designed as a scoping exercise. The EC acknowledges that there is no granular data available on outbound flows due to the absence of any systemic review and/or assessment of outbound investments by EU Member States. The EC therefore intends to collect information on (i) the specific investments in critical technologies made by EU-based companies outside the EU; (ii) whether such transactions may give rise to security risks; (iii) and whether a policy response—at the EU or national level—might contribute to an effective and proportionate remedy to the issues identified.

The White Paper cautions that “[i]n case policy action will be deemed necessary to respond to identified risks, the Commission and Member States should try, to the extent legally possible, to address any risks from outbound investments through existing instruments, such as dual-use export controls or FDI screening mechanisms, either by enhancing the use of these instruments or by amending them to cater for new risks.” Such cautious language is customary as the EC is bound by principles of necessity and proportionality when proposing new legislation.

<sup>5</sup> Commission Recommendation of 3.10.2023 on critical technology areas for the EU's economic security for further risk assessment with Member States, available at: <https://defence-industry->

## Charting the Way Forward

The White Paper invites interested parties to comment on the following notable parameters of a potential outbound control mechanism:

- Cover a wide range of investments, such as acquisitions, mergers, asset transfers, greenfield investments, joint-ventures, and venture capital investments (but excluding pure portfolio investments), and potentially extend the scope to R&D cooperation and top talent mobility.
- Apply to investments by natural or legal persons that are resident or established in the EU, or those carried by an EU investor through an investment vehicle abroad.
- Focus product scope on advanced semiconductors, artificial intelligence, quantum technologies, and biotechnologies. This list is in line with the EC’s Recommendation on critical technology areas for the EU’s economic security for further risk assessment with Member States.<sup>5</sup>
- Delineate geographic scope based on Member States’ “*assessment of the risk profiles of certain countries*”. Previous violations to the UN Charter should be taken into account. Member States are also encouraged to assess the risk of seeing technologies or items used in war or conflict situations, for human rights abuses, or the proliferation of weapons of mass destruction. Unlike in the United States, there is no direct reference to China, though in a 2023 speech, President von der Leyen notably referred to the need “*to ensure that our companies' capital, expertise and knowledge are not used to enhance the military and intelligence capabilities of those who are also systemic rivals*” (emphasis added).
- Apply retroactively to all relevant transactions completed since January 1, 2019.

Based on the evidence gathered during the monitoring and risk assessment, the EC will then determine whether a new EU-wide outbound control instrument is warranted.

[space.ec.europa.eu/system/files/2023-10/C\\_2023\\_6689\\_1\\_EN\\_ACT\\_part1\\_v8.pdf](https://space.ec.europa.eu/system/files/2023-10/C_2023_6689_1_EN_ACT_part1_v8.pdf)

## The EU Is Jumping on the Regulatory Bandwagon.

The European Union has been at the forefront of the regulatory curve in developing a comprehensive set of tools to bolster its “*open strategic autonomy*”, from the Anti-Coercion Instrument to the Foreign Subsidies Regulation. But the EU is trailing behind on outbound investment control. Japan and China already have a mechanism in place and the US issued an Executive Order in August 2023.<sup>6</sup> Restrictions on outbound investment are also under consideration in the UK.

This delay might be related to the delicate balance between the Union (which has exclusive competence on commercial policy) and the Member States (which may restrict investment flows, including within the EU, on public security and public policy grounds or for overriding reasons in the general interest).<sup>7</sup> Germany’s “strategy on China” issued in July 2023 acknowledged that “appropriate measures that are designed to counter risks connected with outbound investment could be important as a supplement to existing instruments for targeted controls of exports and domestic investments.”<sup>8</sup>

## Increased FDI Outbound Focus May Materialize Quickly

An EU-wide legislative proposal is not yet on the table and would in any event not be officially proposed before the end of 2025. However, EU-based companies active in the four sensitive sectors at issue should closely monitor any developments, particularly in Autumn 2024 when the EC gives its Recommendation to Member States.

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<sup>6</sup> See: “U.S. Government Unveils Proposal for Outbound Investment Regime Targeting China”, Cleary Foreign Investment and International Trade Watch, available at: <https://www.clearytradewatch.com/2023/08/u-s-government-unveils-proposal-for-outbound-investment-regime-targeting-china/>

<sup>7</sup> Article 65 of the Treaty on the functioning of the European Union (TFEU).

<sup>8</sup> Strategy on China of the Government of the Federal Republic of Germany, available at: <https://www.auswaertiges-amt.de/blob/2608580/49d50fecc479304c3da2e2079c55e106/china-strategie-en-data.pdf>