Foreign direct investment in focus

A European perspective

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Foreign direct investment ("**FDI**") remains an important part of the global economy. Cross-border investment helps countries' economies to grow and allows domestic businesses to expand and access new markets, customers and/or investors. In Europe in particular, FDI has been linked to increased job creation, productivity and technological investment, all of which has benefited individual Member States and their citizens. However, despite the undisputed benefits that FDI has had, the practice is coming increasingly under threat.

Countries worldwide are growing more and more wary of the inherent risks that run hand-in-hand with FDI from both a national security and geopolitical standpoint. This has manifested itself in a burgeoning trend for national Governments to scrutinise and, if necessary, intervene in transactions involving FDI. Typical factors that have prompted such scrutiny include economic protectionism, trade wars, and the desire to safeguard key assets/technology, as well as the need to address vulnerabilities identified in critical supply chains and any perceived lack of reciprocity in investment opportunities in those nations from whom FDI would typically originate.

COVID-19 has only exacerbated these trends, where recent interventions have been intended to protect businesses involved in various sectors including healthcare, medicines (including vaccines), medical equipment (such as personal protective equipment) and strategically important sectors which might be vulnerable to foreign takeover as a result of the economic and other consequences of the pandemic. Indeed, it now seems that some countries are using FDI to protect wider economic and social concerns triggered by COVID-19.

As a result of all this, many countries have recently introduced new FDI screening regimes (or else strengthened existing ones) to combat these factors. The United States, Canada, Australia, Germany, France, Spain, Italy and UK are all countries which have introduced (or are about to introduce) new, tougher screening regimes and a supra-national FDI cooperation mechanism has also been introduced at the EU level. Some newly introduced measures have been temporary whilst others will remain in force indefinitely. Indeed, whilst there are some exceptions to this general trend– some countries like China, Chile and UAE have actually relaxed their screening rules to encourage more FDI – the overarching development seems clear: tougher FDI rules are here to stay.

Clearly, Europe is not immune from this worldwide trend and this briefing provides a guide to the FDI regimes rules in each of the following key jurisdictions.

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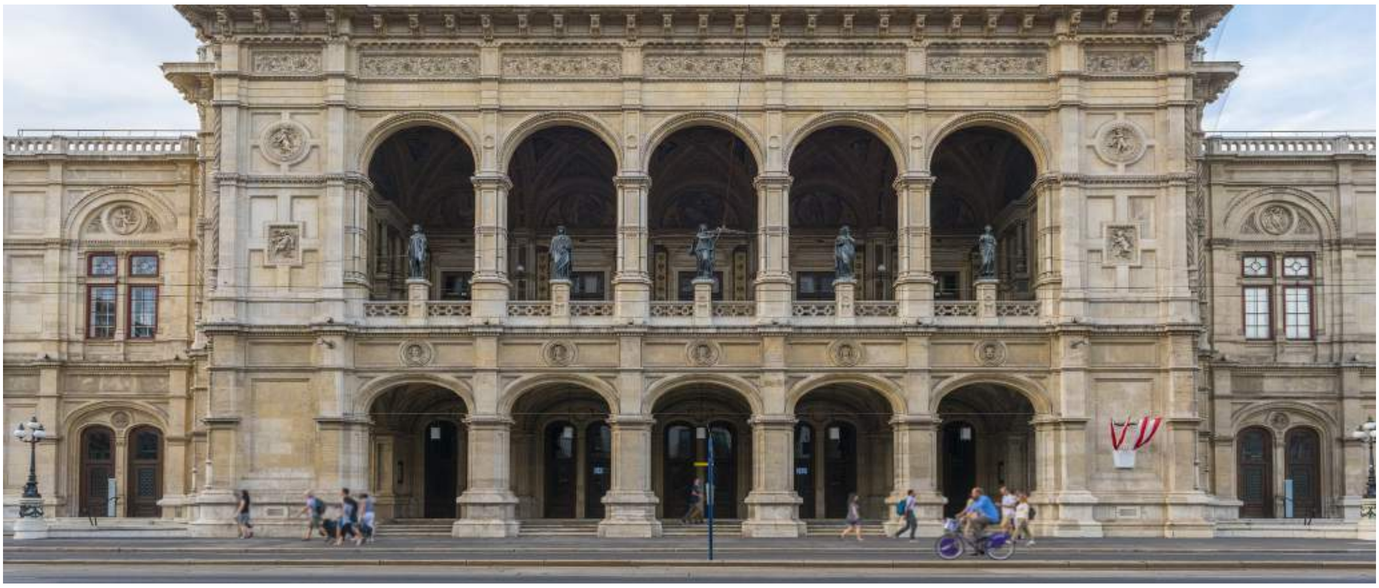
Austria: New Investment Control Act sees a tightening control of foreign direct investments



Austria enacted a new investment screening regime right at the beginning of the COVID-19 crisis. According to the Minister of Economic Affairs, the explicit aim of the new rules was to prevent a "sell out" of the Austrian economy. Set out below is an overview of the Austrian FDI regime.

Background

Until the COVID-19 crisis, the question of FDI was a topic of rather minor importance in Austria. Section 25a of the Austrian Foreign Trade Act was enacted in 2013 in order to control acquisition transactions by non-EEA nationals in Austrian companies that could pose a threat to public security and order within the meaning of Art 52 and 65 (1) TFEU. The extent of this provision, however, was very limited. The scope of the Austrian FDI regime was expanded very significantly in July 2020, when Austria enacted the Investment Control Act ("**ICA**") which replaced the old regime under the Foreign Trade Act. Based on the European FDI Screening Regulation (EU) 2019/452 ("**Screening Regulation**") and developments in Germany, Austria established a very wide notification requirement for transactions which could pose a threat to public security and order in Austria.

Investments subject to control

Pursuant to the ICA, the following transactions are subject to mandatory pre-closing approval by the Austrian Minister of Economic Affairs:

- direct or indirect acquisitions
- by a non-EEA or Swiss national
- of shareholdings meeting certain thresholds (see below) or control
- in Austrian companies
- which are active in one of the areas covered by the ICA.

Acquisitions of micro enterprises (i.e., targets with less than ten employees and a turnover or balance sheet total of less than EUR 2 million) are exempted from the notification requirement.

Relevant areas and shareholding thresholds

The relevant sectors are listed in the Annex to the ICA. In particularly sensitive sectors, the approval requirement is triggered by acquisitions of 10%, 25% or 50% of a company's voting rights (and/or control over the same). These sectors are listed exhaustively in the Annex and relate to:

- Defence equipment and technologies
- Operation of critical energy infrastructure
- Operation of critical digital infrastructure, in particular 5G
- Water
- Operation of systems that guarantee the data sovereignty of the Republic of Austria
- Research and development in the fields of pharmaceuticals, vaccines, medical devices and personal protective equipment.

