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Screening of Foreign Direct Investments in Sweden from 1 December 2023 – New notification rules and risks for investments and transactions

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On 13 September 2023, the Swedish Parliament passed an act on foreign direct investments (the "FDI Act").[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 new rules enter into force on 1 December 2023 and will catch 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 –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 will apply to a broad number of investments, including mergers, acquisitions and minority investments in companies, trusts and other legal entities domiciled in Sweden.

Deals covered by the FDI Act will be 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 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. 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 FDI Act has a clear political dimension and will allow for the possibility to screen foreign investments and prohibit those that are considered harmful.

In 2019, the Swedish Government first announced that it considered introducing a new FDI regime in Sweden, but it took four years before the new legislation was adopted. On 13 September 2023, the Swedish Parliament passed the FDI Act which will enter into force on 1 December this year.

The 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 2 000) and SEK 100 million (approximately EUR 9 million). Investments may be prohibited also after completion.

1. *Sw.* Ett granskningssystem för utländska direktinvesteringar till skydd för svenska säkerhetsintressen, Prop. 2022/23:116.

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. The sectors will be further exemplified in ordinances and regulations from the competent authorities but examples indicated in the preparatory works are services or infrastructure within energy, transport, healthcare, water supply, food production and food supply, telecommunications, banking and finance, security-sensitive operations, 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 notification obligation applies to all investors irrespective of nationality. 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 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. While reports from media suggest that the Inspectorate of Strategic Products ("ISP") (Sw. Inspektionen för strategiska produkter) is to be appointed as screening authority, the legislator has left this decision open.
- 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 to 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.
- 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 targeted business and any circumstances surrounding 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.

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- Under certain circumstances, the screening authority will be able to prohibit investments or clear investments subject to certain conditions, if deemed necessary in order to safeguard Swedish security, public order or public safety. 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 does 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. Background to the proposal – the EU FDI 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. 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 preparedness would be negatively affected.

In the wake of the EU membership, 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.

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**") 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 a 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 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.[2]

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,[3] the Commission has strongly encouraged all Member States to do so or to strengthen their existing FDI regimes.[4] TToday FDI regimes exist in almost all Member States.[5]

In November 2022, the Commission published its second annual report on the EU FDI Regulation,[6] 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 defence, 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 were cleared subject to conditions.
- 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.

Current FDI legislations on other Member States and the UK to watch out for

Considering the many 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 both as regards timing but also potential obstacles. The FDI rules are important to take into regard for all investments and transactions considering the severe sanctions for failure to notify and the potentially far-reaching implications that such failure may entail.

II. The reasons for the proposed Swedish legislation

As stated by the Government in the legislative bill preceding the FDI Act, foreign direct investments are crucial to Sweden's economy as they have positive effects in terms of higher growth and employment. However, the Government 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.

2. Sectors and activities covered by the proposed FDI Act

I. Targeted sectors and activities

The scope of the FDI Act is broad. The legislator has now clarified the aim of the FDI Act by explicitly stating that 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),[7] and

2. Article 4 of the EU FDI Regulation.

3. See e.g. recital 8 of the EU FDI Regulation.
4. See information here.
5. A list of screening mechanisms in the Members States as of 2 February 2023 is available here.
6. See information here.

7. 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.

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and (ii) which may have detrimental impacts or effects on Swedish security and public order and public security in Sweden.[8] 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.

8. Section 1 of the FDI Act.

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. Also, the sectors might overlap with each other to a certain extent. In short, the following types of sectors and activities are included but some of them will be further determined in regulations issued by the relevant competent authorities:

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. The sectors will be further exemplified in ordinances and regulations from the competent authorities but examples indicated in the bill are services or infrastructure within energy, transport, healthcare, water supply, food production and food supply, telecommunications, banking and finance, etc.
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.
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.
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.
Sectors and activities listed above which are marked with * will, according to the FDI Act, be further defined either in ordinances adopted by the Swedish Government or regulations adopted by the competent authorities. It is therefore, at the time of writing this article, unclear whether all activities within a certain sector will be covered.	

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. 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 not including 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),[9] This is also a clear example of how the review systems vary between the Member States, which is also made possible by the EU FDI Regulation not requiring 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

9. 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

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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;

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; 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 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 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.

II. Which undertakings are covered?

The FDI Act applies to all investments in Swedish undertakings carrying out any of the aforementioned 'protected activities', regardless of their legal form.[10] That said, it should be noted that non-profit organizations (Sw. *ideella föreningar*) are excluded.

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 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 covered sectors, 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.

10. 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.

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

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.[11] The fines for failure to notify are described blow.

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.[12] 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.[13]

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 already at the first stage.

11. Section 12 of the FDI Act.
12. Ibid, Section 13.
13. See page 87 of the legislative bill.

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 screening authority has either decided to take no further action or has cleared the investment following an in-depth review.[14] 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.[15] When examining the latter, the screening authority should consider whether:[16]

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 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.

14. Section 16 of the FDI Act.
15. Ibid, Section 17.
16. Ibid, Section 18.

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.[17]

Unless the screening authority considers that the investment is likely to harm national security, public order or public security, it shall clear the investment.[18] Such clearance may be subject to conditions.[19] 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.[20] If prohibited, the investment will be considered null and void[21] (except for acquisitions in listed companies where the investor may be ordered to make a divestiture).[22]

As for the possibility to clear investments subject to conditions, the legislator has decided that it shall be in the authority'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 screening authority 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.[23]

5. Powers of the screening authority

The screening authority 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 authority 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.

17. Ibid, Section 30.
18. Ibid, Section 19.
19. Ibid, Section 21, second paragraph.
20. Ibid, Section 20.
21. Ibid, Section 23, first paragraph.
22. Ibid, Section 23, second paragraph.
23. See pages 101-104 of the legislative bill.

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.[24] 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.[25]

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 screening authority may impose fines ranging between SEK 25 000 and SEK 100million (approximately EUR 2 000 and EUR 9million) 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.[26]

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.[27] 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.[28]

24. Section 26 of the Proposed FDI Act.
25. Section 28 of the Proposed FDI Act.
26. Section 31 of the FDI Act.
27. See page 123 of the legislative bill.
28. Section 34 of the FDI Act.

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.[29]

6. Parallel notifications in accordance with other Swedish legislation

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)[30] 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 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

29. Section 33 of the FDI Act.
30. Real estate is however currently exempted from the Protective Security Act.

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.[31] 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, as of 1 December, 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.

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.[32] 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.

It is important to look out for the upcoming ordinances and regulations that are to be adopted by the Government and the competent authorities 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 is covered by the 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 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),[33] 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 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."[34]

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.

31. 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

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

33. Information here.

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

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