

VINGE BRIEF

New Swedish FDI Act

September 2023

The Swedish Parliament has enacted a new act providing for screening of foreign direct investments (the “FDI Act”) in Sweden. The FDI Act will be applicable to transactions closing on 1 December 2023 or later. The purpose of the FDI Act is to prevent foreign direct investments that may harm national security, public order or public safety. The FDI Act will have significant implications for mergers, acquisitions and other investments in companies domiciled in Sweden. In this briefing, some key takeaways are presented.

Target companies within scope

Investments in undertakings domiciled in Sweden are within scope, including indirect transfers of shares and transfers of shares in listed companies.

Investment thresholds

The FDI Act will apply to investments resulting in the investor acquiring (directly or indirectly) voting rights equal to or exceeding 10, 20, 30, 50, 65 or 90 per cent in a target company performing activities eligible for protection, influence over the management of such target company through other means, or assets or business eligible for protection. No turnover or

deal value thresholds apply. Specific thresholds apply to investments in other legal entities (e.g. limited partnerships or trusts) and to greenfield investments. Certain types of issuance of new shares are exempted.

Investors covered

Investments by investors from all countries are covered by the screening mechanism (including investors from Sweden and other EU Member States). However, only investments made by an investor from a country outside the EU may be subject to a substantive examination by the screening authority and a decision to prohibit the investment or to impose conditions.

Activities or sectors covered

SECURITY-SENSITIVE ACTIVITIES – activities covered by the Swedish Protective Security Act, i.e. activities that are of importance to Sweden's national security.

ESSENTIAL SERVICES – activities, service or infrastructure which maintain or ensure societal functions which are essential to society's fundamental needs, values or security.

MILITARY EQUIPMENT – manufacturing, development, research relating to, or the supply of, military equipment or the supply of technical support for military equipment.

DUAL USE ITEMS – manufacturing, development, research relating to, the supply of dual-use items listed in Annex I to Regulation (EU) 2021/821 or the supply of technical support for such items.

EMERGING TECHNOLOGIES AND OTHER STRATEGIC PROTECTED TECHNOLOGIES – research or the supply of products or methods relating to emerging technologies or other strategic technologies eligible for protection, or activities capable of manufacturing or developing such products or methods.

CRITICAL RAW MATERIALS, METALS AND MINERALS – prospecting, extraction, enrichment or sales of raw materials or other metals and minerals that are critical to Sweden.

LOCATION DATA OR PERSONAL DATA – extensive processing of sensitive personal data (as defined in Article 9(1) of the GDPR) or location data through a product or service.

Notifying party

The investor is responsible for submitting the notification to the screening authority. There is no filing fee. A target company which is subject to a notifiable investment must, subject to certain exemptions for listed companies, inform the investor that the investment is within scope of the FDI Act.

Screening authority and *ex officio* screening

There will be one responsible screening authority. The screening authority shall consult with other relevant authorities. It is envisaged that the Inspectorate of Strategic Products (Sw. *Inspektionen för strategiska produkter*) (the “ISP”) will be appointed by the government as the screening authority.

The review authority may on its own initiative initiate an examination of an investment which is not covered by a notification obligation, if there is reason to believe that the investment may harm national security, public order or public safety.

Statutory review periods

Phase I – the screening authority shall decide, within 25 working days of a complete notification, either to take no further action or to initiate an examination.

Phase II – in the case of a decision to examine the investment, the screening authority shall make a final decision within three months after the decision to initiate the examination. If there are special grounds, this deadline may be extended to six months.

The substantive assessment

In its examination, the screening authority will make a case-by-case assessment of the risks associated with the investment, taking into account the nature and extent of the activities

of the target company and various circumstances related to the investor. Whether the investor is controlled by the government of a country outside the EU will be considered. Another relevant factor is if the investor has previously been involved in activities that have or could have adversely affected Sweden’s security or public order or security in Sweden or in another EU Member State. Whether there are other circumstances pertaining to the investor that could pose a risk to Sweden’s national security or public order or security in Sweden will also be relevant.

Standstill and prohibition

An investment that falls within the scope of the FDI Act may only be implemented if it has been approved or a decision has been made by the screening authority not to take further action. Hence, closing of a transaction that falls within the scope of the FDI Act is not allowed prior to such decision.

If necessary due to Sweden’s national security, public order or public safety, a foreign investment may be prohibited by the screening authority. Such prohibition will render the investment null and void. Where the investment is made in a listed company or in real estate, a prohibition will be combined with an injunction to divest the relevant undertaking or real estate.

Conditions

The screening authority may approve an investment subject to conditions. Such conditions could relate to, *inter alia*, the activities of the target company, the management and control of the target company and circumstances relating to the investor.

Sanctions

The screening authority may impose administrative fines for infringements of the FDI Act amounting up to SEK 100 million. For example,

an investor may be fined due to a failure to notify an investment subject to the FDI Act. Further, a fine may be imposed on an investor that closes a transaction prior to, or contrary to, a final decision or that acts in breach of the conditions decided by the screening authority. Further, the investor and/or the target company may be sanctioned for failure to provide the screening authority with the information requested by the authority or for providing false information.

Appeal

The screening authority's decision to prohibit an investment or to impose conditions may be appealed to the Swedish Government. Injunctions and administrative fines may be appealed to the Stockholm Administrative Court.

Relation to the screening mechanism in the Protective Security Act

The FDI Act applies in parallel to the screening system under the Protective Security Act (the latter has a narrow scope of application). The same transaction may thus trigger filing obligations under both the FDI Act and the Protective Security Act.

Status and next steps

The Parliament passed the bill for the FDI Act on 13 September 2023. The FDI Act will enter into force on 1 December 2023 and be applicable to transactions that close on 1 December 2023 and onwards. It is envisaged that the Government will issue an implementing regulation and assign the ISP as screening authority. It is further envisaged that the ISP and another government agency will issue regulations outlining the scope of application of the FDI Act in certain respects and rules on the procedure before the ISP. However, there is a chance that these regulations will not be issued until the FDI Act enters into force in December.

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