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New rules on Foreign Direct Investment apply from 1 December 2023

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As of 1 December 2023, the act on foreign direct investments (the "FDI Act") is in force.[1] The purpose of the FDI Act is to prevent foreign direct investments that may harm national security, public order or public safety in Sweden. The FDI act catches investments that close from that day onwards. Thus, investments that have already been signed but with long-stop dates after 1 December are also targeted.

The new regime – where notification is mandatory also for Swedish and EU investors and for minority investments in certain sectors – has a very broad scope and will no doubt impose an additional administrative burden on many transactions and investments (including green field investments) in Sweden, causing delays in closing times. The rules apply to e.g. mergers, acquisitions and minority investments in companies, trusts and other legal entities domiciled in Sweden.

Deals covered by the FDI Act are surrounded by uncertainty as they risk being prohibited or cleared subject to conditions. In addition, non-compliance with the new rules can lead to hefty fines, prohibitions and forced divestitures.

The geopolitical situation in the world is 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. The FDI Act has a clear political dimension and allows for the possibility to screen foreign investments and prohibit those that are considered harmful to Swedish interests.

The new FDI Act requires mandatory screening of investments in a wide range of sectors. In certain cases, investments will be prohibited or made subject to conditions and sanctions, including fines between SEK 25 000 and SEK 100 million. Under certain conditions investments may be prohibited also after completion.

Given the far-reaching sanctions and the risk of prohibition it is necessary for investors to know and adhere to the new rules. In this article we highlight the most important parts of the FDI Act.

1. Sw. *Lag (2023:560) om granskning av utländska direktinvesteringar.*

Summary of the FDI Act

- The screening mechanism provides for mandatory notification of investments in Swedish entities, including listed companies, that carry out certain "protected activities" in a wide range of sectors.
- "Protected activities" includes 'essential services', security-sensitive operations, activities related to critical inputs or raw materials, activities whose major purpose is processing of sensitive personal data or location data, activities related to emerging technologies and other strategic protected technologies, military equipment and dual-use products.
- The Swedish Civil Contingencies Agency's (MSB) regulations (MSBFS 2023:4) state what services are considered essential services and protected activities.[2]
- The notification obligation applies to all investors irrespective of nationality. In other words, investors from third countries, other EU Member States and Sweden are obligated to notify their investments in protected activities if the notification criteria are met.
- The notification obligation applies both to a first-time investment and an increase of holding assets. A new notification is 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. The Inspectorate of Strategic Products ("**ISP**") (Sw. *Inspektionen för strategiska produkter*) has been appointed as screening authority.
- The screening is a two-stage procedure. 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 it is decided that the investment should be examined, 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 by an additional three 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.
- Important factors for the assessment will include 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 investor; whether the foreign investor is directly or indirectly controlled by the government of a third country, the foreign investor or anyone in its ownership structure has already been involved in activities affecting security or public order in Sweden or another EU Member State, or if there are other circumstances suggesting that the investment may harm national security, public order or public security in Sweden.
- Under certain circumstances, the ISP is able to prohibit foreign direct 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 or prohibit the investment if the conditions for a prohibition are met.

2. Examples of what is deemed to be essential services are activities with at least five employees or a total annual turnover of SEK 5 million and which conduct certain activities in the extraction of minerals etc., in manufacturing, in the supply of electricity, gas, heating, cooling and fuels, in water supply, sewage treatment, waste management and sanitation, in construction, installation and maintenance, in trade, in transport and storage, in the hotel and restaurant sector, in the information and communication sector, in the finance and insurance sector, in property management, in science and technology, in letting, property services, travel services and other support services, in education, and in health and social care. In some cases, other requirements regarding the number of employees and annual turnover apply, e.g. start-ups are covered without such requirements.

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- 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 does not apply to listed companies, where the investor may instead be ordered to sell what has been acquired.
- ISP may request notifications of non-notifiable investments.
- The screening mechanism according to the FDI Act does not replace but complements existing notification requirements under the Protective Security Act (which applies to transfers of security-sensitive activities) and/or the competition rules. Note that investments in activities that have been assessed as security-sensitive activities under the Security Protection Act must be notified under the FDI Act. If the investment object has operations outside Sweden, the investment may also need to be notified under other national rules on FDI.

