POSITION PAPER
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Position on a Framework for Regulating Outbound Investments

Overview

The Technology Industries of Sweden and the Swedish Security and Defence Industry Association represent companies at the forefront of both civil and defense technological advancements essential to national and European security interests. In response to the ongoing work at EU level to assess risks related to outbound investments and the discussions to determine the possible need for mitigating measures, this position paper sets out principles that should be adhered to when considering the design of a framework for regulating outbound investments.

A globally competitive industry and technological leadership are prerequisites for European economic security. The ability to operate and invest in the global market is fundamental to European industry's competitiveness and technological edge. Outbound investments enable access to global technology and innovation ecosystems, value-adding partnerships and the inflow of technology. This builds strengths and capabilities that foster reverse and mutual dependencies that limit the risk of economic coercion, through indispensability in critical technology areas. In addition, outbound investments can contribute to the diversification of production networks and facilitate the necessary inflow of technology in areas where European industry is dependent on other countries or regions that have a technological advantage, thereby strengthening the resilience and security of supply of the European economy.

Meanwhile, there are legitimate security risks in case of intentional or unintentional technology leakage, for example in technologies that can be used in military operations or hybrid warfare by antagonistic states. Therefore, a regulatory framework to mitigate such risks may be warranted. However, it must be ensured that any such legislation does not negatively impact the competitiveness of European industry, for example by placing an unreasonable burden on companies or investors that introduces delays in time-sensitive processes (such as venture capital investments, joint ventures, or mergers and acquisition transactions); nor entails undue restrictions of the inflow of technology and opportunities for the transfer of innovation from the civil to the defense sector.

Therefore, we stress that potential legislation must be proportionate, precise and predictable with a clearly defined purpose and scope to avoid regulatory complexity. We assert that targeting the flow of capital is not well-balanced or accurate; rather, it is the transfer of sensitive technology and information that can lead to concrete national or European security risks that legislation should target.

In response to rising geoeconomic competition and weaponization of dependencies, we observe that countries are implementing measures to mitigate risks with outbound investments, that a similar development could take place in the EU, and that an EU level mechanism would be preferable to avoid fragmentation in the European Single Market.

Against this background, the Technology Industries of Sweden and the Swedish Security and Defence Industry Association put forth these principles for how a framework for regulating outbound investments could be designed.

Principles for a substantive legislation on outbound investments

Clearly defined purpose

The legislation should clearly state its purpose as preventing technology leakage that creates concrete national and/or EU security risks, and thus exclude any potential objective relating to industrial, competition or trade policy.

The legislation should also be tailored to specifically address the loopholes prevalent in current legislation. For example, if leakage of experimental new technology that is still under development (without any specific uses or applications) is deemed to pose a risk, it is not certain that legislation which focuses on specific applications, products or functionality, such as the existing sanctions or export control legislation, is suitable. It may in these cases be more appropriate to instead target transfers of information and technology within certain defined areas, regardless of their future potential or current practical use. If current legislation already addresses a certain risk, e.g. through export controls or sanctions, outbound investment rules should not become a parallel or double legislation.

Form of legislation

If legislation is necessary, we consider the most well-suited, predictable and streamlined form to be a single standalone EU regulation which creates a framework for regulating outbound investments. This would avoid fragmentation in the form of 27 diverging outbound investment regimes. Preferably, if a filing mechanism is introduced, there should be a single EU filing portal and a harmonized EU decision framework. Even if national security remains the responsibility of each member state and each member state therefore could have its own competent authority, with its own decision-making power, it is preferable to have, as far as possible, harmonization and centralized or coordinated decision-making at the EU level (cf. the FDI Screening Regulation (EU) 2019/452).

Scope and notification requirements

Transactions subject to notification requirements could include those where an EU person intends to transfer or enable development of sensitive capabilities, know-how, intellectual property or technology within clearly defined areas (e.g. AI, advanced semiconductors or quantum computing). Such review should only target aspects of a transaction that entail the transfer of sensitive information or technology and not outbound flows of capital as such, as the capital flows do not per se cause technology leakage.

Strict deadlines

For predictability, statutory deadlines should be clearly defined in the legislation, with specified time limits for when the competent authority must have completed its review, limits on extensions, etc. The same rules should be applied to all EU member states.

No call-in right

To ensure legal certainty, transactions falling outside the notification scope should in principle not be subject to later review. If a call-in power is nevertheless included, it should be strictly limited to exceptional cases, based on clearly defined criteria, and subject to a short and non-extendable statutory deadline after closing (e.g. no later than three months).

Exceptions for partners and low-risk jurisdictions

Even if the EU were to retain a country-neutral approach, an exception or fast-track for transactions with jurisdictions with comparable controls and aligned security positions should be included, to reduce burdens and ensure focus on the highest risks. Cf. the similar concept of general authorizations for dual-use export controls, e.g. EU001.

Confidentiality

The legislation should only require disclosure of such data which is necessary for the competent authority's/authorities' assessment.

Strict confidentiality for the process should be ensured, including protection against disclosure of trade secrets and technical data.

Remedies and proportionality

There should be a preference for mitigation over prohibition (e.g., approvals with conditions such as information barriers, governance restrictions, carve-outs). Prohibiting a transaction should be a last resort.

Due process

The right to receive a reasoned decision and a right to judicial review should be ensured.

Review and evaluation mechanism

In order to ensure that EU competitiveness is not impacted in a detrimental way, the enacted legislation should include periodic evaluations and stakeholder consultation for changes in its scope.

These principles have been developed in collaboration with the law firm Mannheimer Swartling, including through a workshop, consultations and final approval by our member companies. The full report can be accessed here.