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Screening of Foreign Direct Investments in Sweden- new rules expected soon

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On 16 March 2023, nearly four years after the Swedish Government first commissioned an inquiry on the need for a regime on the screening of foreign direct investments in Sweden, it submitted a draft bill to the Council on Legislation proposing such a regime ("the Proposed FDI Act").[1] The Council on Legislation has now delivered its opinion which, while providing some criticism, mainly supports the Government's proposal. The next step in the legislative process is for the Government to submit a bill to the Swedish Parliament.

The purpose of the proposed FDI Act is to prevent foreign direct investments that may harm national security, public order or public safety in Sweden. If adopted, the proposed FDI Act will be applicable to investments and transactions closing on 1 December 2023 or later, and will have significant implications for mergers, acquisitions and minority investments in companies, trusts and other legal entities domiciled in Sweden. The scope of the suggested legislation is wide; requiring investments made also by Swedish and EU investors to be notified. Non-compliance may have severe consequences, including hefty fines, prohibitions and divestitures.

The geopolitical situation in the world is currently tense and security issues are high on the agenda of many governments, the Swedish included. Given the size of Sweden's economy, foreign direct investment is crucial to ensuring economic growth and competitiveness. At the same time, the Swedish government perceives risks associated with foreign actors acquiring interests in Swedish companies that conduct activities worthy of protection from a national security perspective. Foreign investments can increase knowledge in cutting-edge technology and be used as a way for foreign antagonists to benefit from Swedish technology, development and knowledge or to gain influence over or knowledge of functions that are critical to Sweden. The proposed FDI Act, that has a clear political dimension, will allow for the possibility to screen foreign investments and prohibit those that are considered harmful.

The legislative process has been slow, but a Swedish FDI regime now seems likely to be in place before the end of the year. In 2019, the Swedish Government announced that it considered introducing a new FDI control regime. In November 2021, the previous Government published a government official report with an inquiry and a proposal for a new FDI screening mechanism ("the **Inquiry Report**").[2] In the Inquiry Report the Government suggested a comprehensive and wide-ranging reform to the Government's powers to review foreign direct investments. The proposal was suggested to enter into force on 1 January 2023 and apply to investments as from 1 February 2023.

This time plan turned out to be too ambitious and there has in the meantime also been a change of Government in September 2022. On 16 March 2023, the Government presented a draft bill to the Swedish Council on Legislation. The draft bill, which to a large extent corresponds to the Inquiry Report, has now been reviewed by the Council on Legislation which, while suggesting some amendments and clarifications, mainly supports the Government's proposal. The Government will now submit a bill to the Swedish Parliament and is expecting that the new regime will be passed by the Parliament before the summer and enter into force on 1 December this year.

The proposed FDI Act requires mandatory screening of investments in a wide range of sectors, including essential services, security sensitive activities, personal and location data, critical inputs or raw materials, emerging or strategic technologies as well as military equipment and dual-use goods. The legislation will impose administrative burdens in a substantial number of investments, transactions and partnerships and will almost certainly lead to delays in closing times. There is a standstill obligation, requiring transactions not to be completed until cleared by the competent authority. In certain cases, investments will be prohibited or made subject to conditions and sanctions, including fines ranging between SEK 25 000 (approximately EUR 2 200) and SEK 100 million (approximately EUR 9 million). Investments may be prohibited also after completion.