For targets active in other critical sectors, the filing requirement is triggered by acquisitions of 25% or 50% of the voting rights (and/or control over the same). Unlike the particularly sensitive sectors, the list of potentially critical areas provided in the Act is not exhaustive. It includes:

- Critical infrastructures which are of essential importance for the maintenance of important social functions, such as the sectors of energy, information technology, transport, health, food, telecommunications, etc.
- Critical technologies and dual-use (i.e., civil and military) products: this includes, in particular, artificial intelligence, robotics, cyber security, quantum and nuclear technology, nano and biotechnology, etc.
- Security of supply of critical resources including energy, raw materials, food, medicines, vaccines, medical devices and personal protective equipment.
- Access to sensitive information including personal data.
- Freedom and plurality of the media.

For the purposes of determining whether the shareholding thresholds are met, the voting rights of any and all foreign acquirers which acquire their shareholdings must be added up. Voting rights held in the target by any foreign parent, subsidiary and sister company(ies) of the acquirer (as well as by companies affiliated with the acquirer through syndicate agreements) must also be included.

Legal test and sanctions

Transactions may be prohibited if they are capable of giving rise to a threat to security or public order, including the provision of basic needs and crisis prevention.

As the Austrian FDI regime is suspensory, violations of the approval requirement are punishable by a personal prison sentence of up to one year. Other violations (e.g., intentional deception), are punished more severely still by up to three years' imprisonment. It should be noted too that transactions are transitionally void until authorisation is granted. Moreover, where, in the case of transactions that have already been carried out, there is a reasoned suspicion of a threat to security or public order, conditions can be retroactively imposed, up to and including, a reversal of the transaction.

Practical tips

Unlike some other jurisdictions, the Austrian FDI rules provide for a standstill obligation. Similar to merger control, transactions may not be closed prior to clearance under the FDI Act. In cases where an Austrian entity is directly or indirectly acquired by a non-EEA or Swiss buyer, it is therefore helpful to consider potential Austrian FDI filing requirements at a relatively early stage in planning the transaction. Moreover, the transaction agreements should allow for a sufficient time between signing and closing in order to obtain clearance.

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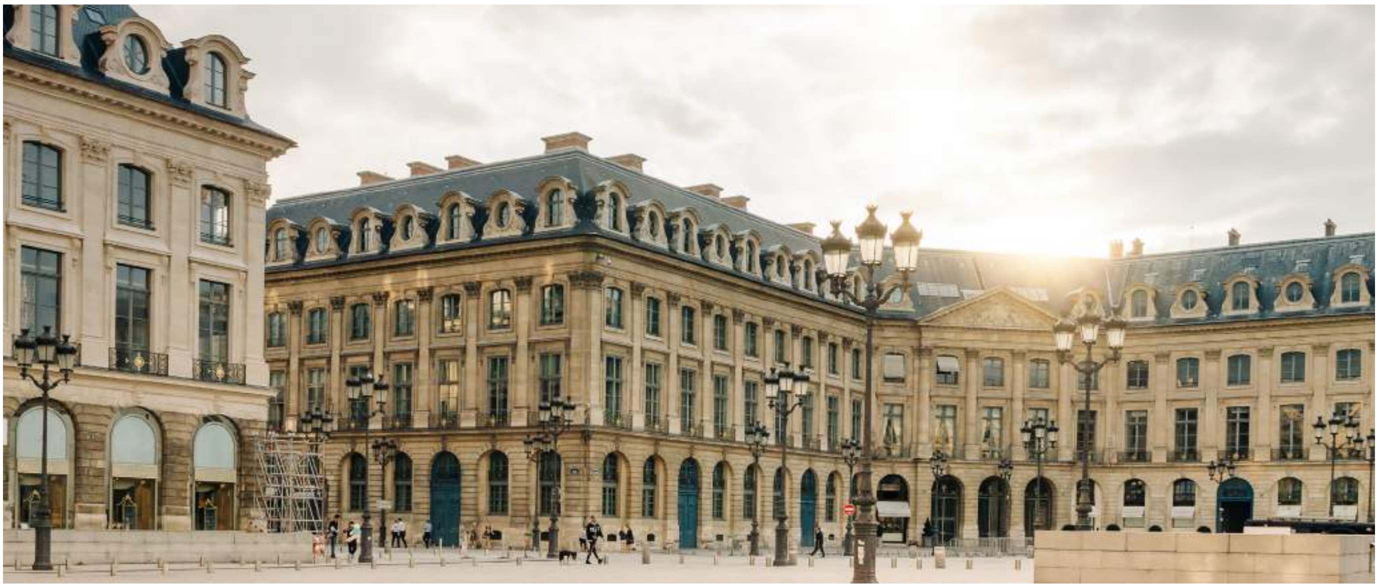
France: Foreign investments in French companies: new rules will mean increased scrutiny



The French authorities are tightening up their scrutiny of foreign investments. The aim is to increase protection of economic sovereignty and industrial resources. On 22 September 2021, a new order was published extending the list of critical technologies to those involved in the production of renewable energy.

More generally, for any transaction involving a direct or indirect foreign investment in France, it is now necessary to determine, on a case-by-case basis, whether prior approval is required from the authorities. This obligation is primarily on the foreign investor. However, French stakeholders – whether acting as sellers of a company or as an innovative company raising capital – also take this criterion into account when selecting foreign investors, as this choice can impact both the feasibility of the proposed transaction and its timeline.

Regulations on foreign investments are becoming tighter

Despite a stated principle of freedom of financial dealings between France and foreign countries, for a long time French law has subjected certain foreign investments in sensitive sectors to the prior authorisation from the Minister of the Economy. This exception to the principle of free movement of capital within the European Union has developed over the past few years in order to restrict foreign policy interference in France and the appropriation of essential skills and expertise.

The increase in recent texts reinforcing the scrutiny of foreign investments in France illustrates this phenomenon such as the PACTE law of 22 May 2019, as well as a number of decrees (dated 14 May 2014 ("**Montebourg**"), 29 November 2018, 31 December 2019, 22 July 2020 and 28 December 2020) and orders (dated 31 December 2019, 27 April 2020 and 10 September 2021).

This trend has partly evolved from a European framework resulting from the Screening Regulation, which aimed at harmonising and coordinating the screening of direct foreign investments in the European Union. Indeed, one of the aforementioned orders of 10 September 2021 was responding directly to the Screening Regulation, as it outlined the complete list of documents to be provided when submitting an application for FDI approval in France so that all necessary information detailed under the new cooperation mechanism could be provided to the European Commission if necessary.

The COVID-19 pandemic has also contributed to this movement. Biotechnologies were added to the list of protected activities in April last year. Moreover, the threshold above which equity investments in listed companies are subject to supervision has been reduced to 10% (this reduction being, in principle, temporary until 31 December 2022).

Investments subject to screening

Beyond this, recent reforms have brought a welcome clarification to the confusion caused by previous laws, now allowing for a more systematic analysis of the transactions concerned. A foreign investment in France will be subject to prior approval from the authorities if three cumulative criteria apply: these relate to the foreign origin of the investor, the nature of the planned investment and the activities carried out by the target company. The sectors subject to this requirement are diverse and have evolved to reflect the transition towards an increasingly digitalised economy. There are three types of activities subject to screening:

- Those that, by their nature, affect national defence, the exercise of public authority, public order or national security (e.g. weaponry, defences against pathogenic or toxic agents, the interception of correspondence and the collection of data).
- Those relating to infrastructure, goods or services that are essential to national interests (in particular the supply of water and energy, the operation of transport or telecommunication networks, public health, food safety and the media).
- Research and development activities into critical technologies (such as cybersecurity, artificial intelligence, quantum technologies, biotechnologies and technologies involved in the production of renewable energy) or dual-use technologies (civil and military) in connection with the aforementioned sectors.