1. Regulation and increased investments in Sweden

I. Background – the EU FDI Regulation

Historically, Sweden has had several different laws aimed at preventing foreign exploitation of businesses worthy of protection. As early as the beginning of the 20th century, laws were passed to prevent foreign exploitation of Swedish natural resources, which were considered to be very valuable. Several modernisations followed, resulting in two pieces of legislation in the early 1980s to prevent foreign acquisitions of Swedish companies and real estate respectively.[3] In principle, the possibility for foreign subjects to acquire Swedish companies or real estate was non-existent. The purpose of the legislation was primarily to protect the Swedish labour market and to prevent the relocation of Swedish companies abroad. The latter referred not only to the risk that jobs would be lost, but also to the risk that Sweden's supply and contingency planning would be negatively affected.

In the wake of the EU membership in the 90s, Swedish laws regulating foreign acquisitions of companies and real estate were repealed. Since then, Sweden has had very limited possibilities to influence foreign legal entities' investments in Swedish companies.

Lately, the opinion on foreign ownership has changed. In 2017, the European Commission ("the **Commission**") published a discussion paper describing in particular the problem of foreign state-owned companies buying up companies that possess intelligence or information worthy of protection for strategic reasons. Corresponding risks with foreign direct investment had then already been raised at Swedish national level by a number of authorities.

The Commission initiative has not led to any harmonised legislation on foreign direct investment, and there is thus no formal requirement for Member States to screen such investments. However, EU Regulation 2019/452 ("**EU FDI Regulation**")[4] is applicable since 11 October 2020 and provides a framework for those Member States that have a screening system in place. The Regulation is only a framework and does not require the establishment of national screening systems. The EU FDI Regulation allows 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 part of the EU FDI Regulation is a mechanism for cooperation and information sharing among Member States, as well as between Member States and the Commission.

The Regulation lists factors and areas which Member States may consider when reviewing foreign direct investment.[5] The list includes, for example, critical infrastructure, critical technologies, supply of critical inputs and food security, 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 almost all Member States.[8]

Thus, Sweden is far from the first EU Member State to having implemented a screening authority for foreign direct investments, rather one of the last. In later years many countries have introduced new regulation, and the countries that already have a screening mechanism in place have strengthened theirs.

In October 2023, the Commission published its third annual report on the EU FDI Regulation.[9] The following conclusions from the report should be particularly highlighted:

- The Commission's handling of screened investments was very fast: 87% of cases were decided within 15 calendar days.
- Less than 3% of the transactions resulted in a Commission opinion, so the EU system does not limit the EU's openness to FDI.
- The majority of countries for the ultimate investor notified in 2022 were the US, the UK, China, Japan the Cayman Islands and Canada.
- The screening mechanisms cover a range of sectors, but the majority of all notifications related to investments in manufacturing (59%) - which covers a range of industries, such as energy, aerospace, defence, semiconductors, healthcare, data processing and storage, communications, transport and cybersecurity.

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

- A formal review was carried out in 55% of the cases in 2022, which is a significant increase compared to previous years.
- Of all cases formally reviewed in 2022, the investment was authorised with conditions in 86% of the cases.
- 4% of the cases were withdrawn by the parties.
- 1% of the transactions were blocked by Member States.

2. Sectors and activities covered by the FDI Act

I. Targeted sectors and activities

The scope of the FDI Act is broad and it targets investments (i) made in Swedish protected activities (i.e., generally not activities essential to other states, unless there is a binding commitment for Sweden to take such activities into consideration),[10] and (ii) which may have detrimental impacts or effects on Swedish security and public order and public security in Sweden.[11] Consequently, it is not possible to hinder foreign investments in undertakings carrying out activities not considered 'protected activities', even though such investments may pose a risk to Swedish security or public security or public order in Sweden.

