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Investment screening in four Nordic countries – an overview

Summary

This report analyses Acts¹ on investment screening and protective security agreements in Finland, Norway, Sweden and Denmark. To put the existing Acts into perspective, also previous Acts and potential future Acts are analysed. The following questions are asked: Which acquisitions are screened/monitored or subject to protective security agreements? Which sectors and factors are considered? Which are the reasons for rejection?

This report shows that Sweden, Norway, Denmark and Finland have quite different systems. Out of the four countries, Finland has the only investment screening mechanism, but to accommodate the new EU Regulation on investment screening, the Act needs to be somewhat updated.

The Norwegian Security Act contains a limited form of investment screening mechanism. If a foreign actor buys a company of strategic importance in part or in full, the Norwegian Act gives the Government the power to approve or reject an acquisition of critical infrastructure, when vital national security could be undermined.

Sweden does not currently have anything resembling an investment screening mechanism. Instead, much like the former Norwegian Act, the Protective Security Act focuses on situations related to running a business that holds information important for Sweden's security.

However, a governmental report was recently released regarding a potential future Act that would cover situations involving the transfer of

¹ Here, the translation of 'lag' and 'lov' into English is 'Act'.

ownership of private companies holding sensitive security information. The proposal of a new Act does not cover transfer of stocks in public companies. Furthermore, the proposal only relates to the security of the nation and not to the strategic security of society or, for that matter, 'security or public order'.

Denmark does not have an investment screening mechanism; instead, Denmark has the Prime Minister's Security Circular. The Circular is similar to the present Swedish Act in its focus on classified information. However, the Danish government has recently created an inter-ministerial working group whose task is to propose legislation on a national screening mechanism.

In addition to security-sensitive information, critical infrastructure is at the core of the Act of Norway and on its way to be in the Act of Sweden.

Moreover, critical infrastructure is mentioned in the EU Regulation as an example of what is targeted by the Regulation. In the future, it will be of interest to follow the differences between what is covered by national security (national competence) and what is covered by the Regulation (EU competence), and how these competencies will interact.

The three EU countries will most likely further converge in the future, with EU Regulation on investment screening serving as a guarantee for the convergence. This likely would have happened anyway but not to the same degree and not as rapidly.

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Investment screening in four Nordic countries

This paper was written to serve as the basis for discussion on the topic of ‘European origins – the EU Member States’ Rules on Screening Foreign Investment’ at the research conference ‘A Common European Law on Investment Screening’ at Gothenburg on 7-8 March 2019.

In recent years, much attention has been paid to foreign companies acquiring European companies that are of strategic importance. However, there is no effective overarching investment screening mechanism at the EU level.

Acquisitions have been identified for which there were no sound economic reasons, and suspicions arose that the reasons for these acquisitions were to gain influence or knowledge about functions vital to state security. There have also been examples of companies that are forbidden to export certain products or services, and that have been acquired by state-owned companies from the very countries to which it is forbidden to export. These problems caught the attention of members of the EU Parliament, who called for an EU Regulation that would give states the tools to control these situations and ensure that the same rules would apply across the entire EU.

Before the negotiations on such EU Regulation began, the EU Commission examined the investment screening mechanisms of the Member States and found that investment-screening mechanisms existed in 13 of them. There were wide variations between these mechanisms, and the argument was made that there should be greater conformity as well as increased information sharing between the Member States and the EU Commission. This was the rationale for having common rules across the EU Member States. The EU Member Countries have now reached an agreement among themselves and the EU Parliament on a future investment-screening framework.²

At the request of the distinguished organizers of the conference at Gothenburg, this paper aims to give an overview of how Finland, Norway, Sweden and Denmark have (or have not) addressed investment screening until the present. To provide a more nuanced picture, the paper

² Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union.

also covers Acts regarding security-classified areas that require security protection agreements to a certain extent.

The paper analyses the existing Acts in these four countries as well as previous and a potential future Acts with an emphasis on the following questions: What acquisitions are screened? What sectors and factors are considered? What are the reasons for rejection?

The Finnish system will below be used as an example of how an investment screening mechanism can be constructed, but also to illustrate some of the characteristics of the EU Regulation.

