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EU Commission's New Outbound Investment Recommendation: The Embryo of a New Screening Regime?

Andrea Pomana, Alejandro Guerrero, Jonathan Saké (Simmons & Simmons) · Friday, January 24th, 2025

On 15 January 2025, the European Commission (Commission) adopted a recommendation inviting Member States to review investments made by domestic companies into third countries (so-called "outbound investments").

The recommendation aligns with similar mechanisms adopted in other countries, (e.g. the US Department of the Treasury's Outbound Investment Security Program), and is part of a broader strategy to enhance the economic security of the EU, by preventing the transfer of critical technologies and know-how to countries that may pose security risks. It targets investments conferring control in sensitive sectors such as semiconductors, artificial intelligence, and quantum technologies.

The recommendation follows Commission's White Paper on Outbound Investments from January 2024 which sparked a subsequent public consultation on the need to assess potential risks related to sensitive technologies and investments leaving the EU.

Legal implications and sectors covered

Although the recommendation is not legally binding, it strongly encourages Member States to implement systematic reviews of outbound investments. Historically, such recommendations from the Commission have seen varying levels of adoption across Member States, depending on the political and economic context. For example, Commission Recommendation of 6 December 2012 on aggressive tax planning was not adopted by all EU Member States to the same extent, with some countries tightening their national laws and practices against aggressive tax planning, while others were slower to act, largely due to concerns over national competitiveness.

The legal implications are significant, laying the groundwork for potential future legislation at Member State level. The recommendation highlights the importance of economic security and preventing technology leakage, which is particularly relevant given the increasing geopolitical pressures on the global stage.

The recommendation specifically targets investments in three critical sectors:

- Semiconductors
- Artificial intelligence, and
- Quantum technologies.

These sectors are considered high-risk for technology leakage that could enhance the military and intelligence capabilities of actors that may use these technologies to undermine international peace and security. The types of investments under review include mergers and acquisitions, transfer of assets (including IP rights), greenfield investments, joint ventures, and venture capital investments.

Temporal scope and challenges

The recommendation covers new and ongoing investments, and those completed since 1 January 2021. This retroactive application may pose some issues, particularly as regards gathering data and assessing risks for past investments. Member States are further encouraged to establish review systems that allow for voluntary or mandatory information provision on transactions, and to amend existing mechanisms where necessary.

By 15 July 2025, the Member States should provide an update to the Commission on their progress, and submit by 30 June 2026 a comprehensive report on the implementation of the recommendation.

Besides retroactive application, the recommendation brings several challenges:

- **Competence and jurisdiction**: In light of the rules of the EU Treaties on trade policy, which is an exclusive EU competence, it is unclear whether Member States can enact outbound investment legislation, potentially leading to future legal and administrative objections.
- **Fragmentation**: Differences in national regulations could result in a fragmented landscape across the EU regarding outbound investments, as we are seeing in respect of the various FDI regimes across the EU. This would create compliance challenges for companies operating in multiple Member States and could negatively influence investment decisions and economic growth.
- **Regulatory proliferation**: Companies may face significant compliance burdens due to additional outbound investment screening mechanisms. This would add to the existing regulatory toolbox, which already consists of the foreign direct investment (FDI) and merger control regimes, and the Foreign Subsidies Regulation (FSR).

Potential for future regulation and conclusion

While the recommendation itself is not binding, it represents a significant step towards a more regulated approach to outbound investments, which may undermine free trade and free movement of capital. However, by targeting specific critical technology sectors and implementing a systematic review process, the Commission is aiming at preventing technology leakage in areas which have been identified as the ones likely to pose the most significant risks for EU's strategic interests.

The results of the risk assessments and the shared understanding of risks among Member States will impact subsequent policy responses. This recommendation may lay the ground for a new regulation aimed at safeguarding EU's economic security interests.

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