

# The New U.S. Outbound Investment Screening: A Model for the EU?

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On August 9, 2023, the President of the United States, Joe Biden, signed an [Executive Order on Addressing United States Investments In Certain National Security Technologies And Products In Countries Of Concern](#). The Executive Order is the first step towards a so-called **outbound investment control**, which is to complement the export control and inbound investment control of the U.S. Can the U.S. *outbound investment control* serve as a model for the EU?

The Executive Order authorizes the U.S. Treasury Department to prohibit or require notification of U.S. investments in companies engaged in sensitive technologies critical to national security and located in listed countries. The regulation is intended to target U.S. persons, including U.S. citizens - regardless of where they are located -, companies governed by U.S. law, and foreign establishments of such companies.

Technologies that the Biden Administration sees as critical to national security include semiconductors and microelectronics, quantum information technologies, and artificial intelligence. The country that should be prevented from benefiting from such investments is China (including Hong Kong and Macau).

The outbound investment control is designed to prevent China from using U.S. investments to develop military, surveillance, intelligence, and cyber capabilities.

A range of investments are covered. In addition to traditional M&A activities or private equity investments, *greenfield* investments and certain debt financing transactions are also included. The restrictions are intended to apply to investments in companies active in the above-mentioned technologies that are governed by the laws of China, have their principal place of business in China, or are majority-owned by Chinese individuals or legal entities.

EU-based companies with U.S. parents or employed U.S. persons should therefore address any compliance risks of U.S. outbound control at an early stage.

## **A Role Model for the EU?**

The EU Commission has closely observed the development of outbound investment controls in the U.S., repeatedly stating that a similar instrument was lacking in the EU toolbox for protecting national security. [In a speech on EU-China relations in March](#) of

this year, EU Commission President Ursula von der Leyen put this idea in concrete terms: "We must ensure that the capital, expertise and knowledge of our companies are not used to strengthen the military and intelligence capabilities of those who are also systemic rivals for us. [...] It would affect a small number of sensitive technologies where investment can lead to the development of military capabilities that pose a threat to national security." Among these sensitive technologies, EU Commission President von der Leyen includes microelectronics, quantum computing, robotics, artificial intelligence, and biotechnology. In this respect, von der Leyen's plans are quite similar to the U.S. approach.

In the [European Strategy for Economic Security](#), which was published in June of this year, the EU Commission stated that it intends to present a **corresponding initiative by the end of the year**. [The German government has signaled its willingness to participate constructively in this process](#). An isolated national effort seems out of the question.

In light of this, the question arises as to whether the EU is able to introduce a foreign investment control instrument at all, and if so, what form it might take.

## **The EU's Competence to Introduce an Outbound Investment Control**

In contrast to the U.S., the protection of **national security** - which is the objective of outbound investment control - is not an argument for transferring jurisdiction from the EU member states to the EU. National security is the sole responsibility of EU member states (Article 4(2) TEU). However, this has not prevented the EU from adopting a screening regulation (EU) 2019/452 for inbound investment control. The screening regulation was based on the competence to implement the common commercial policy under Article 207 (2) TFEU. It merely contains the addition that *"the sole responsibility of each Member State for the protection of its national security pursuant to Article 4(2) TEU and the right of each Member State to safeguard its essential security interests pursuant to Article 346 TFEU"* is not affected by the screening regulation. An outbound screening regulation could be adopted in a comparable manner.

The common commercial policy also covers foreign direct investments. The term "foreign direct investment" refers not only to investments by third-country nationals and companies in the EU, but also to investments by EU nationals and companies in third countries ([ECJ, Avis 2/15](#), para. 82). European outbound investment control is therefore theoretically possible.

However, the term only covers investments "which offer the possibility of participating effectively in the management or control of a company carrying on an economic activity" ([ECJ, Avis 2/15](#), para. 82). As the EU Commission has stated in connection with the Screening Regulation, this applies to M&A activities as well as *greenfield* investments. Portfolio investments or debt financing in which the investor does not obtain a stake in

the management or control of the company are excluded. Consequently, an instrument based on Article 207 (2) TFEU would have only a limited scope of application.

An instrument to control foreign investment could theoretically also be based on Article 64 (2) TFEU, according to which the EU can conclude "measures on capital movements with third countries in connection with direct investment". However, this would not offer any advantages as a legal basis, as Article 64 (2) TFEU also refers to the term "direct investment" and therefore cannot be the grounds for a regulation on portfolio investment or debt financing. Second, compared to Article 207 (2) TFEU, Article 64 (2) TFEU is a shared competence (Article 4 (1) (a) TFEU), which would require a subsidiarity test under Article 5 (2) TEU.

## **The Screening Regulation: A Model for a European Foreign Investment Control Instrument**

If the EU Commission were to base an outbound investment control on Article 207 (2) TFEU, the European Parliament and the Council could adopt a **regulation** in the ordinary legislative procedure (Article 294 TFEU). The regulation would be of general application, binding in its entirety and directly applicable in all EU Member States (Article 288 (2) TFEU).

An investment screening by the EU itself would most likely exceed its capacities. The screening of investments not only requires a high level of staffing, but also information from intelligence services, which the EU lacks compared to the member states. In addition, member states are likely to be similarly reluctant to relinquish their authority as they are in inbound investment screening. For this reason, the **Screening Regulation** gives Member States the authority to implement investment controls and leaves it up to them to decide whether to do so. However, the Screening Regulation provides for some framework conditions. For example, it provides for a cooperation mechanism that requires member states to establish a contact point and to consider reports from the EU Commission or other EU member states on potentially harmful investments. It stands to reason that a similar system would be created for the control of foreign investments. However, there is also the - rather unlikely - possibility that a control mechanism for foreign investments is created along the lines of the Foreign Subsidies Regulation ((EU) 2022/2560), which provides for implementation by the EU itself.

**In terms of content**, a regulation on foreign investment could regulate foreign direct investments into a country that is considered a systemic rival. As Ursula von der Leyen's speech on EU-China relations suggests, the EU considers China to be such a systemic rival. Although the "list approach" is not alien to foreign trade law (see the general export licenses in Annex II of the Dual-Use Regulation (EU) 2021/821), it is unlikely for foreign policy reasons that the EU will exclusively target outbound investments to China, as the United States has done. Inbound investment controls also refrain from drawing up a list of critical and non-critical states, as it ultimately comes down to an examination of the

individual case. The regulation could target the areas of microelectronics, quantum computers and artificial intelligence, as well as robotics and biotechnology.

## **The Need for a European Foreign Investment Control Instrument**

Finally, the question arises whether investment control is the right regulatory venue for the aforementioned gap in the toolbox for national security. Export control law seems to be closer to the issue by prohibiting the export of critical goods and technologies. An extension of export control to goods that do not necessarily have both military and civilian uses could be considered. In addition, it should be possible to link export controls not only to the export of goods or technology, but also to investment.

This would allow the objective of outbound investment control to be achieved even without the introduction of a new instrument. However, the EU has indicated that it does not consider export control law sufficient to safeguard European security interests.

BLOMSTEIN will continue to follow the EU's policy on foreign investment. If you have any questions, do not hesitate to contact [Dr. Roland Stein](#) and [Dr. Leonard von Rummel](#).