The comparison between Sweden, Norway, Denmark and Finland shows that the countries have quite different systems. Out of the four countries, Finland has the only investment screening mechanism, but its Act needs to be updated to accommodate the new EU Regulation. The Norwegian Act includes transfer of critical infrastructure which is at the focus of the this analysis, at the expense of security agreements.

The paper has benefitted greatly from the interaction with Marjaan Aarnika from the Finnish Ministry of Economic Affairs and Employment, Ole Ødegård Lindal from the Norwegian Ministry of Defence, Dan Leeman from the Swedish Ministry of Justice and Birgitte Spühler Hansen from the Danish Business Authority.

1 Monitoring acquisitions in Finland

There are no specific rules in Finland regarding security-classified public procurement, outsourcing, etc. Instead, there is an Act, the Monitoring of Foreign Corporate Acquisitions 2012.³ The aim of the Act is to monitor, and if required due to key national interests, restrict foreign influence in Finnish companies.⁴ The key⁵ national interests mainly refer to: 1)

³ Lag om tillsyn över utlänningars företagsköp 13.4.2012/172, here translated as the “Act on the Monitoring of Foreign Corporate Acquisitions” (172/2012).

⁴ The overview of the Finnish system is based on the author’s reading of the Finnish law and on information published on the home page of the Finnish government: <https://tem.fi/en/acquisitions>. I would like to thank Marjaana Aarnikka, Commercial Counsellor at the Ministry of Economic Affairs and Employment, for helping me to acquire information regarding the Finnish system for monitoring acquisitions.

⁵ ‘Key’ could be replaced here by ‘utmost’ or ‘fundamental’, stressing the severity of the national interest that is at stake.

national defence, 2) security of supply, and 3) functions fundamental to society.⁶

The Ministry of Economic Affairs and Employment must approve the corporate acquisition unless it potentially conflicts with such interest. If the corporate acquisition may potentially conflict with a key national interest, then the Ministry must refer the matter for consideration at a government plenary session.

The Finnish screening system targets ‘mergers and acquisitions’, whereas the new EU Regulation concerns ‘foreign direct investment’ (FDI). However, in practice there seems to be little difference between the two. This is because in the Finnish Act the term ‘acquisitions’ targets the following situations: ‘When a foreign owner gains control of at least one-tenth, at least one-third, or at least one-half of the aggregate number of votes conferred by all shares in the company, or a holding that otherwise corresponds to a decision-making authority in a limited liability company or other monitored entity.’⁷

Remembering the difference between an FDI and a portfolio investment,⁸ we can conclude that in this matter the Finnish Act is in line with the EU Regulation that only covers FDI.⁹ However, the Act does not cover real estate investments and green field investments.¹⁰ The Finnish Ministry of Defence has recently presented the Finnish Parliament with a new governmental proposal concerning the monitoring of foreign acquisitions of certain lands and properties of importance to the total defence.¹¹

⁶ 1 § the Act on the Monitoring of Foreign Corporate Acquisitions (172/2012) and home page of the Government of Finland last visited on the 13th of December 2018: <https://tem.fi/en/acquisitions>

⁷ 2 § subsection 5 The Act on the Monitoring of Foreign Corporate Acquisitions

⁸ FDI requires at least one-tenth of the deciding votes in a company. Less than that is a portfolio investment.

⁹ Para (8) and (9) in the preamble of the Regulation. Even if the CJEU has clarified what is meant by FDI the Regulation has a definition of its own in article 2(1): foreign direct investment' means an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity.

¹⁰ Green field investment is a type of FDI where a parent company builds its operations in a foreign country from the start.

¹¹ Bill HE 253/2018

1.1 Which acquisitions are monitored?

A state can choose to either require that investments be approved in advance or after an acquisition. Finland has chosen both.

All corporate acquisitions in the defence¹² and dual-use¹³ sectors require advance approval by the Ministry of Economic Affairs and Employment. In the defence materials industry, monitoring covers all foreign owners, including EU and EFTA investors.

Other sectors covered by the Act can voluntarily notify of the acquisition in advance or even after the acquisition.¹⁴ However, an advance notification can only be submitted immediately before the final conclusion of the acquisition.