Summary of the proposal

- The proposed screening mechanism provides for mandatory notification of investments in Swedish entities, including public companies, that carry out certain "protected activities" in a wide range of sectors.
- The notification obligation applies to all investors. In other words, investors from third countries, EU Member States and Sweden are obligated to notify their investments in protected activities if the notification criteria are met.
- The notification obligation will apply both to a first-time investment and an increase of holding assets. A new notification will be required each time shares exceeding 10, 20, 30, 50, 65 or 90 percent of the voting rights in a target company are acquired. Thus, there is no requirement on change of control and also minority investments, including greenfield investments, must be notified.
- Investors must obtain clearance from the screening authority prior to closing. While the Inspectorate of Strategic Products ("**ISP**") (Sw. *Inspektionen för strategiska produkter*) is expected to be appointed as screening authority, the Government has left the decision open.
- A two-stage screening procedure is suggested. In the first stage, the screening authority decides either to take no further action or to initiate an examination. Such decision must be taken within 25 working days from receipt of a complete notification. In the case of a decision to examine the investment, the authority must adopt a final decision within three months of the decision to initiate the examination. Where there are special reasons, this deadline may be extended up to six months.
- The screening authority may impose administrative fines of up to SEK 100 million (approximately EUR 9 million) on companies that fail to comply with the new legislation.
- The screening authority will be able to prohibit investments or clear investments subject to certain conditions. If a condition imposed is not met, the screening authority may either order the investor to comply with the condition, subject to an administrative fine, or prohibit the investment if the conditions for a prohibition are met.
- An investment may be prohibited also after implementation, e.g., where the investor has failed to notify the investment to the screening authority or not respected the standstill obligation and provided that there are grounds for prohibition. Such prohibition would render the investment and its implementation null and void, meaning that it must be reversed. This will not apply to listed companies, where the investor may instead be ordered to sell what has been acquired.
- The screening mechanism will not replace but complement existing notification requirements under the Protective Security Act (which applies to transfers of security-sensitive activities) and/or the competition rules.

1. *Sw.* Lag om granskning av utländska direktinvesteringar. The Council on Legislation (*Sw.* Lagrådet) reviews draft bills which the Government intends to submit to the Parliament. One of its most important tasks is to consider whether the draft bills are compatible with the Swedish constitution.

2. SOU 2021:87, available in Swedish here.

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1. Background to the proposal – the EU FDI Regulation and increased investments in Sweden

I. Background – the EU FDI Regulation

Various national foreign direct investment rules exist throughout the world and may be more or less restrictive.[3]

As for the situation in the European Union, there is no harmonised EU legislation on foreign direct investments and no formal requirement on Member States to screen foreign investments. However, the EU FDI Regulation 2019/452 (the "**EU FDI Regulation**")[4], which is applicable since 11 October 2020, provides a framework for those Member States that have a screening mechanism in place. The EU FDI Regulation allows the European Commission (the "**Commission**") to review certain investments of "union interest" and to issue non-binding opinions to those Member States that are reviewing investments under their national FDI regimes. A key part of the EU FDI Regulation is a mechanism for cooperation and information sharing among Member States, and between Member States and the Commission. The Regulation lists factors and areas which Member States may consider when determining whether a transaction is likely to impact their security or public order.[5] The list includes, for example, critical infrastructure, critical technologies, security of supply, access to sensitive information and freedom and pluralism of the press. While the EU FDI Regulation does not oblige Member States to adopt national FDI screening mechanisms,[6] the Commission has strongly encouraged all Member States to do so or to strengthen their existing FDI regimes.[7] Today FDI regimes exist in a majority of the Member States.[8]

The Commission published its second annual report on the EU FDI Regulation in November 2022,[9] which shows that the use of the mechanism expanded in 2021. Its key findings were the following:

- The vast majority of foreign direct investments pose no problem from a security/public order perspective and are approved swiftly (both at Member State level and under the EU FDI Regulation).
- The Commission completed its assessment of the FDI transactions notified by Member States very quickly: 86% were assessed in just 15 calendar days.
- Less than 3% of the transactions resulted in a Commission opinion, the focus remains on security and public order.
- The top five countries for the ultimate investor notified in 2021 were the US, the UK, China, the Cayman Islands and Canada.
- FDI covers a wide range of sectors, but most cases notified concerned manufacturing (44%) covering a diverse set of industries including defense, aerospace, energy, health and semiconductor equipment, and Information and Communications Technologies (32%).

As regards the decisions adopted by the Member States, the following can be noted from the Commission's report:

- Throughout 2021, most transactions (73%) where a decision was reported, were cleared without any conditions.
- 23% of the decided cases did entail mitigating measures.
- 3 % of the cases were withdrawn by the parties.
- 1% of the transactions were blocked by Member States.

