"*Straight outta Europe*" – or not? The new proposals for an EU Outbound Investment Screening

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Over recent months, one of the most highly debated issues in the field of international trade law has been the expected introduction of a novel instrument of trade restrictions – the so-called Outbound Investment Screening. In Berlin, Brussels and Washington DC, governments and legislators are currently engaged in discussions over the exact nature of the tool, which seeks to both monitor and – under certain circumstances – restrict investments by Western companies in third countries (in particular China). While reports suggest that a Presidential executive order on this subject is imminent in the US, the EU has now equally taken a further step to clarify its intentions through a newly published position paper, which forms part of the new "*European Economic Security Strategy*". The document entitled "*An EU approach to enhance economic security*" begins to illustrate how the European Commission intends to conceptualise the instrument for the EU single market, with European Commission representatives announcing concrete proposals for the end of the year. The position paper's contents are also likely to have significant influence on the ongoing reform attempts by the German Ministry for Economic Affairs and Climate Action.

Outbound Investment Screening – filling in the gap

The geopolitical upheavals of the last decade have led to the emergence of new investment control legislation and an increase in political pressure to curtail unlimited investments by certain state actors in Western countries. Alongside export control regulations, foreign direct investment (*FDI*) screening has become one of the central instruments in international trade law for both EU Member States and its allies. The aim has been to protect their geopolitical interests in a multipolar world and avoid dangerous dependencies on non-democratic or autocratic states. More recently, however, especially the United States appear to have identified a gap in their toolkit to safeguard against the outflow of sensitive know-how and technological capabilities to countries such as China. Proponents of the new instrument argue that while FDI screening can prevent third countries from gaining intelligence and know-how through investments, this drain may equally occur when US (or EU) companies transfer financial, industrial and technological capabilities abroad. Similarly, export control regulations are deemed, at least by some, as insufficient in preventing a substantial knowledge transfer that may in the long-term harm national economic and security interests.

The US - leading the way

The US congress has been working on the concept of Outbound Investment Screening since at least 2018 when it first failed to be included in the Foreign Investment Risk Review Modernization Act (FIRRMA). More recently, however, legislators from both chambers of Congress have introduced legislation seeking to provide the possibility of both monitoring and restricting outbound investments in certain circumstances. The debate accelerated when US Treasury Secretary Janet Yellen announced on 20 April of this year the Biden administration's intention to issue an **executive order** temporarily regulating the subject until legislation had been passed.

For now, the Biden administration has signalled an approach targeting very specific security-sensitive sectors. The measures are likely to include notification requirements and powers of restricting outbound investments to so-called "countries of concern". This type of a **country-specific targeting** of the instrument aligns with a more confrontational approach of both the US Congress and the last two administrations *vis-à-vis* China as the country of primary concern.

The EU is catching up – yet only slowly

In Europe, the issue has also been heating up over the spring with German Minister for Economic Affairs and Climate Action Robert Habeck and the European Commission's President von der Leyen coming out in favour of the instrument, with the later announcing the Commission's plans of "*a targeted instrument on outbound investment*".

The new position paper published by the EC on 20 June 2023 continues in this vein with EC Vice-President Dombrovskis announcing further discussions with Member States and stakeholder consultations, promising to propose an initiative by the end of the year. According to the European Commission the aim remains to ensure that EU companies' capabilities are not "*used to fuel technological advances in countries which may use them to undermine peace and security.*" As a concrete step, the European Commission will set up a new dedicated group of Member States' experts with the intention to build a confidential cooperation mechanism.

The new paper and "The-One-Who-Must-Not-Be-Named"

The document highlights the biggest divergence between reform efforts in Europe and across the Atlantic: In both places the authorities favour a tailored approach directed at a restricted number of key industries with security implications – with the EU naming quantum computing, artificial intelligence, 6G or robotics as examples. This **sectoral approach** is also inherent in the EU Screening Regulation which provides a legal framework for FDI screening procedures at Member State level.

Yet, unlike the US, the EU is refraining from targeting specific countries, reflecting the more double-sided relationship between EU Member States and China in particular. In fact, China is not mentioned once in the 17-page-long document. In this regard, the position paper is in alignment with Brussels' three-pillar strategy of considering the country a partner, competitor, and systemic rival. Alongside political considerations the European Commission has historically been careful not to single out specific countries, being bound by the EU's adherence to the principle of equal treatment.

Complications could arise from the fact that defence and investment policies – unlike trade law – are still in the hands of EU Member States. Against this backdrop, it has been a hot topic of debate within institutions on both EU and Member State level whether – according to the treaties – the former or the latter would primarily be responsible for enacting relevant legislation. In any case, considerable effort will be needed to develop a common European approach on this matter, given the differing views on the correct strategy regarding trade relations with China throughout the bloc. It therefore remains to be seen in what form this new regulatory investment will be set up: in the form of an umbrella type legal framework such as the EU Screening Regulation or rather in the form of a detailed regulation.

The German Response

Following today's announcement it will be interesting to see whether the German government will in response intensify or slow down its own reform ambitions, which are currently still being discussed in the Ministry for Economic Affairs and Climate Action. While the planned reform is mainly aimed at consolidating and improving the current provisions on FDI screening, it is also being discussed to include provisions on outbound investment screening. Complicating matters, German Chancellor Olaf Scholz appeared to contradict his Vice-Chancellor in recent days by expressing scepticism of the potential new instrument. It therefore remains to be seen whether the German government will let the EU take the reins on the issue or whether it will push ahead regardless. Given the current prevailing legal position, classifying the proposed instrument as one to be implemented by the Member States, it will also take some time to get a clear-eyed view on the relationship between the planned "initiative" of the European Commission and any reforms introduced on the national level.

Convergence of Approaches

While differences remain – particularly on the question of a country-specific or more abstract regime – a certain degree of convergence between the US and the EU appears likely going forward. It is no secret that the United States have pressured the EU and its Member States behind the scenes to come along for the ride when it comes to Outbound Investment Screening. Politicians across the pond aim to avoid a situation where weaker control mechanisms in the EU could undermine stricter US regulations, with US companies investing abroad through their EU subsidiaries, or disadvantaging US industry. It is therefore likely that the transatlantic allies, despite their diverging China strategy, will attempt to conceive a unified approach to this novel instrument.

BLOMSTEIN is constantly monitoring the effects of new developments such as the potential introduction of Outbound Investment Screening instruments on foreign trade law and its impact on companies. Roland M. Stein and Leonard von Rummel will be happy to answer your questions at any time.