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Gernandt & Danielsson

Swedish FDI Regime – Cheat Sheet

1 December 2023



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As of 1 December 2023, transactions (including intra-group transactions) involving Swedish entities may be subject to a mandatory and suspensory FDI approval process.

While the agency (**ISP**) is yet to develop guiding precedents, this deck provides a “cheat sheet” for a first screening of

- (i) whether an envisaged **transaction structure** falls within the scope of the FDI-legislation, and
- (ii) if the **underlying business** (the *Target*) triggers a filing obligation

Practical pointers relevant to negotiating transaction terms are also set out.

Type of Transaction Structures Caught

When the following conditions are met:

- The Target or any of its subsidiaries are **incorporated in Sweden**; and
- The transaction, **irrespective of form** (e.g. green field investments, new share issues, acquisition of shares / assets, granting/waiving a loan in return for shares / influence) results in the investor:
 - Acquiring at least 10% of the **votes** (or increases its existing stake to 20%, 30% 50%, 65% or 90%); or
 - Gaining **influence** over the Target, e.g. by way of the right to appoint a board member or the right to influence the overall business of the Target



Certain particularities with the Swedish regime

- The **nationality** of the investor is **irrelevant** for the purposes of determining filing obligation – even Swedish investors must file. However, ISP aims to approve Swedish & EU-investors quicker than the **Phase I target 25 business days deadline**.
- ISP considers that **intra-group transactions are caught** when a new entity within the group acquires votes or influence over a sensitive target, e.g. filing obligation arises when a sensitive business is transferred from subsidiary A to subsidiary B although both subsidiaries are ultimately controlled by the same parent company.
- Each time a voting **threshold is exceeded** a new filing obligation is triggered. For instance, a transaction resulting in 20% voting stake is filed and approved. If the same investor reduces its stake to 18% but then subsequently increases the stake again to 20%, a new filing must be made before the investor can acquire the additional 2%.





Underlying Businesses Subject to FDI Screening

The regime covers in practice two sub-groups:

- “Usual suspects” in terms of **security** and **strategically** sensitive activities: e.g. military, dual-use products, processing of large amount of personal data; exploration / production / sale of critical minerals and raw material; emerging technologies etc.
- A broad range of activities considered to be **essential to society at large** set out in an implementing regulation. Among the many activities listed (some with turnover or production thresholds) a none exhaustive selection is provided below:

Food chain supply	Production / distribution / trade of electricity, fuel and certain chemicals	Educational activities (including preschool and elementary school)
Pharmaceuticals, biotech and health care services (including supplies / facilities related to them)	Management of properties in which certain socially essential activities are carried out (e.g. data centres, universities, hospitals, police, laboratories)	Infrastructure (e.g. heat, water and waste management, tunnels, transport networks and hubs, public transport)
Financial services such as banking, life insurance and pension fund operations as well as support services to financial markets	Scanning services, cartography, printing of material related to decisions of public bodies, elections	Electronic communication networks, computer operating services, IT-forensic

Timeline



- The clock will only start if ISP considers the filing “**complete**” (ISP will not issue a confirmation of completeness but will issue RFIs if filing considered incomplete)
- Closing prohibited until ISP **explicitly** issues a no action letter / approval decision (i.e. **no implicit approval** when the statutory deadline lapses)
- Swedish & EU-investors are expected to obtain approvals quicker than the **Phase I target 25 business days deadline**



Practicalities to consider when negotiating transaction terms

- **Filing obligation is with the investor.** The Target has typically a duty (unsanctioned) to inform the investor that its business falls under the FDI regime
- Transactions not subject to a mandatory filing obligation may nevertheless be **called-in** at the discretion of ISP
- **Cooperation between the parties** required as the filing form focusses on detailed information re
 - the Target's activities and current ownership structure
 - the investor's activities and previous FDI "track-record", including each individual and legal entity holding 10% or more in the investor
- **Standstill** obligation until ISP **explicitly** issues a no action letter / approval (i.e. **no implicit approval** when the statutory deadline lapses)
- Transactions must be approved unless prohibition is **necessary to prevent harmful impact** on Sweden's security /public order





Practicalities to consider when negotiating transaction terms

- Approval may be **subject to conditions** such as commitments to ring-fence sensitive information, minimum production / supply, appointing pre-vetted management
- ISP expects to issue no action letters for Swedish & EU-investors quicker than the Phase I **target deadline of 25 business days**
- **Complex cases** in Phase II can be reviewed for **least 7 months** and will ultimately be determined by **geopolitical considerations**
- ISP may conduct **site visits** during its investigation
- **No judiciary review** of prohibition or conditional approval decisions – such appeals can only be made to the Swedish government
- Breach of the filing obligation or the stand-still obligation can result in **finances** up to 100 m SEK and, if the transaction is ultimately prohibited, **nullity** and/or **order to divest** the acquired assets



Outstanding questions

ISP yet to develop precedents and guidance on a number of issues. A few examples:

- **Material threshold** for when foreign influence is considered to risk having harmful impact on Sweden's security or public order
- The standstill rule and the **timing implication** in context of public bids, enforcement of pledge over shares or new share issue
- The voting % thresholds and the aggregation of ownership with respect to **funds**
- The effectiveness and **reasonableness** of filing (all?) intra-group transactions

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