

# Sweden

## Proposal for New Foreign Direct Investment Screening Rules

November 2021



## EXECUTIVE SUMMARY

In recent years, many countries have introduced or broadened their existing foreign direct investment (“**FDI**”) screening systems, allowing governments and authorities to control certain foreign investments in their national territories for reasons of national security or public order. Sweden is one of few EU Member States that does not yet have FDI screening rules in place. This is about to change. In 2019, the Swedish government ordered a parliamentary inquiry with the dual purpose of adapting the Swedish rules to the EU’s FDI framework (EU regulation 2019/452) (the “**EU FDI Regulation**”) and proposing Swedish FDI screening rules.

On 1 November 2021, the proposal was presented by the parliamentary inquiry (SOU 2021:87). It will now go through the legislative process, including stakeholder consultation, and the resulting new law is expected to enter into force on 1 January 2023. In many ways, the Swedish proposal differs from other countries’ FDI screening rules and we expect that the consultation process will lead to changes to the proposal.

In the following report, we highlight the main features of the proposal. Although the legislative process may lead to changes, we expect that the final version of the new law, once adopted, will affect numerous investments and M&A transactions on the Swedish market.

In sum, the key take-aways are:

- All direct investments, whether by Swedish, EU or non-EU investors, above ten per cent and in certain covered sectors must be notified (such broad investor-scope is stated to prevent circumvention). Although the proposal is intended to cover indirect investments as well, it is unclear what type of indirect investments would be covered.
- Although investments by all nationalities must be notified, an FDI review should only be initiated for non-Swedish investors. Investments made by exclusively Swedish citizens, or companies ultimately controlled by exclusively Swedish citizens, are exempt from review.
- The scope of covered sectors is broad, including overarching sectors such as energy, transportation, healthcare etc. and does not in all respects correlate to the sectors covered by the EU FDI Regulation.
- A threshold of ten per cent ownership will apply for the notification requirement, and for every new investment thereafter. Any other actions which seek to give influence to a foreign investor will also be covered.
- The competent Swedish authority will be the Inspectorate for Strategic Products (“**ISP**”). The ISP is already the competent authority for export control (dual-use and military items) in Sweden.
- The ISP will have the power to prohibit, or approve subject to conditions, foreign direct investments that pose a risk to Sweden’s security or public order.
- A two-step screening procedure is foreseen. In the first step, a notification is to be submitted, and the ISP has 25 business days to decide whether to clear the investment or to proceed to further review. The second step provides the ISP with three additional months to conduct an in-depth investigation into the investment. If special reasons are at hand, this time period may be extended to six months.
- Failure to notify an investment may lead to the investment being declared null and void, and the investor may be subject to administrative fines. An administrative fine may also be imposed in cases of gun-jumping or for the failure to provide required information.
- The FDI screening procedure will apply in parallel to the existing Swedish Protective Security Act. Investments involving businesses of importance for Sweden’s security (i.e. security-sensitive activities) will be subject to two separate screening procedures conducted by two different authorities.

## WHICH SECTORS WOULD BE COVERED?

The proposed law would cover the following sectors:

- **Essential services (Sw. *samhällsviktig verksamhet*):** This broad sector will likely trigger notification in many transactions, covering areas like energy, financial services, healthcare, information and communication, food supply and transportation. The Swedish Civil Contingencies Agency (“MSB”) will be empowered to issue administrative regulations which define the activities that are deemed essential services. The MSB shall consult with the Swedish Armed Forces, the ISP, the National Board of Trade, the Swedish Security Service and other public authorities prior to issuing such regulations.
- **Security-sensitive activities:** Activities that are covered by the Protective Security Act will fall directly under the scope of the new FDI screening rules. The sale of a business with security-sensitive activities will be subject to both sets of rules and would thus be subject to a consultation obligation (to be made by the seller) with the relevant monitoring authority and an FDI notification (to be made by the investor) to the ISP.
- **Critical raw materials, metals and minerals:** Businesses that prospect for, extract, enrich or sell raw materials that are critical for the EU, or other metals and minerals that are critical to Sweden are to be covered by the new FDI screening rules. Critical raw materials for the EU are listed in accordance with the EU framework for Critical Raw Materials Resilience and in relation to Sweden, a list will be prepared by the Geological Survey of Sweden.
- **Sensitive personal or location data:** Businesses whose main activities include the processing of sensitive personal data or location data will be covered by the new FDI screening rules. The proposal mentions insurance and healthcare as sectors that are particularly prone to processing sensitive personal data. Since certain employers regularly process sensitive personal data, the proposal notes that data processing within the employment context generally should be excluded from the FDI screening rules. Businesses that gather location data extensively will, however, be covered.
- **Emerging technologies and other strategic protected technologies:** Activities related to emerging technologies and other strategic protected technologies will be covered by the new rules. The scope of this sector shall be defined in an ordinance issued by the ISP and other defence agencies. A draft list of said technologies is enclosed with the proposal.
- **Dual-use items:** Businesses that manufacture, develop, conduct research into or supply dual-use items or supply technical assistance for such items will be

covered by the new rules. Dual-use items are products, software and technology as defined in the EU Dual-Use Regulation (2021/821).

- **Military equipment:** Businesses that manufacture, develop, conduct research into or supply military equipment or supply technical support for military equipment. Military equipment and technical assistance are specified in the Military Equipment Act.

The proposal leaves open if the media sector should be covered by the FDI screening rules. It is suggested that if the media sector were to be included, the scope should be limited to public news media (Sw. *allmänna nyhetsmedier*) as defined in the Media Subsidies Act.

As regards scope, the proposal does to a certain extent apply a terminology that differs from the EU FDI Regulation and we therefore expect a certain degree of uncertainty, as the ISP is required to apply both the FDI screening rules and the EU FDI Regulation. In particular, this uncertainty may arise when the ISP has to assess whether to trigger the intra-EU consultation mechanism with other EU Member States and the European Commission as required under the EU FDI Regulation when it has decided to initiate a review of a notified investment.

## WHO MUST NOTIFY?

Although the proposed rules purport to identify and block sensitive *foreign* direct investments in the covered sectors, the proposed legislation suggests that a notification shall be made by all investors irrespective of their nationality. In other words, Swedish, EU and foreign investors must all notify their investments in the covered sectors.

The investments that may be screened in accordance with the proposed rules are those where the investor is either (i) a natural person with citizenship(s) in countries *other than* Sweden, or (ii) an entity ultimately owned or controlled by a foreign government or natural person(s) with citizenship(s) in countries *other than* Sweden. The scope of investors thereby includes not only third-country investors but also investors from other EU Member States, and potentially also certain Swedish investors (e.g. those with two nationalities). This is a significant difference compared to other FDI screening rules and will likely impose a heavy administrative burden on the ISP.

The stated rationale behind the proposal to require all investors to notify an investment in the covered sectors is to prevent circumvention of the screening system. The proposal indicates that exclusion of intra-EU investments from the scope could entail circumvention risks, for example if an investor makes an investment through EU nationals or companies based in EU Member States with less strict rules, which in turn may result in the assets being transferred outside the EU.

For similar reasons, investments by Swedish investors will also be subject to notification. The rationale is that in order

to prevent circumvention, investments by Swedish-owned companies or Swedish citizens acting as vehicles for other parties should not automatically be exempt from an FDI screening. When the investor has only Swedish citizenship or is ultimately owned or controlled only by such persons, the notified investment will be approved, unless there is a risk of potential circumvention.

The proposal suggests that the great majority of investments from both Swedish and EU investors will be cleared quickly in the first stage, i.e. not proceed to formal FDI screening.

