THE EUROPEAN COMMISSION ANNOUNCES FIVE NEW INITIATIVES IN ITS ECONOMIC SECURITY PACKAGE

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EU Policy and Regulatory Alert

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On 24 January 2024, the European Commission (Commission) published its Economic Security Package, which introduces five new initiatives with the aim to increase the European Union's economic security, including:

- The proposal for an updated Foreign Direct Investment (FDI) Screening Regulation;
- A White Paper on Export Controls;
- A White Paper on Outbound Investments;
- The Proposal for a Council Recommendation on Enhancing Research Security; and
- A White Paper on Dual-Use Research.

While the Commission notes that the five initiatives will maintain “openness of trade, investment, and research for the E U's economy”, the impact that the future measures could have on trade and investment in the European Union remains uncertain.

Proposal for an Updated Foreign Direct Investment Screening Regulation

With its proposal to update the FDI Screening Regulation, the Commission aims to revise the current FDI framework through an evaluation of the existing regulation, which has applied since 2020. The Commission takes into account its experience since the entry into effect of the current FDI Screening Regulation and sets out ways to improve the effectiveness of the existing regime.

From October 2020 until June 2023, the Commission dealt with 1,125 cases notified by Member States and identified a few areas for improvement, which the proposed revisions of the FDI Screening Regulation seek to address. The main goals of the proposed revision of the FDI Screening Regulation are the following:

- Ensure that all EU Member States have more harmonized national FDI screening mechanisms in place (as of January 2024, 23 of the 27 Member States had foreign investment screening mechanisms);
- Impose minimum requirements to be complied with by national FDI mechanisms, including:
    - Setting-up adequate procedures to determine whether national screening authorities have jurisdiction over a notified foreign investment, and to carry out an initial review followed by, where necessary, an

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in-depth investigation to determine whether that foreign investment is likely to negatively affect security or public order;

- Monitoring by national screening authorities to ensure compliance with the screening mechanism and screening decisions, in particular through adequate procedures to identify and prevent circumvention of these screening mechanisms and decisions;
- Providing the possibility to screen a transaction at least 15 months after completion if the screening authority has grounds to consider that it may affect security or public order;
- Ensuring the protection of confidential information, including commercially sensitive information, made available to the Member State carrying out the screening;
- Ensuring that undertakings concerned by a screening decision have the possibility to seek judicial recourse against that screening decision;
- Empowering national screening authorities to impose mitigating measures, prohibit, or unwind foreign investments subject to an authorization requirement that were not notified or that were notified after completion, and to address effectively the consequences of noncompliance with the mitigating measures; and
- Setting-up adequate procedures for the notification of notifiable investments to the EU cooperation mechanism;

- Set out a minimum sectoral scope where all Member States must screen foreign investments, as there are still significant inconsistencies in terms of the scope of the national FDI mechanisms. In that regard, the proposed FDI Screening Regulation requires prior notification and screening for foreign investments in companies (i) involved in projects or programs of EU interest, or (ii) activities of particular importance for the security or public order interests of the European Union as listed in Annex II of the proposed FDI Screening Regulation (i.e. military equipment on the Common Military List of the European Union, dual-use items subject to export controls, critical technologies, critical medicines, critical entities and activities in the European Union's financial system);
- Set out criteria, relating to both the investment and the investor, to be taken into account by national screening authorities when assessing whether an investment is likely to negatively affect security or public order; and
- Extend the EU screening to investments by EU investors that are ultimately controlled by individuals or businesses from non-EU countries, to address the loophole identified by the Court of Justice of the European Union's Xella ruling (C-106/22 - 13 July 2023). In this case, the court held that the FDI Screening Regulation only allows Member States to screen investments by non-EU companies, and not acquisitions by investors incorporated in the European Union.

The Commission's proposal to update the FDI Screening Regulation is open for feedback until 1 April 2024. The Commission will summarize the feedback and present it to the European Parliament (Parliament) and the Council of the European Union (Council) in preparation for subsequent legislative debate on the initiative.

White Paper on Export Controls

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By adopting the White Paper on Export Controls, the Commission has launched a policy dialogue with Member States and stakeholders for the adoption of EU export controls of dual-use technologies that could impact the European Union's security.

The White Paper on Export Controls sets out several objectives, such as improving the coordination of export controls at the EU level to enable the European Union and Member States to act more effectively, thus reinforcing the European Union's ability to respond to unilateral actions by third countries imposing new export controls. Of the measures introduced, two are notable, including: (1) the Commission's forthcoming proposal to introduce uniform EU controls for items that would have been adopted in the multilateral regimes “if not for the blockage of the decision-making process within these regimes;” and (2) the proposal of a newly created forum for political coordination.

The Commission's White Paper on Export Controls is open for feedback until 13 May 2024. The Commission will summarize the feedback and present it to the Parliament and the Council in preparation for subsequent legislative debate on the initiative.

White Paper on Outbound Investments

With the White Paper on Outbound Investments, the Commission has launched a policy dialogue with Member States and stakeholders on the potential risks arising from investments made by EU companies in third countries.

The Commission notes that Japan, China, the United States and other third countries already control outbound investments from their respective territories. Through this consultation process, the Commission wishes to garner (1) what kind of outbound investments in certain critical technologies are made from the European Union; (2) whether such outbound investments could put the European Union or a Member State's security at risk; and if so, (3) to what extent such risks can be addressed by existing mechanisms or would require additional measures at the EU or national level.

The Commission's White Paper on Outbound Investments is open for feedback until 17 April 2024. The Commission will summarize the feedback and present it to the Parliament and the Council in preparation for subsequent legislative debate on the initiative.

Proposal for a Council Recommendation on Enhancing Research Security

The Commission's proposed Council Recommendation on Enhancing Research Security seeks to push Member States to strengthen the research and innovation sector. By suggesting this action to the Council, the Commission advocates for Member States to establish a policy framework for research and security. The Commission would monitor the progress and implementation of the measures introduced in such a recommendation.

White Paper on Dual-Use Research

With the White Paper on Dual-Use Research, the Commission reviews the support offered under current EU funding programmes for research and development and identifies how this could be improved.

It outlines three possible approaches: (1) strengthening and advancing the current framework; (2) removing the exclusive focus on civil applications in selected parts (e.g. where the dual use potential is most prominent) of the successor programme to Horizon Europe, the European Union's key funding programme for research and innovation; and (3) creating an instrument with a focus on dual-use research and development. To that end, the

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Commission solicits feedback in a consultation with public authorities, civil society, industry and academia on these three options to provide strategic support to dual-use technology development.

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