There are two observations to draw from these criteria. The first is that a transaction may be subject to scrutiny by the French authorities even if it is not directly targeted at France: for example, a French FDI review could be triggered from the acquisition by a Chinese investor of an American group, one of whose subsidiaries carries out a protected activity in France. The second is that where the target company carries out a protected activity, even if it is not its main activity, this will suffice to subject the transaction to the prior approval requirement.

Enforcement and sanctions

This approval is not merely a formality - making an investment without the prior authorisation from the Ministry of the Economy exposes the investor to monetary sanctions. The amount of the penalty will be proportionate to the breach committed and can extend to twice the amount of the investment, 10% of the annual turnover (excluding tax) of the company performing the protected activity, five million euros for legal entities or one million euros for natural persons (whichever is the greatest). These sanctions also apply if the authorisation was obtained fraudulently or if any conditions attached to the authorisation were not complied with.

Sanctions can also impact the transferor or the company that is benefiting from the investment because any contractual commitment to make an investment in a protected area without obtaining the required authorisation is null and void. In addition, the Minister of the Economy has the power to: (i) suspend voting rights or distribution of dividends on shares acquired without authorisation; (ii) order that the terms of the investment be amended; or even (iii) order that the transaction be unwound and the target company revert to its previous make-up. Finally, the Ministry of the Economy may impose various conditions on the authorisation, such as eliciting a commitment that the expertise of the target entity will be kept in France.

Practical tips

This requirement for approval is subject to some limited exceptions. Certain transactions which by their nature might appear to be subject to prior authorisation may be able to benefit from an exemption if they are carried out between entities within the same group or are for the purpose of reinforcing a pre-existing foreign controlling investment that has already been approved by the authorities. However, this exception is limited in scope. In reality, the transaction must not result in all or part of the protected activity being transferred abroad, nor prevent compliance with the conditions set out under a previously-obtained foreign investment authorisation.

In case of doubt as to whether the authorisation regime applies to a particular investment, a prior request for a review can be made to the Minister of the Economy. The Minister has two months to respond.

Finally, the screening of foreign investments should not be confused with the system for declaring beneficial owners or with the obligation to report statistics to the Bank of France in respect of certain direct foreign investments. These are subject to their own separate regimes.

The aim of the authorities is to ensure that strategic activities are protected and essential skills and expertise are kept in France. The new regime is complex and a detailed analysis is therefore required for any investment into critical sectors, particularly in the fields of new technology and health.

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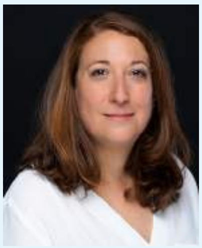

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Germany: Foreign direct investment in Germany

In order to prevent security risks, the German Federal Ministry for Economic Affairs and Energy may review and, in the worst case, prohibit the acquisition of German companies by foreign buyers on a case-by-case basis. The German Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance provide the legal basis for this. Each year, more than 100 acquisitions of German companies by foreign investors are subject to mandatory or voluntary FDI screening.

Whereas such screenings have been quite relaxed in the past, during recent years, due to various amendments of the applicable German laws, FDI control has become tighter, where it now covers more business sectors and even applies, in certain cases, to (indirect) minority stakes of 10% or more of a company's shares. Since sanctions may be imposed on the transaction partners for non-compliance with approval requirements, we recommend checking upfront for each foreign transaction whether German FDI may be triggered, similar to checking merger control filings.

Broader scope of German FDI

In the wake of several critical investments from non-EU states, in particular acquisitions in sensitive and high-technology industries, and as a result of implementing the Screening Regulation, the German Foreign Trade and Payments Act and the German Foreign Trade and Payments Ordinance have recently been amended several times, where the latest amendment came into play in May 2021 which tightened the FDI regime applied by the German Ministry of Economics (Bundesministerium für Wirtschaft) ("**BMWi**").

Consequently, it is now the case that, generally, the scope of industries subject to *ex ante* FDI approval is much larger, including industries not only relevant for military purposes or critical infrastructures, but also for many high-tech, medical and health care related areas. *Inter alia*, in reaction to the Covid-19 pandemic, personal protective equipment (including preliminary products and components), essential drugs (including starting materials and active ingredients), in vitro diagnostics in the field of infectious diseases (including precursors and components), and medical devices for infectious diseases (including preliminary products and components) are now covered by the FDI regime.

Moreover, the acquisition thresholds triggering FDI scrutiny have been lowered significantly from 25% to, in certain cases, 10% or 20% of the voting rights.

Sector-specific, cross sectoral and "catch-all" examinations

The scope of controlled business areas is threefold under the new German FDI regime:

- First, the sector-specific review deals with investment projects that are particularly relevant for Germany's national security. It applies to any investor who is not a German national, i.e. including EEA nationals. The amended law basically covers the whole defence sector, including war weapons and other key military technologies, specially designed engines and gearboxes for military tracked armoured vehicles, and products with IT security features that are used for processing classified Government information. Similar special rules also apply to the acquisition of a company that operates a high-grade earth remote sensing system (Section 10 of the Act on Satellite Data Security). The review considers whether the respective acquisition poses a threat to essential security interests of the Federal Republic of Germany
- As regards the so called cross-sectoral examination, the case group catalogue has been significantly expanded, including not only critical infrastructure, but also emerging technologies, such as artificial intelligence, robotics, nanotechnology, semiconductors and quantum/nuclear technology, as well as automated vehicles, health, farming and mining businesses, etc. Here, however, only investments by EEA-outsiders are subject to FDI scrutiny. The review considers whether the respective acquisition poses a threat to the public order or security of the Federal Republic of Germany, i.e. whether the acquisition represents a sufficiently serious and present threat that affects a fundamental interest of society.
- Finally, the BMWi has the power to screen any and every transaction ("**catch-all**") that is likely to affect the security or public order of the Federal Republic of Germany, any other member state of the European Union or with respect to a project of or programme of union interest within the meaning of Article 8 of the Screening Regulation.

Triggering events

The applicable acquisition thresholds triggering FDI scrutiny depend on the kind of examination as detailed above.

- Sector-specific and cross-sectoral transactions listed in Sec. 60ff., 55a (1) No. 1-7, 8-27 of the Foreign Trade and Payments Ordinance must be notified to the BMWi *ex ante*, i.e. they must not be closed until the acquisition has been cleared or is deemed to be cleared.

  A 10%-acquisition threshold (voting rights) applies for highly sensitive industries (defence and critical infrastructure; Sec. 60ff., 55a (1) No. 1-7), and 20% for cross-sectoral industries according to Sec. 55a (1) No. 8-27). A renewed notification is required where shareholdings are increased, meeting the following thresholds of 20%, 25%, 40%, 50% or 75%, depending on which sector is concerned.