## WHAT ARE THE RELEVANT TYPES OF INVESTMENTS?

### General

The proposed legislation would give the ISP the power to review foreign direct investments that pose a risk to Sweden's security or public order or security. A direct investment would entail an investment made for the establishment or maintenance of lasting links or connections between the investor and the relevant target company. Investments to be covered are those which grant the possibility of "actual participation" in management or influence in a company. According to the proposal, the law should also cover greenfield investments.

### Investment thresholds

The proposal states that anyone (whether Swedish or foreign) having the intention to invest in a business in a covered sector must notify the investment to the ISP if *inter alia*:

- The investor holds ten per cent or more of the total number of votes in the company after the investment;
- If the investor together with others holds ten per cent or more of the total number of votes in the company after the investment; or,
- The investor has influence over the management of the company through other means (Articles of Association, shareholders' agreements, etc.).

In addition, there are corresponding thresholds for other forms of legal entities (limited partnerships, trusts, etc.).

Certain investments will be exempt from the notification requirements, including transfers due to division of property, wills or succession, and the issuance of new shares pro rata to the number or shares previously owned by the investor.

It should be noted that every investment resulting in ownership of ten per cent *or more* of the total number of votes must be notified and potentially reviewed, even if a prior investment by the same investor in the same Swedish target was previous reviewed and approved by the regulator (unless the exemptions mentioned in the previous paragraph apply).

For investments in Swedish listed entities, this implies that an investor who has already been subject to an FDI review but wishes to increase its ownership even by one share must file a new notification. Since such notification must be made prior to the investment, a waiting period of at least 25 business days can be expected.

Notifications must also be made if a company in the covered sectors wishes to issue new shares on a non-preemptive basis, and this leads to either a new investor becoming the owner of more than ten per cent of the total number of shares in the company, or that an investor owning more than ten per cent of the shares increases its ownership. This will have consequences for example for venture capital investors, private companies raising capital and larger management incentive programs.

### Indirect investments left undefined

The proposal is intended to cover both direct and *indirect* investments in targets covered by the scope of the new legislation. One essential question is therefore what could constitute an indirect investment. The proposal provides one example of a party who through an investment indirectly gains influence of a company and is therefore to be considered as the actual investor, but this example is in relation to a Swedish holding company.

Furthermore, the types of investments intended to be covered by the rules are investments made in companies located in Sweden. However, the proposal is silent as to whether the notification obligation would be triggered when an investor makes an investment in a non-Swedish parent company with a Swedish subsidiary in a covered sector. This marks a further significant difference compared to FDI screening rules in other countries.

## WHAT WILL THE ISP TAKE INTO CONSIDERATION IN ITS REVIEW?

When assessing notified investments, the ISP shall make an overall assessment in each individual case based on the need to protect the target of the investment as well as circumstances related to the potential investor.

The ISP may consider the following circumstances relating to the investor in its assessment:

- Whether the investor is directly or indirectly, wholly or partly **controlled by the government of another country** through its ownership structure, significant financing or in other ways. The proposal does not include any list of countries implicating higher or lower risk for investments. The ownership structure and the actual control of a company may also be of importance when assessing the risks of an investment. In the case of a private investor, there may be reason to examine whether the investor has links to another country's regime. Such investments may in some cases be inappropriate, as private investors could be loyal to the regime even though the regime is not in direct control of the investor's choices. There may

also be reason to examine a relevant person's connection to countries other than their home country. There may be situations when other countries act as agents in an investment. Like nationality, the foreign investor's management structure could therefore be of interest.

- Whether the investor has **previously been involved in activities that have had a detrimental effect** on Sweden's security or public order or security. Examples include where the investor has previously been denied making a foreign investment or breached conditions associated with such an investment, either in Sweden or in other EU Member States.
- Whether there are other circumstances surrounding the investor that could **constitute a risk** to Sweden's security or public order or security. Examples include (i) where the investor or owner engages in illegal activities, (ii) where the investor may take advantage of its dominant position to gain benefits, and (iii) where the investor is from a country acting antagonistically, or which may intend to act antagonistically, towards Sweden.

