

## SWEDEN INTRODUCES RULES TARGETING FOREIGN INVESTMENTS

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As of January 1, 2021, all Swedish related business transactions that involve the transfer of security sensitive activities must be notified to the Swedish Security Service or the Swedish Armed Forces which could ultimately prohibit the transfer. The new legislation places great responsibility on individual companies planning to transfer part of their business and adds an additional regulatory process to keep in mind when planning for a new transaction. A summary of the main changes as well as some key points to bear in mind when planning for a transaction are outlined below.

There is already an obligation under the Swedish Protective Security Act (2018:585) for companies engaged in security sensitive operations to assess the need for protection of these activities and take the necessary precautions to ensure its protection. There is also an obligation to go through a specific procedure when procuring services that entail a transfer of any security-protected activities to third parties.

The new legislation adds an additional obligation to notify transaction that involve the transfer of security-sensitive operations. The following is noteworthy:

- **The company itself must assess whether the Protective Security Act applies to its business.** The law applies to companies (both private and public), authorities, municipalities or regions that carry out security-sensitive activities that are of importance for Sweden's security. The act is not limited to activities related to military or police operations but rather to all activities that are of strategic importance for Sweden's security, including the protection of water, electricity and heating plants, IT-facilities, healthcare infrastructure, transport infrastructure, surveillance of important buildings, etc. It is emphasized that the definition of security sensitive activities should be interpreted broadly and that it would be inappropriate to be more concrete by listing all sensitive operations.

The Swedish parliament noted during their assessment of the legislative proposal that the lack of a clear definition of the term Sweden's security could make it difficult for individual companies to determine whether the legislation applies to a potential transaction. The parliament therefore

required that the government would ensure that individual companies receive guidance and support in making this assessment. As examples of this guidance the parliament suggested general guidelines or the possibility to reach out and discuss with the relevant authorities. To date, no more information has been provided in this regard by neither the Swedish government nor the relevant authorities.

As such, great responsibility is put on individual companies to determine whether the legislation applies to them. To determine if this is the case, the company must undertake a so-called *safety analysis*.<sup>1</sup> The purpose of such an analysis is to determine whether the company has information, personnel or assets that require specific protection.

- **The legislation applies to all transactions that involve any transfer of security sensitive activities.** As such, there are no qualifying conditions or thresholds to determine which transactions that are covered by the legislation. Instead, all transfers, regardless of their structure, or size, need to be notified to the relevant authority. The legislation applies even if the transaction is limited to the sale of certain products or innovations.<sup>2</sup> Thus, companies planning to transfer any security sensitive activities will have to plan for this procedure each time they are involved in a transaction no matter the size or importance of these activities.
- **The seller must carry out a safety and appropriateness assessment.** The legislation is brief on details on the envisaged procedure. It states that a safety and appropriateness assessment is to be conducted. More details are to be provided by regulations and guidelines from the relevant authorities. The following is mentioned at this stage about these assessments:
  - **Safety assessment:** The purpose of this assessment is to identify the potential security sensitive activities that will be available to the buyer through the transaction. The assessment should be based on the *safety analysis* that companies must carry out under the Protective Security Act. In addition, the Swedish Security Service refer to a Protective Security Regulation they issued for further guidance in this regard. Under section 2, para. 12 of the regulation, the seller must clarify whether the transaction (i) can affect the protective operations at issue, (ii) is appropriate based on the impact it has on Sweden's security, (iii) may entail the need of further security measures, and (iv) if the safety analysis needs to be updated.
  - **Appropriateness assessment:** Based on the safety assessment and other relevant circumstances, the seller is to determine whether the transaction may result in any damage for Sweden and whether it at all is appropriate to transfer the security sensitive activities. The preparatory works mentions that inappropriate transfers may include situations where the business should be carried out by a particular operator or situations where the buyer is not suitable. As such, part of this assessment involves the determination of whether the buyer is appropriate. The guidance provided by the Swedish Security Service so far mentions that the assessment includes the consideration of whether the acquirer could represent the interests of a foreign power or other antagonistic interests. The information on how individual companies should carry out such an assessment is currently scarce, but the Swedish Security Service refers to its own publications as

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<sup>1</sup> The Swedish Security Service (one of the relevant authorities) have issued relevant guidelines for the preparation of a safety analysis. This includes [Introduktion till Säkerhetsskydd](#) och [Säkerskvyddsanalys](#) (both in Swedish).

