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MANNHEIMER SWARTLING



Investment Screening and Foreign Subsidy Regulation

The protection against foreign subsidies distorting the internal market

6 May 2022

Agenda

- Case study Sweden
- The Foreign Direct Investments (“**FDI**”) Regulation and national procedures
- Regulatory interplay with the Foreign Subsidy Regulation

An aerial photograph of a dark, calm lake. The left shore is rocky with some sparse vegetation, while the right shore is covered in dense, dark green forest. The water is a deep, dark blue-grey color.

Swedish Case Study

Investment screening mechanisms

Swedish proposal FDI screening Act

- Rules are delayed: second half of 2023
- Broad scope: sectors, investors, investments
 - Swedish, EU and non-EU investors
- Investor circumstances of importance
 - Undemocratic and antagonistic states
 - Direct or indirect control - private actors
 - Control through state aid
- Conditionalize or prohibit investment

Existing Protective Security Act

- Protecting Sweden's national security
 - Malicious activities, e.g., espionage, sabotage, terrorism and other crimes
- Operators of security-sensitive activities
- Protective security measures
- Mandatory consultation for sellers of operations, assets or shares
 - Swedish, EU and non-EU investors
- Similar investor circumstances
 - Undemocratic and antagonistic states
- Conditionalize or prohibit sales operation

Låt inte Peking spränga tunnelar i Stockholm

KINA Publicerad 3 maj 2022 kl 06:00



Tunnelbanan ska klara fred och krig. Stockholms tunnelbana som vi är vana att se den.
Foto: ALI LOREŠTANI / TT / TT NYHETSBYRÅN

Statskontrollerade, kinesiska bolag vinner svenska upphandlingar genom att lägga sig betydligt lägre i pris än konkurrenterna. Det är ett säkerhetsproblem.

Expressen 3 May 2022

State controlled Chinese companies win Swedish procurement by means of substantively lower prices compared to competitors. This is a security problem.



Tunnelbanan i Kharkiv har blivit skyddsrum åt hundratals sedan kriget inleddes. Lubov Persichanskaya, hennes dotter Ekaterina och katten Tichon har sökt skydd undan det ryska bombardemanget.

Foto: CAROLYN COLE/LOS ANGELES TIMES/SHUTTERS / CAROLYN COLE/LOS ANGELES TIMES/SHUTTERSTOCK SHUTTE



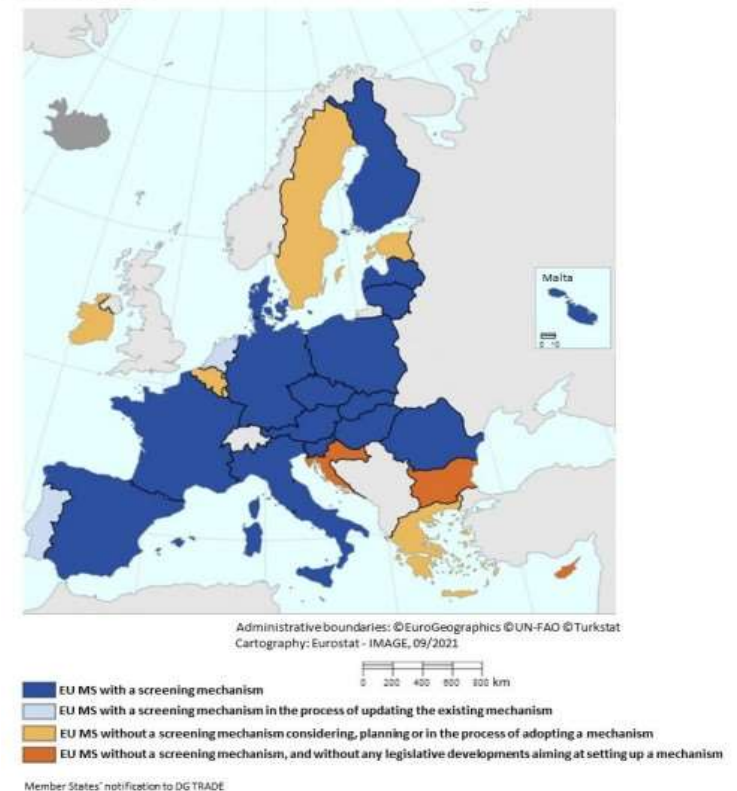
The EU FDI Regulation

FDI Framework

Subject matter and scope (Art. 1)

1. A framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments.
2. This Regulation is without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4(2) TEU, and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU.
3. Nothing in this Regulation shall limit the right of each Member State to decide *whether or not* to screen a particular foreign direct investment within the framework of this Regulation.