## SCREENING PROCEDURE

### Competent authority

The ISP is proposed as the competent authority and will therefore be responsible for the examination of foreign direct investments in a Swedish context. The ISP is the competent authority for export control rules (military equipment and dual-use items) and many economic sanctions regulations in Sweden.

The ISP will be required to consult and utilise the expertise and knowledge of other government agencies in its screening process. The ISP is already the Swedish contact point under the EU FDI Regulation.

Challenging a decision should not follow normal administrative judicial procedures. Instead, an appeal of the ISP's final decision would have to be made to the Swedish government.

### Notification to be made by the investor

As in most other FDI screening systems, the onus for filing a notification will be on the investor. The proposal further suggests that the ISP will issue regulations specifying what such a notification must contain. However, as a minimum, a notification must contain the information listed in Article 9.2 of the EU FDI Regulation. This includes the following:

- The ownership structure of the foreign investor and of the company in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital;

- The approximate value of the foreign direct investment;
- The products, services and business operations of the foreign investor and of the company in which the foreign direct investment is planned or has been completed;
- The EU Member State(s) in which the foreign investor, and the company in which the foreign direct investment is planned or has been completed, conducts relevant business operations;
- The funding of the investment and its source; and,
- The date that the foreign direct investment is planned to be completed or was completed.

The target of the investment will be obliged under the FDI screening rules to inform the investor that the FDI screening rules apply. A similar rule also applies in relation to the Protective Security Act where a company must inform a potential investor if said act applies to the company's business.

### Timing – notify before closing

A notification must be submitted before the investment is completed, i.e. before the investor can exercise influence over the target. The exact time for when such influence is deemed to arise may vary but should in any case be considered to have arisen when some form of transaction is carried out between the parties. For most investments, this will mean that the investment documentation can be signed, provided appropriate closing conditions allowing for an FDI filing are included. If the investment is completed without notification or before approval has been received, the investment may be declared prohibited and therefore null and void, and an administrative fine may be imposed.

### Two-step procedure

As a first step, the ISP shall within 25 working days of receiving the notification decide to either leave the notification without further action, or initiate the second step of the procedure, meaning the opening of an in-depth review. If the ISP decides to initiate an in-depth review, such a review shall be completed within three months unless there are special grounds in which case the time limit may be extended to up to six months.

### EU consultation procedure

The EU FDI Regulation establishes a consultation process on FDI-related cases between the EU Member States and the European Commission. The ISP is the contact point for this process and already receives notifications from other EU Member States and the European Commission on FDI cases in other jurisdictions. When the FDI screening rules have been implemented, the ISP will be responsible for submitting information about cases falling under the EU

FDI Regulation to other Member States and the European Commission.

We expect that the ISP will commence this consultation procedure if and when it takes a decision to open an in-depth review, i.e. 25 business days after the notification has been filed. The EU Member States and the European Commission will then have 15 plus 35 days in accordance with the EU FDI Regulation to comment on the proposed investment, and Sweden is required to take any comments received into consideration in its review.

#### Assessment and decision

If the ISP decides to initiate a formal FDI review, it must consult with the Swedish Armed Forces, MSB, the Swedish Security Service and the National Board of Trade Sweden and, where appropriate, other authorities.

If the ISP finds that the notified investment poses a risk to Sweden's security or public order or security, it will have the powers to prohibit the investment, or approve it subject to conditions.

A decision to prohibit or condition an investment may also include the imposition of a conditional administrative fine. An investment made in violation a prohibition is to be considered null and void.

An investment may also be approved with conditions, which may relate to the following:

- That certain operations of the target, e.g., the part of the business that is critical to Sweden's security, public order or security are not to be included in the investment;
- That the target's governance and management, e.g., the board and/or CEO must be Swedish citizens and residents of Sweden;
- Certain circumstances concerning the investor, e.g., that one or more investor must be excluded from the transaction;
- The extent of the investment, e.g., that the foreign owner, directly or indirectly, will not receive controlling influence; and/or,
- Possible resale, e.g., that a future resale must be notified.