In Sweden, the ISP has been designated as the contact point for the information-sharing mechanism under the EU FDI regulation. However, the ISP's authority in this regard is limited to what is required under the EU FDI Regulation and it is thus only empowered to share information to other EU Member States about investments in Sweden that may affect more than one Member State and/or the Member State that requests the information. The ISP may also order an investor or the target company to provide information about the investment.

II. The reasons for the proposed Swedish legislation

As stated by the Government in the draft legislative bill, foreign direct investments are crucial to Sweden's small economy as they have positive effects in terms of higher growth and employment. However, it also stresses that if a company engaged in activities relevant to national security interests is acquired by a foreign actor, there is a risk that valuable technology or information will be controlled by a foreign power in an undesirable way. The Government also stresses that the proposed FDI Act needs to enter into force soon and the expected date is 1 December 2023.

2. Sectors and activities covered by the proposed FDI Act

I. Targeted sectors and activities

The scope of the proposed FDI Act is broad. In general, the screening mechanism targets various kinds of activities and services deemed to be of importance for Sweden's national defense or that are otherwise deemed to be critical to society. Also, the sectors might overlap with each other to a certain extent.

In short, the following types of sectors and activities are included:

Sectors and Activities covered	Definition
Essential services*	'Essential services' refers to services or infrastructure that maintain or ensure societal functions that are vital to society's basic needs, values or safety.
Security-sensitive operations	'Security-sensitive operations' are activities covered by the Protective Security Act (Sw. *Säkerhetsskyddslagen*).
Critical inputs or raw materials*	Activities that prospect for, extract, enrich or sell raw materials or metals and minerals that are of critical strategical importance to Sweden.
Activities whose major purpose is processing of sensitive personal data or location data	'Sensitive personal data' means personal data as defined in Article 9(1) of the EU General Data Protection Regulation ("**GDPR**"), i.e., personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. Location data are data processed in an electronic communications network or by an electronic communications service and which show the geographical position of the terminal equipment of a user. The meaning of '*major purpose*' should be determined on a case-by-case basis, taking all available facts into consideration.

3. The OECD has published "FDI restrictiveness", an OECD index gauging the restrictiveness of a country's foreign direct investment (FDI) rules by looking at four main types of restrictions: foreign equity restrictions; discriminatory screening or approval mechanisms; restrictions on key foreign personnel and operational restrictions. Implementation issues are not addressed and factors such as the degree of transparency or discretion in granting approvals are not taken into account. Click here for more information.
4. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.
5. Article 4 of the EU FDI Regulation.
6. See e.g. recital 8 of the EU FDI Regulation.
7. See information here.
8. A list of screening mechanisms in the Members States as of 3 February 2023 is available here.
9. See information here.

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Sectors and Activities covered	Definition
Activities related to emerging technologies and other strategic protected technologies*	The Swedish Government will adopt an ordinance setting out the activities that are to be considered related to emerging technologies and other strategically protected technologies.
Dual-use products	Activities that include manufacturing, development, research into or supply of dual-use products or technical assistance for such products. 'Dual-use items' means products listed in Annex I to the EU's Dual-Use Regulation (EU) 2021/821, i.e., items that have a civil implementation but may be used for military purposes as well.
Military equipment	Activities that include manufacturing, development, research into or supply of military equipment or technical support for military equipment. Military equipment and technical assistance are the same as referred to in the Military Equipment Act (1992:1300) (*Sw. lag om krigsmateriel*).
Sectors and activities listed above which are marked with * will, according to the proposed FDI Act, be further defined in ordinances adopted by the Swedish Government.	

The sectors include activities where (i) it is the acquisition as such that would risk being detrimental to Swedish security, e.g., if a foreign owner would be able to prevent the target company from contributing to the Swedish total defense in case of a crisis, and (ii) a foreign investor may gain information of importance for Sweden and Swedish security, e.g., through acquisitions in undertakings that export military equipment or conduct research on emerging technologies.