MS with screening mechanism/legislative activities
As of 1 August 2021



EU FDI Regulation

Art. 3 – Framework

- Right to FDI on grounds of security or public order
- Transparent procedures
- Measures to prevent circumvention
- No veto rights

Art. 6 – Member states with a screening system

- Screening triggers notification to other MS and COM
- Automatic requirement to provide info
- Opinion/comments (15 & 35 days)

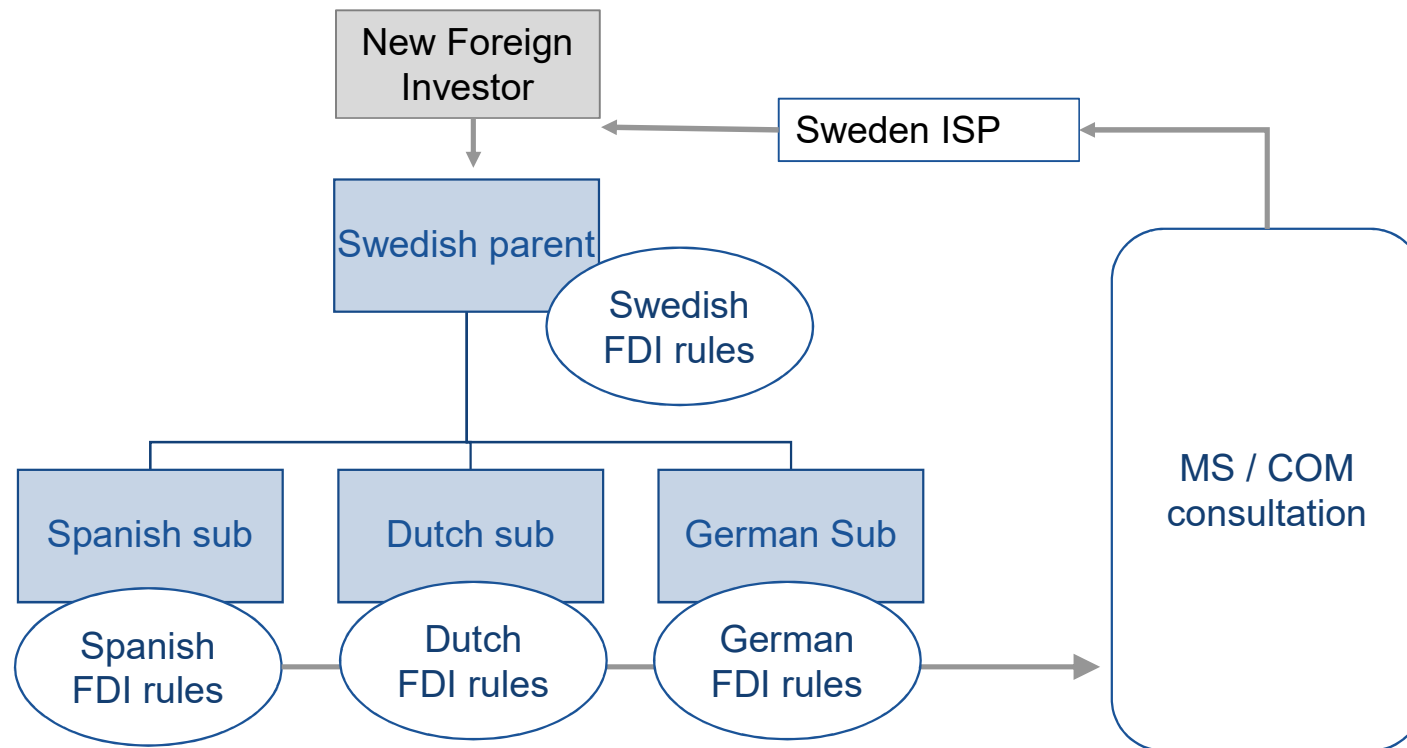
Art. 7 – Member states without a screening system

- No trigger - comments/opinion at the latest 15 months after investment has been completed
- The MS may however ask for comments
- Opinion/comments (15 & 35 days from info)
- Comments and opinions from MS and COM to be given “due consideration”

Art. 8 – Union interest

- The Commissions opinion shall be taken into “utmost consideration” explanation if not followed

EU FDI Regulation



EU FDI Regulation – foreign investor

EU FDI Regulation definition:

Art. 2(1)

“[...] an investment of *any kind* by a foreign investor aiming to establish or to maintain *lasting and direct links*...including investments which *enable effective participation in the management or control of a company* carrying out an economic activity [...]”

- Not “portfolio investments”
 - But, no thresholds
- Art. 2(2) – Foreign investors means outside EU
 - But, prevent circumvention

