TheCityUK comments on EU White Paper on Outbound Investments

About TheCityUK

1. TheCityUK is the industry-led body representing UK-based financial and related professional services. We champion and support the success of the ecosystem, and thereby our members, promoting policies in the UK and internationally that drive competitiveness, support job creation and enable long-term economic growth. The industry contributes 12% of the UK's total economic output and employs over 2.4 million people – with two thirds of these jobs outside London across the country's regions and nations. It pays more corporation tax than any other sector and is the largest net exporting industry. The industry plays an important role in enabling the transition to net zero and driving economic growth across the wider economy through its provision of capital, investment, professional advice and insurance. It also makes a real difference to people in their daily lives, helping them save for the future, buy a home, invest in a business and manage risk. Our membership is broad-based and includes several of the largest financial institutions and market infrastructure companies headquartered within the European Union.

Introduction

2. We welcome the opportunity to comment on the European Commission's proposals for targeted fact-finding and analysis of selected outbound investments from the EU to determine the nature and extent of risks related to such investments and the need for policy responses.

3. We acknowledge that any future policy response to the potential risks posed by outbound investment in certain critical technologies will be informed by the proposed monitoring and risk assessment phases of the step-by-step approach outlined in the White Paper on Outbound Investments (the White Paper).[1] However, we note the desire to ensure that any future "policy action should be effective, proportionate, targeted, and enforceable". As such, this is an important opportunity to recognise – at an early stage – the wider policy issues that will need consideration in the design of any future policy response. Working with the private sector to identify these issues now will help to ensure that the monitoring and risk assessment exercise is focused and effective in delivering this goal.

4. We recognise that the proposed fact-finding and analysis stage of policy development is ultimately a matter for the Commission and Member States. However, we would also note that the European Commission's 2023 Joint Communication on European Economic Security Strategy (the Economic Security Strategy) identifies as one of its key priorities "partnering with the

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[1] European Commission, 'White Paper on outbound investments', (24 January 2024); https://circabc.europa.eu/ui/group/aac710a0-4eb3-493e-a12a-e988b442a72a/library/51124c0d-58d8-4cd9-8a22-4779f6647899/details?download=true

TheCityUK, Fitzwilliam House, 10 St Mary Axe, London, EC3A 8BF Registered in England number 7088009.
E: info@thecityuk.com | T: 020 3696 0100 | W: www.thecityuk.com

broadest possible range of countries who share our concerns or interests on economic security."[2]

5. In this submission, we have drawn on discussions with members who operate across multiple jurisdictions, as well as our engagement with policymakers developing and analysing potential outbound investment regimes in the UK and the United States. We believe there are important points to be reflected across these jurisdictions as they develop their respective approaches to the question of outbound investment screening. The investment required for growth depends on clarity and certainty, and therefore how businesses might potentially need to navigate different controls requires careful consideration.

Minimising the burden of the monitoring exercise

6. The White Paper invites comments on the "feasibility and the balance to be struck in terms of the burden" that information gathering under the monitoring exercise may represent. The proposed retrospective timeframe, which would seek to capture transactions dating back to 1 January 2019, would place an unnecessary extra burden on businesses. A forward-looking timeframe would limit the cost impact of these proposals by enabling businesses to factor in any monitoring requests into their business-as-usual activities.

7. We would welcome greater clarity on the proposed approach to engaging with business to monitor and assess risks. For example, future proposals should ask Member State monitoring to focus only on those outbound investments that could potentially threaten EU or national security (see in particular the security risks listed in 3.1(4) of the White Paper i.e. possibility of technologies or other items to be used in war or conflict situations, etc).

Scope and reach: definitions of sectors and transactions

8. The Commission proposes that the monitoring period apply to "natural or legal persons resident or established in the EU". We suggest the Commission clarifies that the monitoring period – and any subsequent regime – will apply only to the activities of EU branches and subsidiaries of non-EU entities, and not to the activities of the non-EU parent when these branches and subsidiaries are not involved.