  In practice, even indirect investments are covered. Where a foreign parent company does not directly acquire shares in a target, but rather uses its (EU) subsidiary to conduct the investment, the BMWi would look through the directly acquiring EU subsidiary and consider the indirect acquisition by the foreign parent company as a trigger. This applies even in cases where the foreign investor holds 10% or more of voting rights in the directly acquiring (EU-based) company, the acquisition of a German target active in a critical sector will be attributed to the foreign investor.

- A 25% threshold exists in relation to the "catch-all" power of the BMWi to screen every security relevant transaction. Here, there is no pre-closing approval required. However, if a security relevance is sufficiently likely, parties may voluntarily apply for a certificate of non-objection in order to avoid the possibility that the acquisition will subsequently be upheld.

Non-compliance

The BMWi may prohibit a transaction in whole or in part and may issue restraining orders. It may also prohibit or restrict the exercise of voting rights in the target company and appoint a trustee for unwinding a closed transaction. In addition, a foreign investor acting contrary to a decision by the BMWi risks monetary fines and/or criminal liability.

Outlook

As with other EU Member States, FDI approval in Germany has now become an important checkpoint in many M&A transactions, possibly leading to prolonged transaction processes and even conditions and/or commitments to be imposed on the parties.

In Germany, we have seen a real increase in the number of filings – on average, more than 40% year on year from 2018 to 2020. In fact, in 2018, there were 78 reviewed compared with 106 reviews in 2019 and 160 cases in 2020. As of May 2021, there had already been 100 cases. As such, we expect the number of reviews to continue to increase. Some of the latest prohibition decisions concerned (variously) a telecommunications technology provider, energy grid operators and metal spinning technologies.

However, in spite of this we are still positive that the vast majority of notifiable transactions will be cleared in Germany.

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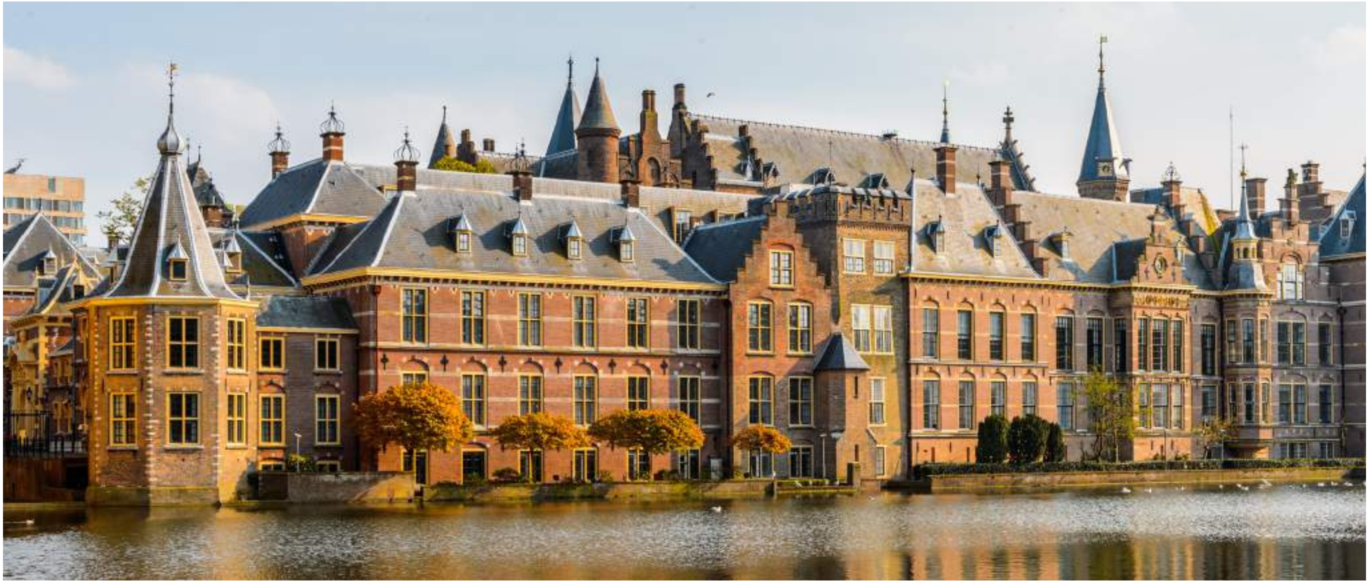
The Netherlands: Foreign direct investments rules



Introduction

In the Member States of the European Union, including the Netherlands, specific rules apply to natural persons or undertakings that want to invest in national companies responsible for vital economic processes or active on the market for sensitive technology (including dual use technology). In addition, EU Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the European Union (hereinafter 'Screening Regulation' or 'Regulation') establishes a cooperation framework to screen FDI at the EU level. The Regulation is directly applicable in the Dutch legal system and, as such and similarly to other EU regulations, operates alongside the national legislation (i.e. does not replace it). Member States have the discretion to issue their own FDI legislation within the boundaries of EU law. Each Member State is responsible for its own tailor-made piece of FDI legislation, which can lead to substantial differences between European countries. For a non-EU investor that considers investing in a Dutch company, it is therefore crucial to have an overview as well as an understanding of the relevant Dutch FDI framework.

The Screening Regulation

As a preliminary note, the Regulation does not establish a fully-fledged EU level FDI control regime, nor does it replace existing national rules. Instead, it introduces an overarching FDI information framework for the whole European Union, designed to complement national rules. Furthermore, the Regulation provides a mechanism for cooperation and information exchange between the EU Member States and the European Commission (including the possibility of issuing opinions).

The Regulation does not prescribe which institution may review a foreign investment that falls within its scope. As noted, the decision on whether to screen an investment, and whether to adopt any control measures, remains the sole responsibility of EU Member States. The national foreign investment rules that apply to a particular investment determine the relevant body competent to review an investment.

The Regulation lays down a set of minimum principles for national FDI control regimes (whether pre-existing or adopted following the Regulation). The Regulation provides for a number of criteria and examples that EU Member States can draw on in establishing national FDI legislation and in determining whether an investment is likely to affect national security or public order.

The (future) Dutch FDI regime

The Dutch legislator has drafted a legislative proposal ('Investment, Mergers and Acquisitions Screening Bill' ("***Screening Bill***")) that creates a general screening mechanism for FDI. The Dutch Minister of Economic Affairs (or its executives) will oversee the new regime.

The new Dutch screening mechanism will apply to transactions that cause a change in control within one or more undertakings in the Netherlands which: (i) are considered responsible for vital economic processes; or (ii) are active on the market for sensitive technology (including dual-use technology). Any change of control in 'vital' companies by candidate investors must be notified to the Dutch Minister of Economic Affairs. The threshold is lower for sensitive technology undertakings: notification is already required if 'significant influence' in the target will be established. Note that threshold values which will indicate 'significant influence' will be determined by Government decree.

The Minister of Economic Affairs will take a screening decision within eight weeks. This term can be extended to six months. The Minister can, in case of threats to national security, choose to allow a notified transaction under specific terms, or (if this is deemed insufficient to remedy the threats), prohibit the notified transaction. Any action that infringes the screening decision is considered void.

The Screening Bill is currently still in the legislative process. Once the Screening Bill comes into force it will have a retroactive effect and may apply to investments made since 9 September 2020 that fall within its scope. The Dutch Government admits that retroactive intrusion in the ownership of companies is a harsh measure. The FDI rules will therefore only apply retro-actively in circumstances that have the potential to pose a public threat as a result of the investment.