In general, it should be noted that there are only minor amendments to the sectors and activities covered in the proposed FDI Act versus those listed in the Inquiry Report. The main criticism from the Swedish Bar Association in its consultation response regarding the Inquiry Report, was that the targeted activities were considered too vague and that the legislation would thus have an unforeseeable scope, especially as regards 'emerging technologies'. Only minor amendments have been included in the proposed FDI Act. However, some sectors and activities will be further defined in ordinances from the Swedish Government, which hopefully will provide investors and affected companies with proper guidance.

II. Media is not a targeted sector

The proposed screening mechanism will not cover media undertakings, even though the EU FDI Regulation stresses that freedom and pluralism of the media may be considered when assessing whether foreign investments are likely to affect the public security or public order of the Member States. The main reason for not including media undertakings is that the Swedish Constitution – mainly the Freedom of the Press Act (*Sw.* Tryckfrihetsförordningen) and the Fundamental Law on Freedom of Expression (*Sw.* Yttrandefrihetsgrundlagen) – stipulates freedom of establishment for media undertakings. Thus, to include media as a targeted sector would violate the freedom of establishment and thus require amendments to the Swedish Constitution (which is a complex and time-consuming process).[10]

10. A change to the Swedish Constitution, somewhat simplified, requires two equivalent decisions from the Swedish Parliament and a general election to the Parliament to be held in between.

3. Scope of the FDI screening mechanism

I. What is a foreign direct investment?

In short, anyone who intends to invest directly or indirectly in any activity covered by the proposed FDI Act must notify the investment, irrespective of nationality or seat. That said, only some of the notified investments will be considered 'foreign'. A *foreign* direct investment is an investment made by an investor that is a:

i. physical person who is a national of a State outside the European Union;

ii. legal entity established in a State outside the European Union;

iii. legal entity owned or controlled, directly or indirectly, by a State outside the European Union; or

iv. legal entity owned or controlled, directly or indirectly, by a legal entity established in a non-European Union country or by a physical person who is a national of such a country.

Any investments made in favour or on behalf of a person or entity listed above will also be considered a foreign direct investment. In other words, the proposed FDI Act will thus also apply to *indirect* foreign investments, i.e., investments or acquisitions made by an intermediary Swedish undertaking that is ultimately controlled by a foreign investor. For example, a foreign investor that carries out an investment via its local Swedish subsidiary will be considered as an indirect foreign investment. The main reason for also including all Swedish investors is to prevent circumvention of the screening mechanism, e.g., through an ownership structure where the investor uses a Swedish company, which is directly or indirectly controlled by a person from a third country. In practice, all investments that fulfil the requirements will need to be notified regardless of whether the ultimate owner is Swedish or an EU entity. However, these may not be subject to prohibitions.

It is notable that the proposed FDI Act stipulates that investors from all states outside the European Union are 'foreign'. This means that investments originating from investors in/from States that are members of the European Economic Area (EEA) but not members of the EU will be considered 'foreign' as well. This exclusion can be questioned given that the EEA Member States are part of the EU's internal market, which enables the free movement of goods, services, capital, and people within the area.

II. Which undertakings are covered?

The proposed FDI Act is expected to apply to all investments in Swedish undertakings carrying out any of the aforementioned 'protected activities', regardless of their legal form.[11] That said, it should be noted that non-profit organizations (*Sw.* ideella föreningar) are not covered. This has attracted criticism from the Council on Legislation which notes that non-profit organizations, such as professional associations or political parties, may also be involved in protected activities and thus be worthy of protection under the proposed FDI Act.

The proposed FDI Act contains different thresholds and control provisions triggering the notification obligation depending on which type of entity the investment concerns and how the investor is expected to gain control of the entity.