#### Administration fines

According to the proposal, the ISP shall be allowed to impose an administration fine of a minimum of SEK 25 000 and a maximum of SEK 50 million if the investor:

- Does not notify a notifiable investment;
- Carries out the investment before the ISP has reached a final decision;
- Carries out the investment in violation of a final decision; and/or,

- Acts in violation of a condition imposed in connection with a final decision.

An administration fine may also be imposed if the investor or the target provides incorrect information to the ISP or fails to provide information which they were obliged to provide.

#### **OTHER PARALLEL LEGISLATION**

The FDI screening rules are intended to apply *in parallel* to other existing regulatory frameworks which have different aims, mechanisms and areas of application, such as the Protective Security Act, the Military Equipment Act, the legislation on dual-use items, and the Competition Act. Neither the proposal nor any of these other frameworks are therefore suggested to be subordinated to one another. A Swedish legal entity may therefore be required to comply with parallel obligations under different applicable laws.

#### The Protective Security Act

The Protective Security Act introduced a new consultation requirement for transfers of security-sensitive activities in 2021 in the wake of the Covid-19 pandemic. Based on this new rule, a seller of operations, assets or shares in businesses that fall under the Protective Security Act must prepare a specific security assessment and consult with the competent authority (which from 1 December 2021 will be different authorities depending on the industry at hand).

The effect of this new consultation mechanism has been difficult to track for two reasons. The first is the undefined scope. Whereas the Protective Security Act applies to businesses with operations or assets that are of importance for Sweden's national security, so called security-sensitive activities, the legislator has chosen to leave the scope undefined so as not to enable countries with adverse interests from understanding what Sweden considers to be its most sensitive industries. Second, is the lack of monitoring and enforcement. The Protective Security Act places the responsibility of assessing and deciding whether a business falls within the scope of the act on each operator or business itself. Monitoring and enforcement are allocated among several regional and sector-specific authorities, and there have to date not been any formal sanctions or penalties for violations of the Protective Security Act. New amendments to the Protective Security Act will enter into force on 1 December 2021, making the act more stringent in some respects. One example is that a company or business that has identified itself as falling within the scope of the Protective Security Act must notify the relevant authority. Administrative fines are also introduced.

The proposal differentiates the FDI screening rules from the Protective Security Act in a number of ways. While the Protective Security Act concerns Sweden's security, the FDI screening rules are proposed to also cover Sweden's public order and security. Furthermore, the rules in the Protective Security Act concerning screening are not applicable to public limited liability companies or investments in

real estate, both of which are proposed to be covered by the FDI screening rules. Despite these differences, some investments may fall within both sets of rules and, in such cases, different procedures would need to be followed. For an M&A transaction, this would entail a seller filing with the relevant monitoring authority under the Protective Security Act and a buyer filing with the ISP under the FDI screening rules.

#### The Military Equipment Act and the dual-use legislation

Entities covered by the Military Equipment Act and the dual-use legislation are at present excluded from the consultation requirement in the Protective Security Act. The FDI screening rules will however apply to these entities and the ISP will thus review foreign direct investments made in such entities. This seems to be an efficient approach as the ISP is already the competent authority for granting these entities authorisations under the Military Equipment Act and the dual-use legislation.

#### The Competition Act

Competition legislation intends to prevent unfair competition, or acts that may distort or harm competition, on relevant markets. Since the FDI screening rules aim to protect Sweden's security, public order or public security from harmful foreign direct investments, requirements will apply in parallel to applicable competition legislation. The procedural rules are to some extent similar to the Competition Act, for example as regards the timeline for review.

#### Inquiry for a stronger total defence

The Protective Security Act does not apply to direct transfers of real estate. However, a separate legislative proposal (SOU 2019:3) proposes a screening for specific property of substantial importance to Sweden's total defence, including real estate within appointed geographical areas. The proposal is still under evaluation. If it were to come into force, the proposal suggest that this legal framework should be subordinated to the FDI screening rules.

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