As indicated in the above, the Screening Bill focuses on two areas when determining whether national interests are at stake:

- **Critical infrastructure or vital processes**. The relevant areas are specified on the website of the National Coordinator for Counterterrorism and Security ("**NCCS**") but they will ultimately be laid down in law. Under certain circumstances they can be (temporarily) extended by a Governmental decree.
- **Sensitive technology.** This area mainly focuses on strategically important products that can be used for both civil and military purposes.

Note that the Screening Bill does not discriminate between sensitive investments from within the national territory, the European internal market or third countries: the Dutch regime can apply to all investments regardless of the nationality of the investor.

Screening checklist for future (contemplated) investments in the Netherlands

We advise prospective investors to go through the following checklist before making any investments in a Dutch company:

- The first step is to define the sector in which the target undertaking is active.
  - In this step, it is important to identify if the investment is aimed at a company that is providing a vital process, or, if the investment is aimed at a company that is active in the production of sensitive technology.
- The second step is to decide which screening mechanism applies to investor's envisaged investment.
  - Different screening mechanisms may apply to a particular investment. It is therefore vital to understand which one applies. It is important to note also that specialised acts can stand alone from the Screening Bill and that the separate merger control system of the Competition Act exists alongside, and in addition to, the Screening Bill's mechanism.
- The third step is to determine the effect of the investment on the control situation within the target undertaking.
  - In essence, the investment must give rise to a legal or *de facto* control within the target company.
  - In case of 'sensitive technology', the 'significant influence' standard has to be met. As noted, threshold values establishing 'significant influence' will be determined by Governmental Decree on a sector-by-sector basis or per number of undertakings.
- At the fourth step, investors need to establish when their investment will take place and which corresponding FDI regime is applicable.
  - Three different periods determine under which FDI regime the investment falls:
    - Firstly, only specific sector mechanisms may apply to the investment if it took place before 9 September 2020.
    - Secondly, if the investment took place between 9 September 2020 and the date of entry into force of the Screening Bill, a retroactive screening may apply to the investment.
    - Thirdly, if the investment took place after the date of entry into force of the Screening Bill, the new FDI regime will apply and the Minister of Economic Affairs needs to be notified.
- Upon completion of the four steps, a screening decision may follow.
  - The Minister of Economics Affairs can make three type of decisions.
    - To allow the intended investment without further restrictions.
    - To allow the intended investment while laying down specific additional obligations or requirements for investors to adhere.
    - To prohibit the intended investment.

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Spain: Foreign direct investments rules

The additional Spanish foreign investment rules enacted at the beginning of the Covid 19 pandemic, and currently in force are regulated under (i) Article 7 bis Act 19/2003 (added by means of Royal Decree Law 8/2020 of 17 March and subsequently amended) and (ii) the Transitory Provision of Royal Decree Lay 34/2020 of 17 November.

These rules may be summarised as follows:

A few definitions:

"**Non-EU/-EFTA residents**" means (i) residents in any country other than EU/EFTA member states, or (ii) residents in EU/EFTA member states whose beneficial ownership corresponds to residents outside the EU/EFTA, a category which includes any EU/EFTA companies in which residents of countries outside the EU/EFTA directly or indirectly possess or control 25% or more of the shares or the voting rights, or otherwise exercise direct or indirect control (there is no indication as to whether this could be computed individually or in aggregate).

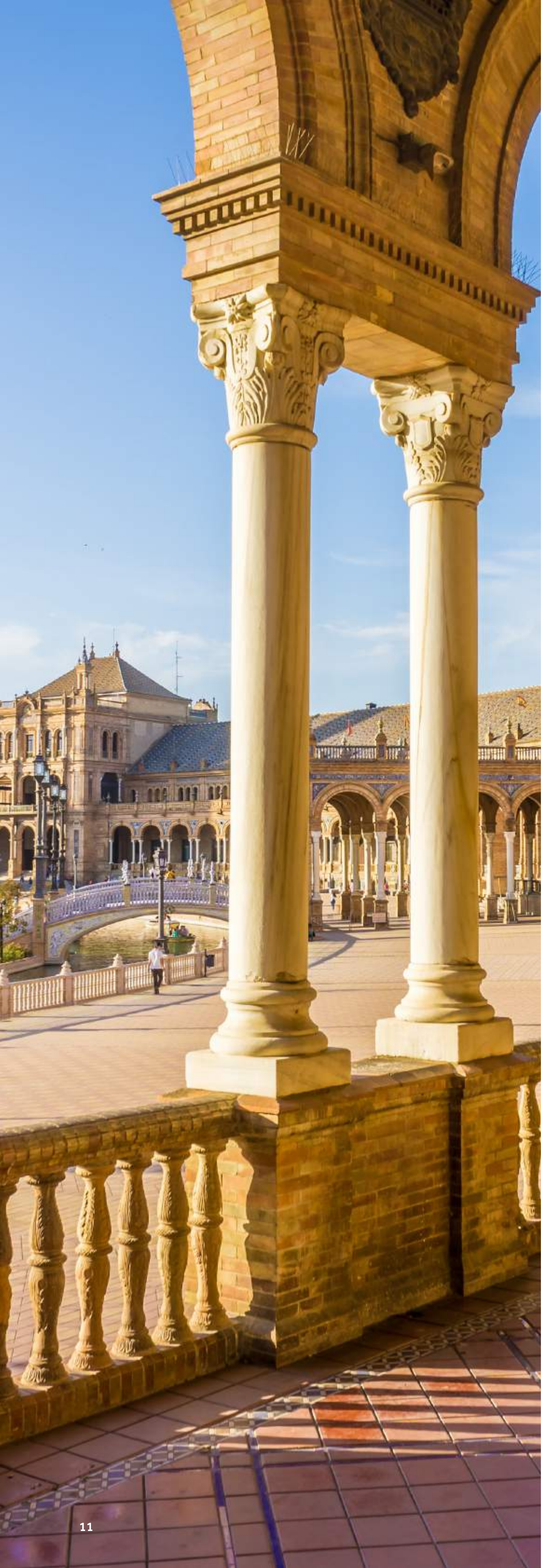
"**Significant Stake**" means a share of 10% or more in the capital of a company or a position that allows the investor to exercise a decisive influence in the management or control of a company.

"**Foreign Direct Investment**" means any investment by Non EU/EFTA residents which results in such residents having a Significant Stake in a Spanish company.

"**Strategic sectors**" includes:

- **Critical infrastructures**, both tangible and virtual (including infrastructures in energy, transport, water, healthcare, communications, media, data storage and processing, aerospace, defence, finance or sensitive installations).
- **Critical technologies,** dual-use items and key technologies for leadership and industrial capability or developed under programmes of specific interest for Spain (including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnology, biotechnology, advanced materials and advanced fabrication systems).
- **Fundamental supplies**, including energy (electricity and hydrocarbons), supplies affecting raw materials or food safety, and strategic connectivity services.
- **Sectors with access to sensitive information** (including personal data) affecting public order, healthcare or security.
- **Media**.