9. Within the four high-level categories identified for monitoring and risk assessment ((1) advanced semiconductors, (2) artificial intelligence, (3) quantum technologies and (4) biotechnologies)[3], it is important that sector definitions give clarity, since this will be an important factor in determining the due diligence that investors would need to carry out on individual transactions, and throughout their investment supply chains under a potential outbound regime. It will also

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[2] European Commission, 'Joint communication to the European Parliament, the European Council, and the Council on "European Economic Security Strategy", (20 June 2023); https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023JC0020

[3] European Commission Recommendation on critical technology areas for the EU's economic security for further risk assessment with Member States, (3 October 2023); https://defence-industry-space.ec.europa.eu/document/download/31c246f2-f0ab-4cdf-a338-b00dc16abd36_en?filename=C_2023_6689_1_EN_ACT_part1_v8.pdf

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be an important factor in determining the effectiveness of the monitoring period and avoiding any unintended consequences.

10. Equally, the European Commission should consider applying a de minimis threshold of activity related to a critical technology that an entity in receipt of an investment should be required to meet before they enter the scope of either the proposed monitoring period or future regime. This would avoid capturing firms or conglomerates for whom activities related to a critical technology are an immaterial part of their business.

11. The White Paper notes that the EU's outbound investment monitoring should cover a "wide range of transactions, including all kinds of active investments, while excluding portfolio investments". We welcome the decision to exempt portfolio investments and note the wider intention to exclude "non-direct foreign investment with the purpose of making a financial investment without any intention to influence the management and control of an undertaking."

12. As such, further proposals should make clear that portfolio investments include publicly traded securities, including subscriptions to initial public offerings (IPO), since after an IPO is completed, the new stock becomes a publicly traded security. Equally, it should be made clear that the definition of investment transactions does not include secondary or intermediary services provided by financial institutions such as prime brokerage, clearing and custody services, underwriting, or securities financing transactions.

13. Finally, it is proposed that monitoring should also cover "other (indirect) investments made by an EU investor, such as investments made through a third-country entity which is used as an investment vehicle, through an existing subsidiary or in the context of an existing joint venture." This includes "investments in third countries that result from previous investments".

14. Any future regime will need to consider how this definition would be applied in practice, including a reasonable knowledge threshold. For example, it is suggested that Member States collect information about "previous and planned or contemplated future transactions entered into by the parties to the investment transaction", and "the previous and planned or contemplated future activities undertaken by the same persons involved in a current activity." Without clarity, an investor may be comfortable that the investee they are dealing with directly does not pose a risk but may remain uncertain about what level of due diligence will be required on their counterparty's supply chain.

Geographic coverage and interaction with other outbound investment regimes

15. The White Paper suggests that both the Commission and the Member States share the view that monitoring "should not a priori exclude specific destinations". Equally, the White Paper recognises that "in light of the high number of countries and existing resource constraints, the Commission is of the opinion, that Member States should best prioritise their monitoring activities based on their assessment of the risk profiles of certain countries."

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16. We would note that this approach contrasts with the proposed US Outbound Investment Programme, which would apply specifically to named “countries of concern”.[4]

17. In the absence of a shared EU assessment of the risk profile of certain jurisdictions, the burden of making these judgments would fall on the private sector. It is questionable how practicable it would be for firms to operate within an outbound regime that does not explicitly identify which jurisdictions are deemed to pose specific risks.

18. TheCityUK has previously engaged with US Treasury and the UK government on their development and analysis of outbound investment screening policy.[5] Our members are multinational and therefore often operate across all three jurisdictions.

19. We are supportive of the Economic Security Strategy identifying “partnering” as one of its key priorities. While each jurisdiction will need to make its own judgment about the risks it is trying to mitigate under an outbound investment regime, coordination between them on the operation of their individual regimes would reduce fragmentation, the risk of arbitrage, and increase effectiveness individually and collectively.

TheCityUK
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[4] US Treasury, ‘Outbound Investment Security Program’, https://home.treasury.gov/policy-issues/international/outbound-investment-program

[5] TheCityUK, ‘Our response to the proposed implementation of the US Outbound Investment Programme’, (28 September 2023); https://www.thecityuk.com/news/our-response-to-the-proposed-implementation-of-the-us-outbound-investment-programme/

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