<sup>2</sup> At present, however, transfers of shares in public undertakings or transfers of real estate are not covered by the new legislation. However, the Government does not rule out the possibility that transfers of public shares and real estate may be covered by the law in the future.

well as publications from the Swedish Armed Forces and the Swedish National Defence Radio Establishment.

- **The seller also must go through a consultation procedure with the relevant authority.** If the seller determines that the transfer is appropriate a consultation procedure needs to be initiated with the relevant authority, which is either the Swedish Security Service or the Swedish Armed Forces.<sup>3</sup> The purpose of the consultation procedure is to facilitate the acceptance of the transaction through dialogue with the relevant authority. The consultation should be initiated by the seller through the submission of a description of the planned transaction, information about the buyer,<sup>4</sup> and documentation of the safety and appropriateness assessment as well as the safety analysis. More documentation may be requested by the relevant authority.
- **There is a standstill obligation under which the seller may not close the transaction until the consultation procedure has been completed.** The relevant authority decides when the seller can proceed with the transaction by formally deciding on the matter. The regulation foresees that certain transfers will require a longer consultation procedure. The original proposal did not consider it necessary to regulate the length of the authorities' examination. However, the Swedish parliament required that the government included an obligation to introduce such a time limit but did not specify in what form. At this stage, no further information has been presented but we understand that the government is currently working on the design of a time limiting rule.
- **In the event of a breach of the consultation obligation, the relevant authority may initiate the consultation on its own initiative.** In such cases, the transaction will not be automatically void. However, the Authority may prohibit the transfer. As such, an already transferred business may need to go back to the seller.<sup>5</sup>
- **The Authority may ultimately order the seller to implement certain measures prior to the transfer of the security sensitive activities or prohibit the entire transfer.** A proportionality test has been included to ensure that prohibition decisions are the very last resort for the relevant authority. As examples of reasons to prohibit a transaction, the preparatory works mention situations where it is not possible to carry out background checks on the buyer's management and staff, or situations where the buyer is a company "*acting as the front of an operator with antagonistic purposes*". A transaction that has been prohibited becomes automatically null and void. A prohibitions decision can only be appealed directly to the government while an order to implement certain measures can be appealed to Stockholm's administrative court.

## IMPORTANT CIRCUMSTANCES TO BEAR IN MIND WHEN PLANNING A TRANSFER

Although much of the proposed procedure needs to be clarified by further regulation and guidelines, it is clear that the new act will impose an additional time-consuming regulatory obligation to consider when planning for a transaction. The parties to a transaction must therefore allow for a potential long and burdensome

<sup>3</sup> The Swedish Armed Forces is the relevant authority for the Swedish Fortification Agency, the Swedish Defense University, and other authorities falling under the Ministry of Defense as well as for individual sellers active within the defense equipment. The Swedish Security Service is the relevant authority for all other consultations.

<sup>4</sup> This includes information about the company structure, ownership, geographic presence, and identification

<sup>5</sup> The relevant authority must however assess the potential damage caused by a prohibition after the transfer has been completed. The relevant authority must also consider the time that has passed since the completion of the transaction. The bar for a prohibition is higher if longer time has passed since the completion of the transfer.

procedure that may result in costly measures. Although some of these risks are unavoidable, there are strategic measures to consider that could mitigate the effects of these risks. This includes:

- **Ensuring that the mandatory *safety analysis* has been carried out and is continuously updated.** The safety analysis is the starting point for the assessment under the new legislation and is also crucial to identify possible risks of a time-consuming process. As such, a carefully drafted and continuously updated safety analysis is an important timesaving measure to consider.
- **Ensuring that the transfer agreement includes necessary safeguards that anticipate a potentially time-consuming process and a potential need to undertake certain measures.** Both buyers and sellers can bear this in mind to avoid contractual risks. This includes a clear division of labor during the procedure, allowing for long-stop dates or including clauses that account for a situation where the Authority's decision is delayed or results in an unfavorable outcome.
- **Involving the right people early in the process.** There are typically good reasons to limit the amount of people involved in a transaction early on. However, it may be wise to extend this group to also include people working with the security sensitive activities. One of the main lessons learned from working with procurement related to security sensitive activities is that the work is often delayed by involving these persons late in the process.
- **Start the consultation process early on to influence the relevant authority's timeline.** Based on experience of other regulatory procedures, early informal contacts with the relevant authority may help to ensure that information prepared for submission is complete and to argue for a timeline that ensures that the examination is handled as swiftly as possible.

If you have any questions, please contact:

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