Additionally, the Spanish Government may include additional sectors in this list and, equally, unilaterally suspend the regime of liberalisation of Foreign Direct Investment in Spain vis-à-vis those and other sectors, when the same may be deemed to affect public safety, public order and public health.



"**Specifically Restricted Investors**" means any Non-EU/-EFTA residents falling in any of the following categories:

- Investors directly or indirectly controlled by the Government of a third country (including its Governmental bodies and armed forces).
- Investors having made investments or participated in businesses related to security, public order or public health (including, but not limited to, the Strategic Sectors) in other EU member states.
- Investors which present a serious risk of carrying out illegal activities affecting public security, order or health in Spain.

Investments subject to prior authorisation:

- Direct Foreign Investment in Strategic Sectors requires prior Government authorisation.
- Direct Foreign Investment by Specifically Restricted Investors requires prior Government authorisation.
- Investments below 1 million euros are exempt.

Transitional regime:

An additional transitional regime has been established until 31 December 2021, by means of which the above-mentioned regime will also be applicable to Direct Foreign Investments made by EU/EFTA Residents if they acquire a Significant Stake in either (i) a Spanish listed company or (ii) a Spanish non-listed company if the investment value is above EUR 500 million.

"**EU/EFTA** residents" means for the purposes of this clause: (i) residents in any EU/EFTA member state other than Spain; or (ii) residents in Spain whose beneficial ownership corresponds to any EU/EFTA member state other than Spain, a category which includes any Spanish companies in which residents in any EU/EFTA member state other than Spain directly or indirectly possess or control 25% or more of the shares or the voting rights, or otherwise exercise direct or indirect control (there is no indication as to whether this could be computed individually or in aggregate).

This transitional regime was originally established until 30 June 2020 and was subsequently extended. Therefore, it is possible that it is extended again before the end of 2021.

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Sweden: One step closer towards an FDI screening mechanism

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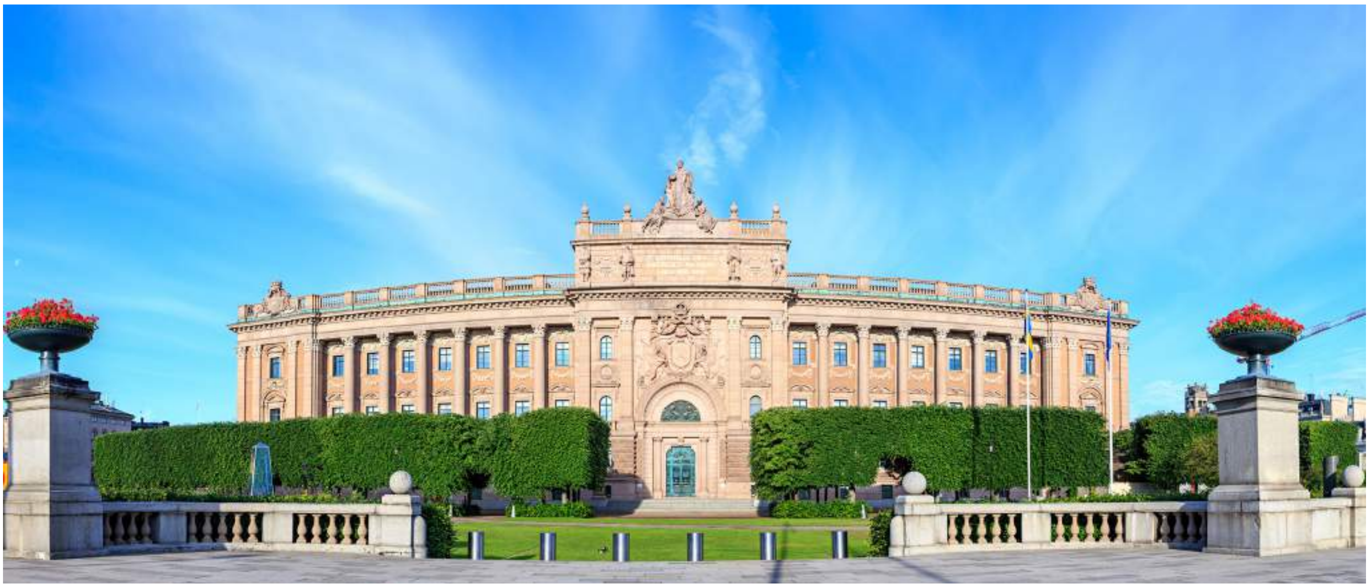


Even though there are certain legal frameworks aimed at protecting Swedish interests from potential hostile actors, Sweden at the moment has no general FDI screening rules[1].

The Screening Regulation which established a framework for the screening FDI at the supra-national European level has applied in Sweden since October last year. The Screening Regulation imposes an obligation on each Member State to set up a national contact point for the exchange of information and views on FDI. Swedish legislation has been amended to adapt to, and implement, the Screening Regulation through the Act on Supplementary Provisions to the EU FDI Screening Regulation (SFS 2020:826) ("**Supplemental Act**") (S*w. lag med kompletterande bestämmelser till EU:s förordning om utländska direktinvesteringar*).

The contact point in Sweden is the Inspectorate of Strategic Products (*Sw. Inspektionen för strategiska produkter*) ("**ISP**"). The contact point may, according to the Supplemental Act, gain access to (and provide to the European Commission) the sorts of information prescribed in Article 9.2 of the Screening Regulation, and will have powers for instance to order a foreign investor (or the company in which the investment is intended to take place) to submit such information. The Supplemental Act does not, however, provide for a general screening mechanism. It does not empower the ISP, the Government or any other authority to prohibit an acquisition. Similarly, there is no notification requirement for investors (foreign or otherwise).

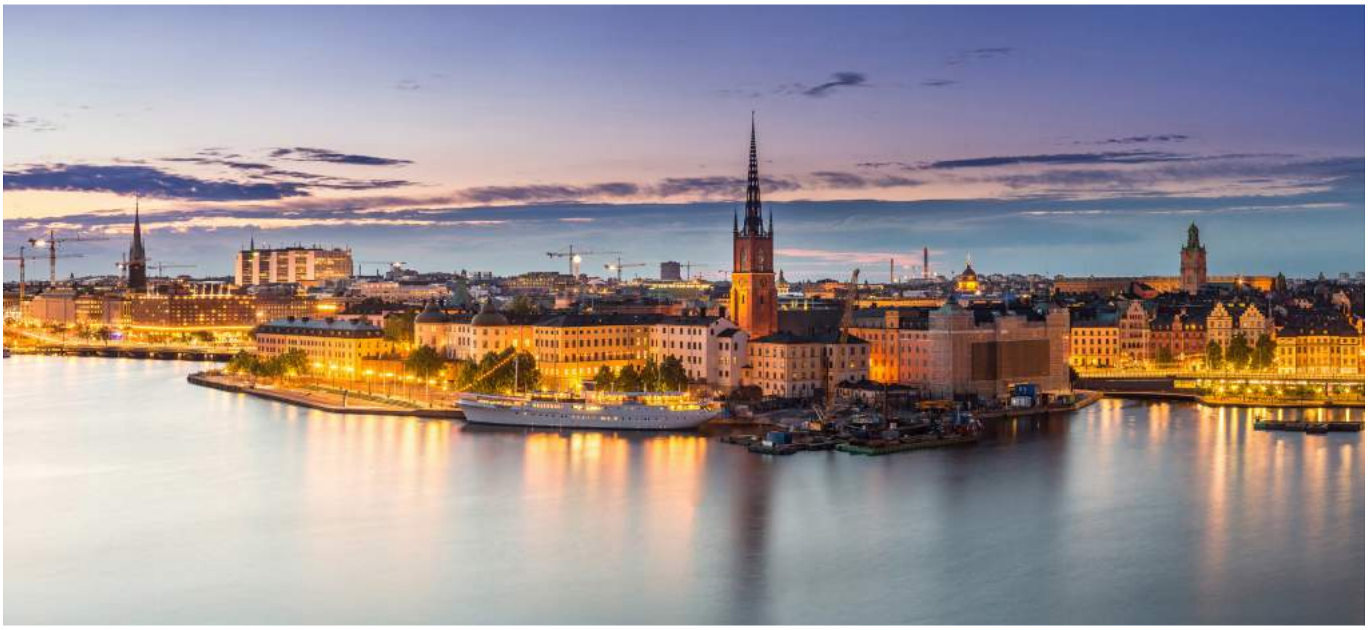
A proposal for a FDI screening mechanism