If the acquisition concerns companies outside of the defence sector, the rules on monitoring only applies to foreign owners residing in or domiciled outside the EU or EFTA.¹⁵ If a party considers that a monitored company could be critical to functions fundamental to society, it is recommended that they file a notification with the Ministry of Economic Affairs and Employment.

1.2 Which sectors and factors are considered?

The Act does not specify sectors (apart from defence) or operations in the private or public sector where companies would fall within the scope of monitoring. According to the Government of Finland, this is because it is not possible to determine which sectors or operations will be critical to securing the functions fundamental to society in the long term.¹⁶ The needs of national defence, public order and security, and other critical functions in the society are ultimately decided by the conditions prevailing at that time.

Application/notification must contain all information regarding the monitored entity, the foreign owner (including the ownership structure that is also mentioned in the EU Regulation in regards to information requirements¹⁷), and the corporate acquisition necessary for examining

¹² Section 4 § The Act on the Monitoring of Foreign Corporate Acquisitions

¹³ 1 § subsection 4 The Act on the Monitoring of Foreign Corporate Acquisitions

¹⁴ 2 § subsection 5 The Act on the Monitoring of Foreign Corporate Acquisitions

¹⁵ 1 § subsection 5 The Act on the Monitoring of Foreign Corporate Acquisitions and home page of the Government of Finland last visited the 13th of December 2018: <https://tem.fi/en/acquisitions>

¹⁶ Q&A Ibid

¹⁷ Article 9(2)(a) of the Regulation.

the notified case at hand. When submitting an application/notification for approval, the foreign company needs to provide all the information necessary for examining the case, including the owner structure of the foreign investor and the monitored Finnish company.¹⁸ The Ministry must request information within three months after a notification of a corporate acquisition in any sector other than the defence sector.¹⁹ The Regulation is less specific in this regard and only states that Member States shall apply timeframes.²⁰ The Act does not specify deadlines by which the Ministry can intervene in a defence sector acquisition or request information.

Even if ‘security of supply’ is a key national interest, this does not mean that all companies operating in this sector are monitored under the Act. For example, a great number of companies operating in the food supply or logistics sectors are not considered as having a key role in the security of supply. Indicative information about the Act's scope of application is available in the public guidance documents on security of supply and national security.²¹

In its Regulation, the EU has more or less followed that approach, with an amendment that includes a non-exhaustive and indicative list of factors and sectors, such as critical infrastructure.²²

1.3 Competence and reasons for rejection

The Finnish Act refers to articles 52 and 65 of the Treaty on the Functioning of the European Union (TEUF)²³ and states that ‘a key national interest means securing national defence or safeguarding public order and security in accordance....’ with the above-mentioned articles. Both articles contain exceptions, including public order and public security. This is also the basis for denial of confirmation (approval) in the Finnish Act.²⁴

¹⁸ 5 § 1 subsection the Act.

¹⁹ 5 § 2 subsection the Act.

²⁰ Article 3(2) of the Regulation.

²¹ Government Resolution on the Goals of Security of Supply ((1048/2018, in Finnish and Swedish):

Security Strategy for Society (Government resolution of 2.11.2017, in Finnish):

http://tem.fi/documents/1410877/2132272/Yhteiskunnan_turvallisuusstrategia.pdf/1f6b0b51-5069-4979-9f3b-579f8c0543d7

²² Para (12) in the preamble and article 4 of the Regulation.

²³ Limitation of the free movement of capital.

²⁴ Section 7, the Act on the Monitoring of Foreign Corporate Acquisitions.

The new EU Regulation on investment screening is based on the EU's exclusive competence to monitor Foreign Direct Investments (FDI) stemming from article 207(2) TEUF and the Common Commercial Policy. The ground for refusal is 'security or public order'. However, the Regulation reaffirms that this is without prejudice to the sole responsibility of the Member States to safeguard their national security, as provided for in Article 4(2) TEU. It is also without prejudice to the protection of their essential security interests, in accordance with Article 346 TFEU.²⁵

In the preamble it is stated that the Regulation is without prejudice to the rights of Member States to derogate from the free movement of capital, as described in article 65(1) TFEU. Article 3 of the Regulation states that Member States may maintain, amend or adopt mechanisms to screen foreign direct investments on the grounds of 'security or public order'. Does this mean that it is possible to have an investment screening mechanism that uses article 65(1) TFEU as a basis for competence after the Regulation enters into force? The interpretation here is that this is not the case. As a consequence the Finnish Act needs to be changed in this regards since it is expressly based on articles 52 and 65 TEUF.