In general, the screening mechanism targets various kinds of activities and services deemed to be of importance for Sweden's national defence or that are otherwise deemed to be critical to society. The sectors may overlap with each other to a certain extent.

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 and that have been listed by The Swedish Civil Contingencies Agency's (MSB) regulations.

3. The Swedish Defence Research Agency report in Swedish "Totalförsvarets forskningsinstitut, Utländska direktinvesteringar i skyddsvärda branscher: En studie av risker, branscher och investerare, Petersson et al., 2020, p. 20.

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 2 February 2023 is available here.

9. See information here.

10. E.g. security-sensitive operations by other states, which Sweden has an obligation to protect, Chapter 1, section 1 of the Swedish Protective Security Act.

11. Section 1 of the FDI Act.

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Sectors and Activities covered	Definition
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 and listed in Annex I of the Ordinance (2023:624) on the review of foreign direct investments (the "**FDI Ordinance**")
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.
Activities related to emerging technologies and other strategic protected technologies	Annex II of the FDI Review Regulation (2023:624) lists the emerging technologies and other strategically important technologies covered by the FDI Act.
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*).
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.

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 defence 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.

II. Specifically about essential services

In its recently adopted regulations (MSBFS 2023:4), MSB has decided which activities are deemed to be essential services and thus worthy of protection under the FDI Act. In order for the target company's operations to be considered essential services, it is required that it, in whole or in part, consists of operations listed in the regulations, and that it meets the requirements regarding the number of employees or annual turnover contained in the regulations.

Among other things, MSB has assessed that the following activities constitute essential services:

- certain activities in the extraction of minerals,
- manufacture of foodstuffs, medical devices, chemicals, pharmaceuticals etc.,
- certain activities in the supply of electricity, gas, heating, cooling and fuel,
- activities in the water, sewage and waste sector,
- certain construction and maintenance activities,
- trade in food, feed, fuel, chemicals etc.,
- transport activities, such as regional and local public transport, special passenger transport, freight transport, etc., and warehousing,
- the production and supply of meals by food businesses,
- certain activities in the field of information and communication,
- certain activities in the field of finance and insurance,
- certain renting, management or operation of real estate, premises or facilities,
- certain activities in the field of science,
- rental services, real estate services, travel services and similar services,
- activities in the education sector; and
- certain health and social care activities.

Activities worthy of protection with at least five employees or an average total annual turnover of SEK 5 million or more calculated on the basis of the last three financial years are normally covered by the regulations. For operations that have been conducted for less than three years, the turnover is calculated on the basis of the previous financial year and, if the target company is part of a group, the turnover requirement is limited to only the target company's turnover. For some activities, other requirements or no requirements apply, e.g. start-ups are covered by the regulations (without taking into account the number of employees or turnover). Essential services in science and technology regulated in Chapter 13 of the regulations are covered regardless of the number of employees or turnover. The same applies to the management or operation of a fiber or broadband association. Delivery of meals is covered if the business either has at least five employees or an annual turnover of SEK 10 million or more.

III. Media is not a targeted sector

Investments in media undertakings are not targeted, 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 excluding media undertakings in the screening mechanism 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),[12] This is also a clear example of how the review systems vary between the Member States, which is also a

12. 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.

consequence of the EU FDI Regulation's lack of specific regulation. Each Member State can therefore choose to leave certain sectors outside scrutiny.

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 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 a:

i. physical person who is a national of a state outside the EU;

ii. legal entity established in a state outside the EU;

iii. legal entity owned or controlled, directly or indirectly, by a state outside the EU;

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

v. person in favour or on behalf of a person or entity listed in (i) – (iv).

In other words, the FDI Act will thus also apply to indirect foreign investments, i.e. investments or acquisitions made by a Swedish undertaking that is ultimately owned or controlled by an investor outside the EU. For example, a Swedish company, owned by foreigners, that carries out an investment is considered as an indirect foreign investment. The main reason for requiring notification also by 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. That said, while all investments that fulfil the requirements will need to be notified regardless of the nationality of the ultimate owner, only foreign investments may be subject to prohibitions.