In 2019, the Swedish Government appointed a special investigator to assess how a national system for FDI-screening, in compliance with the Screening Regulation, could be designed ("**Inquiry**"). As a first step, in March 2020 the investigator proposed the adaptations accounted for above in relation the Screening Regulation.

On 1 November 2020, the investigator presented a final report ("**Report**") with proposals for a new FDI regime in Sweden. It is proposed that the regulatory framework shall enter into force on 1 January 2023. The Report will now be referred for consideration to the relevant Government and public bodies.

In this summary, we will cover some of the most relevant aspects of Sweden's proposed FDI regime as outlined in the Report.

[1]When it comes to national security, the Protective Security Act (SFS 2018:585) (Sw. Säkerhetsskyddslag) applies to certain types of activities or businesses. The Protective Security Act applies to anyone conducting security-sensitive activities in, or in relation to, Sweden. Security-sensitive activities are activities that are of importance to Sweden's security or are covered by an international protective security commitment that is binding for Sweden. Thus, there is a certain threshold of sensitivity of an entity's business to be covered by the Protective Security Act. Since 1 January 2021, there have been rules in the Protective Security Act applicable to entities conducting security-sensitive activities who intend to sell all (or any part of) the security-sensitive business, or property that is important for Sweden's security or an international commitment to Sweden for security protection. Such entities must perform a security assessment and consult with the Swedish Security Service (Police) (Sw. Säkerhetspolisen) or the Swedish Defence Agency (Sw. Försvarsmakten) (depending on the type of business in question). The consulting agency can, in certain cases, decide to prohibit a transaction. The obligation to consult also applies to persons intending to sell shares in non-public entities that conduct security sensitive activities. There are also rules which limit the level of foreign ownership in companies which are involved in the manufacturing of military equipment – these rules are, however, of limited scope.



Overview of Sweden's proposed FDI regime

The Report's starting point is that FDI in Sweden is ultimately beneficial and, as such, should only be prohibited if necessary. Any new screening mechanism should target only harmful investments and should not intervene more than is necessary to protect Sweden's security interests. It has been proposed that the Swedish mechanism for screening FDIs should cover those investments that could pose a risk to Sweden's security – its national competence – and those that could pose a risk to public order or security in Sweden in accordance with EU law.

A foreign direct investment is proposed to be defined as a direct investment where the investor is a natural person with a citizenship other than solely Swedish, or a legal person ultimately owned or controlled by another State or by natural persons with a nationality other than only Swedish. A direct investment is defined in the proposal as an investment made to establish or maintain lasting links between the investor and the undertaking for which the capital is made available to conduct economic activities, including investments that enable effective participation in the management or influence of an undertaking conducting economic activities of any description.

Nationality of the investor and the proposed screening authority

The investigator proposes that both third country investors, and investors from EU Member States, should be subject to any new FDI screening in Sweden. Further, investments made by investors from Sweden should also be subject to a notification obligation. If any prospective investor is a natural person whose only citizenship is Swedish, however, the notification requirement will (under current proposals) be waived. This also applies if the investor is a legal person ultimately owned or controlled only by natural persons with only Swedish citizenship.

It is further proposed that the ISP – in addition to being the contact point for information exchanges with the European Commission – will also be the relevant screening authority.

What undertakings are proposed to be covered by the screening mechanism?

Even though it is pointed out that limited companies will be in focus for a screening mechanism, it is proposed that any new FDI screening regime should apply to investments in limited companies, partnerships, unincorporated partnerships, sole trader undertakings, economic associations, and foundations and trusts domiciled in Sweden.

...and which activities might be covered by the new regime?

The Report proposes a list of certain activities that would be covered by a new FDI screening regime. Furthermore, the Report suggests that the Government (or, in some instances, the relevant agency acting on the Government's behalf) should be able to amend this list through various ordinances or administrative provisions.

Looking at the proposed list of sectors, media undertakings are proposed to be excluded but the following areas are proposed to be covered:

- Essential services (services or infrastructure that maintains or assures societal functions that are vital to society's basic needs, values or safety. For instance, energy supply, financial services, health care, information and communication, food and transport).
- Security-sensitive activities (covered by the Protective Security Act (SFS 2018:585) (Sw. Säkerhetsskyddslagen), aiming to safeguard those activities that are in greatest need of protection from a national perspective).
- Activities that prospect for, extract, enrich or sell raw materials that are critical to the EU, or other metals and minerals that are critical to Sweden.
- Activities whose principal purpose is the processing of sensitive personal data or location data.
- Activities related to emerging technologies and other strategic protected technologies.

- Activities that manufacture, develop, conduct research into or supply dual-use products or supply technical assistance for such products.
- Activities that manufacture, develop, conduct research into or supply military equipment or supply technical support for military equipment.

Assessing the proposed investor

According to the proposal, the ISP (or whichever body ultimately takes this role) shall assess whether the investor is directly or indirectly (in whole or in part) controlled by the Government of another country through its ownership structure, or substantial financing, or in some other way. Further, the ISP shall assess whether 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. If there are other circumstances surrounding the investor that could pose a risk to Sweden's security or public order or security in Sweden, those shall be assessed as well.

The proposed screening process

The obligation to notify

The proposal entails that anyone planning to make an investment covered by the proposed new FDI regime is required to notify the investment to the ISP. The notification must be made before the investment is implemented. The investor, as well as the target undertaking, will, according to the proposal, be required to provide any necessary information or documentation that the ISP requests.