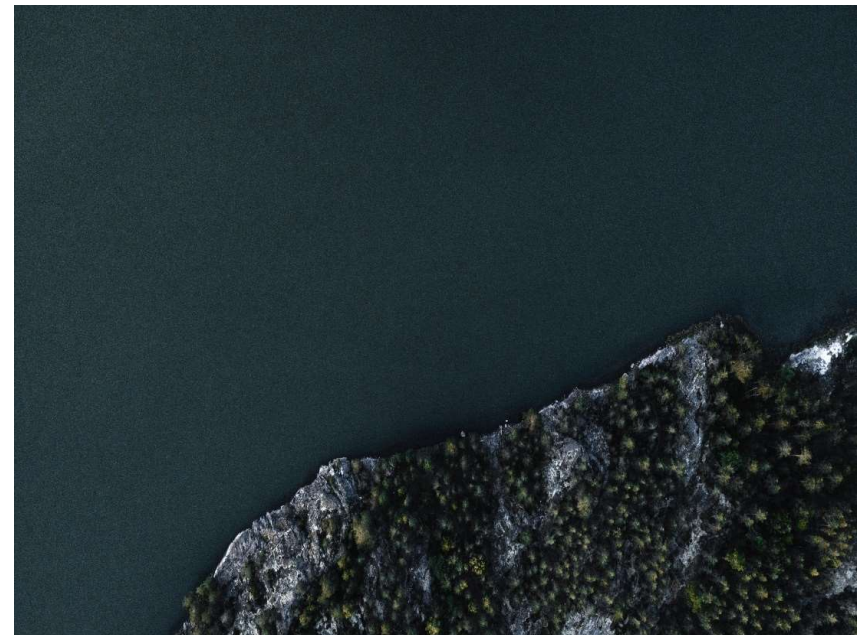
EU FDI Regulation – Scope (target)

- Art. 1 and Art. 2(4) – Screening based on grounds of security and public order
- Art. 4 – Scope: Foreign investment's potential effects on, inter alia
 - Critical infrastructure (physical or virtual), energy, technology, water, health, communication, data storage, electoral or financial infrastructure, sensitive facilities, and related land and real estate
 - Critical technologies and dual use, AI, robotics, semiconductors, aerospace, cybersecurity, nuclear, nano technology and biotechnology
 - Critical inputs, energy or raw materials, food security
 - Access to sensitive information, including personal data, or the ability to control such information
 - Freedom and pluralism of the media

EU FDI Regulation – Investor

Art 4.2 (a) Factors that may be considered re investor:

- Investor is controlled by a foreign state, including through financing
 - Direct or indirect
 - Subsidies
 - Ownership threshold is not decisive
 - Influence in board appointment
 - Foreign investor's track record
- Serious risk of illegal or criminal activity



EU FDI screening – Information sharing

Art. 9 Information requirements to other MS & COM:

- Ownership structure investor and target, including “ultimate investor and participation in the capital”
- Funding of the investment and its source
- Approximate value of investment
- Products, services and business operations (investor and target)
- Member States concerned (relevant business operations)
- Date for completion of investment



An aerial photograph of a two-lane asphalt road winding through a dense, lush green forest. The road is light gray with white dashed lane markings. The surrounding forest is thick with various shades of green trees. The title 'Regulatory Interplay' is centered over the road in a white serif font.

Regulatory Interplay

Regulatory Interplay

EU Merger Control – all types of sectors – EU dimension – COM powers

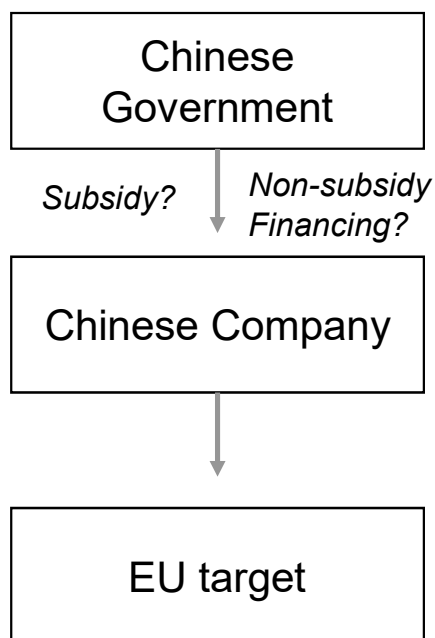
FDI screening

- Specific scope – not all sector
- Foreign investor
- MS powers

- Subsidized foreign investor
- FDI sector
- COM & MS powers

EU Foreign Subsidy Regulation

- Foreign subsidy
- Not necessarily foreign investor
- COM powers



EU FDI	EU Foreign Subsidy	WTO ASCM
"Control through financing"	Broader interpretation of "subsidy" – financial contribution	Narrower interpretation of "subsidy" – financial contributions
<p>"Affect security or public order"?</p> <ul style="list-style-type: none"> Context and circumstances, a foreign investor may be controlled directly or indirectly, e.g., through significant funding, including subsidies 	<p>"Third country"</p> <ul style="list-style-type: none"> Central government and government authorities at all other levels; Foreign public entities, whose actions can be attributed to the third country; or Any private entity whose actions can be attributed to the third country. 	<p>"Public body" - those entities that possesses, exercise or are vested with governmental authority</p>
Member States – EU Commission may consult	EU Commission	WTO Panels and Appellate Body

FDI and Primacy EU law (AEGON)

Swedish proposed FDI screening Act

- Scope: all nationalities
- Risk of circumvention – proportionality with screening of intra-EU or national investors?

EU Merger Regulation

- MS' legitimate interests of public security
- General principles and Community law
- Proportionality, suitability, free establishment

Contacts

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