It is notable that the 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.

The FDI Act is expected to apply to all investments in Swedish companies engaged in protected activities in any of the sectors listed above, regardless of the legal form of the company.[13] Furthermore, no exceptions are made for intra-group investments. This means that even cases of restructuring within a group may be covered. However, it should be noted that non-profit associations are excluded from the scope of the legislation, even though the Legislative Council proposed that all legal entities should be covered by the legislation. This means that, for example, influence in political parties and interest groups that constitute non-profit associations remains uncontrolled.

II. The voting rights of family members must be taken into consideration

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 FDI Act what constitutes an indirect disposal, as that will be determined on a case-by-case basis.

III. Notification obligation when reaching certain control thresholds

The FDI Act contains different thresholds and control provisions triggering the notification obligation depending on which type of legal entity the investment concerns and how the investor is expected to gain control of the entity. The notification obligation shall be fulfilled before the investor gains influence over the undertaking, i.e., prior to closing.

In relation to investments in limited companies, European Companies and economic associations, the FDI Act 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 10, 20, 30, 50, 65 or 90 percent of the voting rights in a legal entity engaging in a covered sector, the investor must notify the investment.

Furthermore, the 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 sectors covered by FDI, will have a notification obligation when the investor, after the acquisition or establishment, directly or indirectly disposes of 10 percent 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. 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 which is expected to carry out activities in a protected sector 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 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 share (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 FDI Act, it is important to carefully assess the actual circumstances of each investment made in a covered sector.

4. Mandatory notification, procedure and assessment

I. Mandatory notification and standstill

An investment covered by the FDI Act will have to be notified in advance by the investor and may not be completed until cleared by the screening authority, a so-called standstill obligation. 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.[14] The fines for failure to notify are described below.

II. Possibility to call in non-notifiable transactions or investments in protected activities

To avoid that the 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, 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.[15] This may be done also after completion of the investment, thereby creating uncertainty for certain deals and

13. The screening mechanism applies to investments in European companies (Societas Europea, SE, Sw. *europabolag*), limited companies (Sw. *aktiebolag*), partnerships (Sw. *handelsbolag)*, unincorporated partnership (Sw. *enkla bolag*), sole trader undertakings (Sw. *enskild näringsverksamhet)*, economic associations (Sw. *ekonomisk förening*), foundations and trusts (Sw. *stiftelser*) domiciled in Sweden. The FDI Act does not explicitly mention activities carried out by Swedish limited partnerships (Sw. *kommanditbolag*). However, our view is that a limited partnership is one kind of partnership (i.e., Sw. *handelsbolag*) in terms of the structure of the legislation for partnerships. This perception is in line with the view of the legislator communicated in the Government Bill. Therefore, our conclusion is that the FDI Act also targets limited partnerships, even though the FDI Act does not mention limited partnerships explicitly in the legislative text.

14. Section 12 of the FDI Act.
15. Ibid, Section 13.

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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.[16]

III. The review process; a two-stage process

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 during the first stage.

Upon receipt of a complete notification, the screening authority will have 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 ISP has either decided to take no further action or has cleared the investment following an in-depth review.[17] As discussed below, failure to respect this standstill provision may lead to substantial fines.

IV. 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.[18] When examining the latter, the screening authority should consider whether:[19]

i. the foreign investor is directly or indirectly, wholly or partly, 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, public order or public security in Sweden or another EU 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 ISP 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 are the Swedish Armed Forces, the Swedish Defence Materiel Administration, the Swedish Board of Trade, the Swedish Civil Contingencies Agency and the Swedish Security Service.[20]

Unless the screening authority considers that the investment is likely to harm national security, public order or public security, it shall clear the investment.[21] Such clearance may be subject to conditions.[22] If a conditional clearance is not considered sufficient to avoid harm to national security, public order or public security in Sweden, the investment shall be prohibited.[23] If prohibited, the investment will be considered null and void[24] (except for acquisitions in listed companies where the investor may be ordered to make a divestiture[25]).