The obligation to notify an investment should, according to the proposal, arise if the investment results in a certain interest in the target undertaking. Depending on the type of target, the interest is expressed differently. In situations where the target is a limited company or an economic association, for example, it is proposed that any investment which would result in the investor acquiring 10% or more of the total number of votes in the undertaking (through their shareholding, other participations, or membership) must be notified. An investment must also be notified if the investor (alone or with others) forms a limited company or an economic association through the investment and thereafter commands 10% or more of the total number of votes. However, it is pointed out that an investor can gain influence over an undertaking's management in other ways than ownership. For instance, provisions in the by-laws or articles of association or agreements with partners may grant the right to appoint or remove board members or exert influence in other ways. Existing undertakings can also merge into a joint venture. Therefore, the Report proposes that any investments which do not either reach the 10% threshold but nonetheless give the investor influence over the management of a limited company or an economic association (or other legal entities) must also be notified, provided that the target undertaking carries on an activity covered by any new FDI regime.

A two-step procedure, prohibiting an investment and administrative sanctions

Screening is proposed to be a two-step procedure. An initial assessment of 25 working days will apply for the ISP to decide whether or not to take any further action (such as a full examination). If the ISP decides to examine the investment, the proposed general rule is that the ISP must make a final decision within three months of the decision to initiate the examination. This deadline may, however, be extended up to six months under certain circumstances.

The ISP, according to the proposal, should be able to make a decision to approve an investment subject to conditions or, in the worst-case scenario, to prohibit the investment altogether (which would render the underlying deal null and void). When it comes to investments in listed companies, however, the ISP may instead require the investor to simply sell the shares that have been acquired (a divestment remedy).

As regards to any breaches of the proposed FDI regime, the Report proposes an administrative fine of anything between SEK 25,000 to 50 million (depending on the severity of the breach in question).

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United Kingdom: Foreign direct investments rules

The National Security & Investment Act ("**NSIA**") comes into full effect on 4 January 2022. It creates a new standalone regime which allows the UK Government to scrutinise and intervene in transactions that give rise to national security concerns. It represents a major change in UK regulation in takeover and investment deals. A new agency called the Investment Security Unit ("**ISU**") sitting in the Department for Business, Energy & Industrial Strategy ("**BEIS**") will enforce the NSIA, but the Secretary of State ("**SoS**") will be the ultimate decision-maker.

Key points include:

- **New Mandatory Notification Regime**: From 4 January 2022, a mandatory filing regime will capture acquisitions of more than 25%, 50% or 75% of shares/voting rights in entities (including a company, LLP, any other body corporate, a partnership, an unincorporated association or a trust) involved in any of the identified 17 sensitive sectors. Lower thresholds may apply depending on the voting rights attached to the acquired shares. Parties will need to obtain prior clearance from BEIS before they can close the deal.

  The 17 sensitive sectors are very broad in scope and technical in nature, covering: advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to Government, critical suppliers to the emergency services, cryptographic authentication, data infrastructure, defence, energy, synthetic biology, military and dual use, quantum technologies, satellite and space technologies and transport.

- **Voluntary Regime:** Voluntary notifications will be advisable in respect of any acquisitions of shares, voting rights and /or assets falling outside of the 17 sectors, if such deals could give rise to a potential national security concern. Importantly, the voluntary regime applies to acquisitions of assets (e.g. IP, land, physical property) and not just shares / voting rights. The trigger events are the same as under the mandatory regime, but will also capture acquisitions of less than 25% where the acquirer would gain (or has gained) "material influence" (which could apply to, for example, an acquisition of shareholdings as low as 10%, acquiring the right to make director appointments and/or any special voting rights).
- **Retrospective "Call-In" Powers:** From 4 January 2022, BEIS will have the power to "call-in" deals for an in-depth review where it reasonably suspects that they will give rise to a national security risk. This "call-in" power will also apply retrospectively to any applicable deals that were entered into or closed after 12 November 2020. BEIS' "call-in" power will be subject to a 5-year limitation period, which may be reduced to 6 months once BEIS becomes aware of the deal.
- **Significant Penalties:** Any failure to make a mandatory filing when required will result in significant consequences for the parties, including fines of up to 5% of a company's worldwide turnover or £10 million (whichever is the higher) and individual criminal sanctions of up to 5 years imprisonment. Transactions will also be automatically void and unenforceable.

- **No Safe Harbours:** There are no *de minimis* financial, transaction value or other market share thresholds. The NSIA can even apply to intra-group deals.
- **Broad extraterritorial scope:** The NSIA applies to UK and non-UK investors as well as to investments in UK entities/assets or foreign entities/assets that have some UK nexus (e.g., overseas companies which carry on activities in (or partly in) the UK or which supply goods or services to persons based in the UK).
- **Outcomes:** BEIS will have the power to either clear, impose conditions on, or unwind or block an acquisition to address any national security concerns identified. Indeed, BEIS will also have the power to impose hold separate orders on parties to prevent businesses from integrating whilst it conducts its review.
- **Review process:** Although, BEIS has indicated that it will assess transactions swiftly, such that parties could get a clearance within 30 working days, the approval process could also extend to 105 working days or more. Parties need to factor this into a deal's timetable and feasibility (e.g., including a realistic and (ideally) flexible longstop date).

Companies and investors should ensure that they are familiar with the new rules now, particularly since the NSIA regime applies retrospectively to any deals taking place currently. In so doing, parties should carefully consider whether (e.g.) the nature of a target company's activities have inherent (or could harbour) national security risks such that a subsequent notification to, and/or informal engagement with, BEIS would be prudent. In particular:

- If you think your transaction is a notifiable acquisition under the mandatory regime, and it would complete on or after 4 January 2022, then you will need to notify it and obtain clearance prior to closing. You will want to consider preparing the filing in advance and including suitable condition precedents, cooperation clauses, warranties and representatives in your corporate deal documentation to address any NSIA risk adequately.
- Even if the deal will (or could) complete before 4 January 2022, parties should consider whether it may give rise to national security concerns and, if this is the case, it may be sensible to consider making BEIS aware of any deal that would otherwise require notification given the possibility of a retrospective "call-in". Apart from anything else, this would reduce the timeframe within which BEIS will be able to "call-in" the deal to 6 months (as opposed to 5 years).
- But importantly, also, it is possible to engage informally with BEIS in order to obtain some guidance from them before 4 January 2022 even if a mandatory notification is ultimately required (or a voluntary filing is deemed to be prudent). In this way, parties can get some comfort now that a deal will not get "called in" or (in the worst case) blocked post-completion and will get cleared post 4 January 2022. BEIS have also indicated that any formal filing made after 4 January 2022 should hopefully be reviewed more quickly if they have considered the matter already on an informal basis (assuming there are no national security concerns).
- Note, of course, that over the next month, transactions which raise national security concerns are still subject to the existing public interest regime under the Enterprise Act 2002 ("**EA 2002**"). As such, if deals already trigger this regime, it may (in certain circumstances and depending on the deal in question) be necessary to consider notifying this deal to BEIS or the CMA (which, until 4 January 2022, carries out any national security assessments under EA 2002). The risk of intervention under the current regime is not theoretical. In the last few years, the number and nature of interventions has increased (with high-profile public interventions in deals such as NVIDIA's proposed acquisition of Arm and Cobham's proposed investment in Ultra Electronics). Once the NSIA comes into force, the existing national security ground under the EA 2002 will be repealed.

Ultimately, it will be important for deal parties to carry out an NSIA assessment early on in a transaction (in parallel, and in addition to, any merger control assessment) and to seek any clearance as early as reasonably possible in order to minimise any potential delay to completion of the deal.

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