In relation to investments in limited companies, European Companies and economic associations, the proposal provides for several control thresholds that will trigger the notification obligation (although there is no requirement regarding change of control as under the competition rules). If the investor, a member of the investor's group or a person on whose behalf the investor is acting, after the investment will directly or indirectly obtain or hold voting rights equal to or exceeding of 10, 20, 30, 50, 65 or 90 percent of the voting rights in a legal entity engaging in a covered sectors, the investor must notify the investment.

Furthermore, the proposed FDI Act will apply to greenfield investments. An investment resulting in a purchase or establishment of a limited liability company, a European company or an economic association operating or intended to operate within the covered sectors, will have a notification obligation when the investor, after the acquisition or establishment, directly or

11. The screening mechanism applies to investments in European companies (Societas Europea, SE, Sw. europabolag), limited companies (Sw. aktiebolag), partnerships (Sw. handelsbolag), unincorporated businesses (Sw. enkla bolag), sole trader undertakings (Sw. enskild näringsverksamhet), economic associations (Sw. ekonomisk förening), foundations and trusts (Sw. stiftelser) domiciled in Sweden.

indirectly disposes of 10 per cent or more of the voting rights. The purpose, according to the Government, is to hinder circumvention of the screening mechanism by e.g., purchasing an existing off-the-shelf company in order to conduct a targeted activity.

As for investments in other forms of undertakings, there are no strict control thresholds proposed. In such cases, the concrete actions taken by the investor will trigger the notification obligation. Thus, an investor who is entering into a partnership or is establishing a foundation or trust will automatically be obligated to notify such investment (irrespective of control, influence or similar).

The notification obligation will also be triggered if (i) an investor, (ii) someone in the same ownership structure as the investor or (iii) a person on whose behalf the investor is acting gains influence (directly or indirectly) over an undertaking's management in any other way than the above described. Such influence may for example be obtained by e.g. a right to appoint or remove board members of the target company, through a shareholders' agreement or provisions of the articles of association. This means that the formation of a joint venture may also have to be notified in accordance with the proposed FDI Act if the investor obtains influence over the management of the joint venture company. However, the screening mechanism will not apply to share issues where the investor has a right of priority to participate in the issue pro rata to the investor's existing ownership of shares (Sw. nyemission med företrädesrätt).

Finally, the notification obligation will also be triggered by *asset transfers* where whole or a part of an entity/activity covered by the screening mechanism is transferred. A similar rule may be found in the Swedish Protective Security Act, targeting transfers of security sensitive activities.

To conclude, in order to ensure compliance with the proposed screening mechanism, it is important to carefully assess the actual circumstances of each investment made in a covered sector.

IV. The voting rights of family members must be taken into considerations

The notification obligation is in part related to the voting rights in the target entity. When calculating the voting rights of the investor, any voting rights directly or indirectly held by or disposed of by the investor's spouse, partner, parents, children, and their respective spouses, partners and children, will be considered as well. It is unclear from the proposed FDI Act what constitutes an *indirect disposal*, as that will be determined on a case-by-case basis.

4. Mandatory notification, procedure and assessment

An investment covered by the proposed FDI Act will have to be notified in advance by the investor and may not be completed until cleared by the screening authority. Should the investor fail to notify the investment despite being required to do so, the authority will be empowered to draft a notification and review the transaction on its own initiative.[12]

To avoid that the proposed FDI Act is circumvented, the Government proposes that investments falling outside the scope of mandatory notification may still be subject to screening under certain circumstances. Thus, according to the proposal, the authority will be empowered to call in non-notifiable transactions or investments in protected activities if it has reason to believe that the investment may harm national security, public order or public security in Sweden.[13] This may be done also after completion of the investment, thereby creating uncertainty for certain deals and investments. Given that the rules are aimed at catching those trying to escape the ambit of the notification requirements and may only be triggered if the screening authority perceives a risk that protected interests will be harmed, the Government has explicitly declared that parties should not be allowed to file a notification other than when the thresholds are met.[14]

I. The review process

It is suggested that the review is carried out in a two-stage process, thereby allowing unproblematic investments – such as those made by Swedish or EU investors – to be cleared quickly and without an in-depth review. Acknowledging that most investments will be of no concern to the screening authority, the Government anticipates that most investments covered by the new rules will be cleared already at the first stage.