The Regulation explicitly does not cover situations based on Article 4(2) TEU²⁶ or Article 346 TFEU^{27, 28}. The reason is that the EU Member States have not given up their competence to protect the essential interests of their security. The consequence drawn here is that a Member State could refuse an application on the grounds of Article 346 TEUF and allow these refusals to follow a path on their own, quite separately from what the Regulation stipulates.

If the reason for rejection is national security or essential security interests the Regulation could in theory be disregarded. Hence, the

²⁵ Para 7 in the recitals.

²⁶ Article 4(2) TEU "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

²⁷ Article 346(1)(b) TEUF "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes."

²⁸ Para (3) and (7) in the preamble and article 1(2) of the Regulation.

grounds on which a country chooses to reject an FDI has effects since it may decide whether the Regulation is applicable or not.

1.4 What are the reasons for rejection in the EU Regulation?

‘Public order and security’ is defined in several decisions of the Court of Justice of the European Union (CJEU), whereas ‘security or public order’ has been imported from the GATS.²⁹ ‘Public order’ comes from article XIV GATS and ‘security’ comes from ‘essential security interests’ in article XIV GATS *bis*. ‘Security’ and ‘public order’ have been merged into one expression: *security or public order*.³⁰ The expected difference between ‘public order and security’ and ‘security or public order’ is that the latter will give Member States a broader possibility to refuse FDI. In the Regulation it is stipulated that the Regulation is without prejudice to the right of Member States to derogate from the free movement of capital as provided for in point b of Article 65(1) TFEU.³¹ However, it will be interesting to see to what extent case law from the CJEU regarding the Regulation will be influenced by the case law stemming from article 65(1) TEUF.

We know from CJEU case law that Member States may limit the free movement of capital on the grounds of a *serious threat to fundamental interests of society*.³² The EU Commission, and later the EU Member states, chose not to include this in the Regulation as a ground for refusal. The interpretation made here is that this was deemed unnecessary because it is included in the ‘security or public order’. Time will tell if the CJEU makes the same interpretation.

1.5 The possibility to appeal

Section 9 in the Finnish Act regulates the right to appeal.

Decisions that cannot be appealed are the ones under:

- section 4(3) of the Act – the referral from the Ministry to the Government’s Plenary session relating to acquisitions in the defence sector;

²⁹ Para (1) in the preamble of the Regulation.

³⁰ Para (35) in the preamble and article 2 of the Regulation.

³¹ Para (4) in the preamble of the Regulation.

³² C-483/99, the Commission v. France para. 45 and C-503/99, the Commission v. Belgium para. 44f.

- section 5(3) of the Act – the referral from the Ministry to the Government’s Plenary session relating to other corporate acquisitions;
- section 5(4) of the Act – decisions of the Ministry to further examine the application.

Decisions made by the Ministry of Employment and Economy and the Government Plenary Session are open to appeal in the manner prescribed in the Finnish Administrative Judicial Procedure Act. Based on the Finnish Act, the right to appeal applies equally to the defence sector and other corporate acquisitions.

If the Finnish authorities do not approve the acquisition, then the foreign investor must dispose of the shares to a degree that diminishes the number of votes to less than ten percent of the total stock, or voting share, or to a previous allowed level.

A working group on behalf of the Government released a proposal on the 28th of June 2018 to change Finnish law regulating transfers of fixed assets. One part of the proposal gives the State increased powers to expropriate in the name of safeguarding territorial integrity. Another part stipulates that foreigners outside the EU and EES need to get approval in advance if they want to buy property in certain areas that are of importance for territorial integrity.

The EU Regulation states that foreign investors and the undertakings concerned shall have the possibility to *seek recourse* against screening decisions of the national authorities.³³ Seek recourse is a vague description and the question arises if it is sufficient to provide a possibility to appeal to the Government or if it is necessary to provide access to the domestic courts in accordance with article 19 TEU.