As for the possibility to clear investments subject to conditions, the legislator has decided that it shall be in ISP's discretion to determine which type of condition that is suitable, necessary and otherwise proportionate in the case at hand. It is acknowledged that the ISP must be able to monitor compliance with the conditions and that the investor may therefore be required to submit reports to the authority on a regular basis and as long as is necessary.[26]

16. See page 87 of the legislative bill.
17. Section 16 of the FDI Act.
18. Ibid, Section 17.
19. Ibid, Section 18.
20. Section 7 of the FDI Ordinance
21. Section 19 of the FDI Act.
22. Ibid, Section 21, second paragraph.
23. Ibid, Section 20.
24. Ibid, Section 23, first paragraph.
25. Ibid, Section 23, second paragraph.

5. Powers of the screening authority

The ISP is 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 ISP with the information or documentation necessary for it to either carry out its review of the investment or make sure that the parties comply with any conditions imposed by the authority.

In order to access such information and documentation (but limited to that aim), the ISP 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.[27] 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 ISP may be assisted by the enforcement authority when carrying out the inspection.[28]

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. The ISP may impose fines ranging between SEK 25 000 and SEK 100 million (approximately EUR 2 000 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.[29]

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

Unlike e.g. the competition rules, there is no requirement of negligence or intent on the party failing to comply with the new rules, but instead strict liability.[30] That said, the decision to impose fines is, to some extent, 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.[31]

In addition, when determining the size of the fine to be imposed, the screening authority has 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.[32]

6. Parallel notifications in accordance with other Swedish legislation

Currently, a transaction may have to undergo several parallel notifications due to the existence of overlapping review systems.

I. The 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)[33] 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*).

26. See pages 101-104 of the legislative bill.
27. Section 26 of the Proposed FDI Act.
28. Section 28 of the Proposed FDI Act.
29. Section 31 of the FDI Act.
30. See page 123 of the legislative bill.
31. Section 34 of the FDI Act.
32. Section 33 of the FDI Act.
33. Real estate is however currently exempted from the Protective Security Act.

Although the 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 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 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). 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 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 FDI Act is higher than under the Protective Security Act. Under the 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.[34] The FDI Act, on the other hand explicitly targets 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 FDI Act.

It is therefore suggested that these regulatory frameworks complement each other and should apply in parallel. This means that 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 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.

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.[35] 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 FDI Act entails both unpredictability and administrative burdens on companies seeking to invest in Swedish companies, trusts etc. engaging in activities covered by the 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 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 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 and standstill obligations into account when considering timelines and the various steps for integration.

While the regulations and orders pertaining to the enforcement of the FDI Act offer some initial guidance, the development of practical applications will require time, implying an element of uncertainty regarding the application of the FDI Act.

Furthermore, due to the sensitive nature of national security, public safety, and public policy issues, the evolving practices in this field are likely to be highly confidential. Some degree of guidance can be obtained from a 2020 report by the Swedish Defence Research Agency (FOI), conducted on behalf of the Ministry of Foreign Affairs. This report specifically assesses foreign direct investment, with a focus on China, Russia, and Iran. It suggests that investors with ties to these countries should exercise particular caution.

It is crucial to note, however, that the permissibility of such investments can vary depending on the specific circumstances of each case. While investments linked to the aforementioned countries may present concerns, investments associated with other nations not mentioned in the report may be deemed problematic based on the unique context of each instance.

One important principle that is not explicitly mentioned in the 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."[36]

For companies and other entities performing activities covered by the 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.

Considering the many EU Member States with FDI regulations in place today, it is important for Swedish investors and companies that invest in such Member States or who have customers in the UK (which has a far-reaching FDI regime) to ensure that they fulfil mandatory notification obligations and assess potential implications of their investments and transactions. The FDI rules are important to take into regard for all investments and transactions considering the severe sanctions for lack of notifications and far-reaching potential implications.

34. 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.

35. Under both the EU and Swedish regime, the authorities may call in transactions under the thresholds provided that certain conditions are met.

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

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