Upon receipt of a complete notification, the screening authority will have twenty-five (25) working days to decide whether to carry out an in-depth review of the investment or to take no further action. If the authority decides to carry out an in-depth review, this should be completed within three months from such decision. If there are special reasons, the authority will have an additional three months to reach a final decision on the matter.

An investment that has been notified may not be completed unless the screening authority has either decided to take no further action or has cleared the investment following an in-depth review.[15] As discussed below, failure to respect this standstill provision may lead to substantial fines.

II. The screening authority's assessment

Through its examination, the screening authority shall determine whether the investment may harm national security, public order or public security in Sweden. In its assessment, the authority shall consider both the nature and scope of the targeted business and any circumstances surrounding the investor.[16] When examining the latter, the screening authority should consider whether:[17]

i. the foreign investor is directly or indirectly controlled by the government of a third country, including through ownership structure, significant funding or any other way;

ii. the foreign investor or anyone in its ownership structure has already been involved in activities affecting security or public order in a Member State; or

iii. there are other circumstances suggesting that the investment may harm national security, public order or public security in Sweden.

While the first two criteria mirror Article 4(2) of the EU FDI Regulation, the third criterion is somewhat broader than the one set out in Article 4(2)(c) of the EU FDI Regulation which requires Member States to consider whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

If the screening authority decides to carry out an in-depth review of the investment, it will have to liaise with certain other public authorities with expertise in the area in question. These authorities will be designated by the Government.[18]

Unless there is reason to prohibit the investment, it shall be cleared by the screening authority.[19] Such clearance may be subject to conditions.[20] If a conditional clearance is not considered sufficient in order to avoid harm to national security, public order or public security in Sweden, the investment shall be prohibited.[21] If prohibited, the investment will be considered null and void[22] (except for acquisitions in listed companies where the investor may be ordered to make a divestiture).[23]

As for the possibility to clear investments subject to conditions, the Government considers that it should be in the authority's discretion to determine which type of condition that is suitable, necessary and otherwise proportionate in the case at hand. While leaving this issue to the authority's discretion, the Government nevertheless suggests that conditions could be related to the operations or management of the target or the size and share of the investment made in the target.[24]

5. Powers of the screening authority

According to the proposal, the screening authority will be granted far-reaching investigatory and sanctioning powers, allowing it to request information, carry out on-site inspections (dawn raids) and impose hefty fines on companies failing to cooperate or completing investments without prior clearance.

I. Investigatory measures

Both the investor and the target will be required to provide the authority with the information or documentation necessary for it to either carry out its review of the investment or make sure that the parties

12. Section 12 of the Proposed FDI Act.
13. Ibid, Section 13.
14. See page 80 of the proposal.
15. Section 16 of the Proposed FDI Act.
16. Ibid, Section 17.
17. Ibid, Section 18.
18. Ibid, Section 30.
19. Ibid, Section 19.
20. Ibid, Section 20, second paragraph.
21. Ibid, Section 21.
22. Ibid, Section 23, first paragraph.
23. Ibid, Section 23, second paragraph.
24. See page 93-95 of the proposal.

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comply with any conditions imposed by the authority. In order to access such information and documentation (but limited to that aim), the screening authority will also have the power to carry out on-site inspections (dawn raids) at the premises of both the investor and the target, but not in private homes.[25] It is suggested that the decision to carry out an inspection may be taken by the authority itself and will thus not require an ex-ante review by the courts. If needed, the screening authority may be assisted by the enforcement authority when carrying out the inspection.[26]

II. Sanctioning powers – maximum fines of EUR 9 million

Anyone failing to comply with the new rules will risk having to pay a hefty fine. It is suggested that the screening authority may impose fines ranging between SEK 25 000 and SEK 100 million (approximately EUR 2 200 and EUR 9 million) on anyone who has:

i. failed to notify and investment despite being required to do so;

ii. completed the investment prior to it being cleared by the authority;

iii. completed an investment contrary to a prohibition;

iv. failed to respect the authority's conditions for clearing the investment, or

v. submitted inaccurate, incomplete or no information despite being required to do so.

