LAW360
Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

EU Investment Plans Play To US Nat'l Security Concerns

By **Jennifer Doherty**

Law360 (January 26, 2024, 11:32 PM EST) -- Three new measures adopted by the European Commission stand to close alternate pathways to advanced technology and funding that have plagued U.S. efforts to thwart adversaries like China and Russia.

The initiatives announced Wednesday include proposed legislation to set baseline standards for foreign direct investment screening in each European Union country, along with policy papers addressing export control inconsistencies and Russian interference in the international bodies that shape them and outlining the bloc's first steps toward an outbound investment review mechanism.

Each is a win for Washington, where successive administrations have grappled with threats to U.S. companies' competitiveness affected by restrictive national security laws — measures that are also less effective when similar deals can be conducted through Europe.

"While I wouldn't say it's scripted, clearly there's been much coordination between the U.S. and the EU," Giovanna Cinelli, head of Morgan Lewis & Bockius LLP's international trade practice, said in a statement regarding the EU's outbound investment initiative. "The proposed approach mirrors the U.S. — with a focus on the benefits of investment while acknowledging the security risks that arise with investments plus know-how."

European officials echoed U.S. policymakers, emphasizing their desire to keep EU markets as open as possible while discouraging support for foreign technological advances that could eventually threaten the bloc's economies or national security.

The EU's white paper calls for a three-step consultation, monitoring and review process. After a three-month call for public comments, authorities plan to begin monitoring European investments in four sectors the U.S. has also identified as critical to national security: advanced semiconductors, artificial intelligence, quantum technologies and biotechnologies.

The plan is a slower roll than President Joe Biden's August executive order, which handed the U.S. Department of Commerce authority to prohibit certain transactions with Chinese entities. But both Commerce and the European Commission are emphasizing industry consultations as key to understanding the potential risks from outbound investments.

"Information gathering is probably the best they can do at this point without risking some seriously ham-fisted overreach," said Reid Whitten, managing partner of Sheppard Mullin Richter & Hampton

LLP's London office.

Anything more at this stage would potentially stifle European growth and investment without actually advancing security, he added.

Outbound investment prohibitions akin to those in Biden's executive order or even a finalized review process "could be a relatively long way off" for Europe, according to Akin Gump Strauss Hauer & Feld LLP senior counsel Laura Black.

While Biden's outbound investment order identifies China as the "country of concern" where U.S. investments are to be limited, the EU approach doesn't name any names.

Instead, Brussels says any country receiving EU investments is fair game for monitoring, but calls on EU members to prioritize oversight based on the risk a country presents, a nuance Black described as Europe "threading the needle a bit more." The specification also leaves EU members some leeway in assessing risk.

"It will be interesting to see how that plays out as this goes forward," said Black, who spearheaded U.S. Department of the Treasury regulations implementing the Foreign Investment Risk Review Modernization Act of 2018, landmark legislation that overhauled review mechanisms to defend against foreign efforts to exploit investment structures.

At the same time U.S. policymakers were developing FIRRMA, officials from both sides of the Atlantic Ocean were engaged in "very constructive conversations" on how best to coordinate and improve screening of foreign investments, according to former Trump administration trade official Jamieson Greer.

He noted that those conversations have continued under the Biden administration, as have public commitments to aligning economic security policy among the G7 and allied countries.

Greer, now a partner at King & Spalding LLP, welcomed the legislative proposal on foreign direct investment screening that the European Commission adopted Wednesday as a "big movement for the Europeans, who historically have shied away from these types of mechanisms."

The legislation would ensure each EU member country has a mechanism in place to review incoming foreign investments and proposes a list of economic sectors each national foreign investment review mechanism should cover.

Greer particularly appreciated how the EU bill "come[s] out swinging against member states that haven't implemented an investment screening process yet." He credited the commission for being "forward-leaning" on both inbound and outbound investment review and "trying to pull all of the members along."

Unlike U.S. administrations, the commission — which is still a new creation in the world of international governance — can only move as fast as its member countries will allow.

"The European Commission is exercising its authorities in ways it hasn't done before, and so it has to do so in a way that's politically sensitive," he said. "At the end of the day, the commission doesn't want to be in a position where they go way out on a limb and then the president of France or the chancellor of

Germany comes out and says, 'We're not doing this.' That undermines the legitimacy of the commission."

Another area of economic security policy where the European Commission has struggled to bring members onto the same page but is motivated to start wrangling is export controls.

The white paper on export controls the commission adopted Wednesday examines how the global environment for so-called dual-use technologies, which have both military and commercial applications, has "fundamentally changed" since Russia invaded Ukraine in 2022, calling for tighter coordination among EU members.

The paper also points to reports that Russia has blocked the various multilateral groups that set export control standards from adding new technologies to their control lists, pushing the EU to act independently to restrict sales of potentially dangerous technology under its jurisdiction.

That acknowledgment that multilateral organizations "aren't really answering the mail here," as Greer put it, is particularly significant in his view given Europe's deep commitment to multilateral bodies and international standards.

"They essentially have recognized that to the extent that Russia is part of these organizations, they're not going to move forward with strong export controls," Greer said. "They're saying that [they] need to do something different, which I think is meaningful."

The policy paper's focus on risk associated with a "patchwork" of controls within the European block also addresses concerns the U.S. has had with various discrepancies.

Whitten pointed to the EU's lack of uniform controls on "deemed exports" — sharing information about controlled items with foreign nationals who are currently within the country that owns the tech — as one area that could come into line with U.S. policy as the EU revises its regulations.

Another issue for U.S. exporters is the EU's lack of bloc-wide liability for reexporters who receive controlled items and then send them on to recipients barred from receiving them under U.S. law.

The policies put forward on Wednesday show that the EU is "closing ranks" with the U.S., according to Whitten.

"I think the EU recognizes that if the U.S. closes off the possibilities of certain technological economic advancement for China through U.S. channels, China will turn to the EU and will make what use it can of its leverage there," he said.

--Editing by Emily Kokoll and Jay Jackson Jr.