Interestingly, the provision does not mention failure to submit to or cooperate during an inspection (cf. dawn raids under the competition rules).

According to the proposal, and unlike e.g. the competition rules, there should be no requirement of negligence or intent on the party failing to comply with the new rules, but instead strict liability.[27] That said, the decision to impose fines should, to some extent, be left to the authority's discretion and the authority will thus be able to decide not to impose a fine in certain cases such as where the infringement is considered minor or the imposition of a fine would otherwise be deemed unreasonable.[28]

In addition, when determining the size of the fine to be imposed, the screening authority will have to make an overall assessment and consider a number of factors such as the harm to national security, public order or public security in Sweden that has occurred or could have occurred, and whether the infringer (i) has acted negligently or with intent; (ii) has attempted to minimize any harm caused by the infringement, or (iii) is a "repeat offender". The authority will also be able to consider any gains made through the infringement.

6. Parallel notifications in accordance with other Swedish legislation

I. The proposed screening mechanism and the Swedish Protective Security Act complement each other

The Protective Security Act requires operators engaging in security-sensitive activities to identify potential security risks and to set up adequate measures to protect these activities. Since 1 January 2021, the Protective Security Act also requires that an operator (or shareholder) who intends to sell security-sensitive activities (in whole or in part) or assets (e.g. patents)[29] of importance to Sweden's security is obligated to consult with its supervisory authority as defined in the Protective Security Ordinance adopted by the Government (*Sw.* Säkerhetsskyddsförordningen).

Although the proposed FDI Act and the Protective Security Act overlap in some parts, they serve different aims and have different areas of application. Whereas the Protective Security Act is designed to protect national security and thus security-sensitive activities, the proposed FDI Act has a wider scope and aims to protect also public security and public order. It could be noted though that it is unusual to have two similar screening systems overlapping each other.

Further, the proposed FDI Act imposes a notification obligation on the purchaser (i.e. the investor), whereas the Protective Security Act imposes a notification obligation on the seller (the operator or the shareholder).

25. Section26 of the Proposed FDI Act.
26. Section 28 of the Proposed FDI Act.
27. See page 114 of the proposal.
28. Section 34 of the Proposed FDI Act.
29. Real estate is however currently exempted from the Protective Security Act.

The FDI Act targets 'investments' in general, irrespective of form, and is not only applicable to security-sensitive activities, meaning that the scope is much broader. The Protective Security Act's notification procedure targets transfers of shares in or assets from security-sensitive operations, and certain agreements concerning security-sensitive operations. In addition, unlike the proposed FDI Act, the Protective Security Act does not provide for any control thresholds and it also excludes listed companies.

The threshold for prohibiting an investment under the Proposed FDI Act will be higher than under the Protective Security Act. Under the Proposed FDI Act an investment may only be prohibited if this is necessary to protect national security, public order or public security in Sweden. The Protective Security Act on the other hand, stipulates that the supervisory authority may prohibit a transfer which is deemed not to be appropriate with regard to the security-sensitive activities concerned, granting the authority a much wider scope of discretion. The notification obligation under the Protective Security Act does not apply if the transfer requires approval under certain other legislation, such as the EU's Dual Use Regulation or the Military Equipment Act.[30] The proposed FDI Act, on the other hand will explicitly target investments in activities involving operations concerning dual use items or military equipment. That said, a transfer of assets requiring an export permit under the EU Dual Use Regulation will also be subject to the notification obligation under the proposed FDI Act.

It is therefore suggested that these regulatory frameworks complement each other and should apply in parallel. This means that, as of 1 December 2023, certain transactions may need to be notified under (at least) two different Swedish regulatory procedures. As a result, an investment may be cleared in accordance with one regime and prohibited under another, all depending on the circumstances. This parallelism has been questioned and criticised and does not exist in many other national regimes. However, the Government has chosen to ignore the criticism and not let the Protective Security Act screening be subsidiary to the FDI screening or vice versa.

30. Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

II. Notifications may also be required under the Swedish Competition Act or the EU Merger Regulation

The Swedish Competition Act (Sw. Konkurrenslagen) and the EU Merger Regulation provide for mandatory notification of transactions and full-function joint ventures when there is a change of control and certain turnover thresholds are met. Also, for transactions under the thresholds, notifications may sometimes be called in. For notified transactions, there is a standstill obligation prohibiting the implementation of the transaction before it has been cleared by the Swedish Competition Authority (Sw. Konkurrensverket) or the European Commission. Investments and acquisitions subject to notification requirements under the new FDI regime and/or the Protective Security Act may also fall subject to merger control rules. Thus, there will still be an obligation to notify transactions under the merger control regime. Even though the legislative pieces have some similar features they serve different aims. While the FDI rules and the Protective Security Act aim at protecting national security, public security and public order, the competition rules serve the aim of ensuring effective competition. Transactions may therefore be prohibited or made subject to remedies if this is necessary to avoid a significant impediment to effective competition.

7. Concluding remarks

The broad scope of the proposed FDI Act entails both unpredictability and administrative burdens on companies seeking to invest in Swedish companies engaging in activities covered by the proposed FDI Act. As it is likely to have a great impact on investments taking place in protected sectors, we recommend that companies and other entities active in these sectors identify and discuss investments that might be covered by the proposed FDI Act with counsel at the earliest convenience.

For private equity investors and other companies which have investments and mergers and acquisitions as their main business, but also for industrial investors, compliance with the proposed FDI Act is of utmost importance. Non-compliance may lead to very high fines and more importantly prohibitions against transactions, even after closure, which may have a huge financial impact.

Parties also need to take the new regulatory obligations into account when considering timelines and standstill obligations.

It is important to look out for the upcoming ordinances that are to be adopted by the Government since these will add flesh to the new rules, designating the supervisory authority/-ies, and providing details as regards (i) activities and services essential to society, (ii) critical raw materials and other metals and minerals, and (iii) emerging technologies and other strategically protectable technologies that will be covered by the Proposed FDI Act. In addition, an implementing regulation providing guidance on the information to be included in notifications will be issued.

It is crucial that all these complementary statutes are in place well in time before the legislation enters into force in order to give companies the possibility both to prepare for notifications and to make strategic considerations.

One of the challenges with the proposed legislation is that it will take time before we have a decisional practice in place. Furthermore, given the confidential nature of these cases, limited guidance will most likely be available even then. Certain guidance may be found in a report from 2020 published by the Swedish Defence Research Agency (FOI),[31] which has analysed foreign direct investments on behalf of the Foreign Ministry. The report focuses on three countries, China, Russia and Iran, indicating that investors with links to those countries should be particularly cautious. However, depending on the circumstances, such investments may be unproblematic and investments with links to other jurisdictions may on the other hand raise concerns.

One important principle that is not explicitly mentioned in the Proposed FDI Act, but which derives both from EU law and the Swedish Administrative Act (*Sw.* Förvaltningslagen) is the principle of proportionality which we hope will have an important role in any assessments made by the supervisory authority. In this context it may be noted that although the issue of Swedish security might at first glance sound like a national issue, this is something which is regulated by EU law and case law from the Court of Justice of the European Union which requires that any derogation from the fundamental freedoms such as the freedom of establishment must be based on "a genuine, present and sufficiently serious threat."[32]

For companies and other entities performing activities covered by the proposed FDI Act, the screening mechanism might call for the establishment of internal routines for handling investments and changes in ownership structures. It will also be important for companies to monitor legislative developments as regards FDI in other EU Member States.

The Council on Legislation has now approved the proposal and a Governmental Bill is expected to be presented in May. We will get back with comments once the legislative proposal has been published.

31. Information here.

32. Case C 66/18, Commission v Hungary, para 204.

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