2 Norway’s Security Act

2.1 The former Act – acquisitions of critical infrastructure

Since 2002 Norway has no rules on acquisitions apart from acquisitions of critical infrastructure.³⁴ The first part of the analysis of the Norwegian system covers the now obsolete chapters 2 and 7 of the Norwegian

³³ Article 3(5) of the Regulation.

³⁴ Lov 20. Mars 1998 nr. 10 om forebyggende sikkerhetstjeneste.

Security Act (Sikkerhetsloven),³⁵ leaving the Competition Act³⁶ and the Stock exchange Act³⁷ aside. Thereafter, the analysis focuses on the new Security Act (lov om nasjonal sikkerhet) that entered into force on January 1, 2019.³⁸

2.2 The former Norwegian Security Act

The aim of chapter 7 of the former Act was to guarantee security when a supplier of goods or a service gained access to an object or information considered worthy of protection. When this was the case, the parties (state and supplier) had to enter into a protective security agreement, and in some cases, the supplier needed to be approved by the responsible Ministry.

In both an investment screening mechanism and in a requirement to enter into a security agreement, you need to fulfil requirements in order to be approved. However, the former Norwegian Act mostly dealt with the protection of security-sensitive information and critical infrastructure.

In the Act there was no explicit Regulation of ownership control or of suppliers. Each Governmental Ministry had responsibility for their respective sectors and if there was none appointed, then the Ministry of Defence served as the fall back.

Chapter 2 of the Act stated that the business community had a general responsibility to educate employees in security related matters. The business community had to alert the Government if they gained knowledge of a planned or ongoing activity that could result in a more than insignificant risk of a threat to the security of the country.³⁹

Article 29 of the Act concerned situations when suppliers of products or other parties got information about critical infrastructure. ‘Critical infrastructure’ was defined as constructions or systems that were essential to uphold the basic needs and functions of the society.⁴⁰ The information duty concerning acquisitions of critical infrastructure was regulated by article 5a of the Act. If a transaction of critical infrastructure

³⁵ Lov om forebyggende sikkerhetstjeneste, all translations from Norwegian into English were made by the author.

³⁶ Lov 5. mars 2012 nr. 12 om konkurranse mellom foretak og kontroll med foretakssammenslutninger (konkurranseloven).

³⁷ Lov 29. juni 2007 nr. 74 om regulerte markeder (børsloven).

³⁸ Lov 1. juni 2018 nr. 24 om nasjonal sikkerhet (sikkerhetsloven).

³⁹ §§ 5 and 5 a Chapter 2 the Act

⁴⁰ Para 3 subsection 21 Chapter 1 the Act.

included more than an insignificant risk of a threat to the essential security of Norway, then the seller of the critical infrastructure had to inform the Government. There was no need to do so if it was manifestly clear that the acquisition carried no such risks. The seller was therefore obliged to inform the Government in all cases where it was not manifestly clear that there was no risk to the infrastructure as such or in how it was used.

If the government found that the transaction could bring about a more than insignificant risk, then it could decide to either forbid the transaction or to attach conditions to the transaction. This was possible even if the transaction had already been made.⁴¹

The Act did not regulate what factors were to be considered when determining if there was more than an insignificant threat to society, nor did it specify any sectors. The impression is that the Act took a catchall approach and that it was very much up to the state to define the powers bestowed by the Act.

The wording of the Act was general, leaving room for interpretation, but the Act also gave the Government the ability to amend the Act with more detailed regulations. The Act did not include a possibility to appeal the rejection decisions or conditions attached to transactions.

2.3 The new Act – objects and infrastructure as well as control of ownership

The new Security Act⁴² came into force in January 2019. As the only country in the analysis outside the EU, Norway is naturally not bound by the EU Regulation discussed above. According to Norway, the Act complies with EEA because of the exception given in article 123 of the EEA treaty.⁴³

There are several key differences between the former and the present Act. For example, the present Act includes information infrastructure, such as internet and mobile telephones.⁴⁴ The change clearly reflects a world moving away from the production of goods to the production of

⁴¹ Para 29a the Act

⁴² Lov om nasjonal sikkerhet

⁴³ NOU 2016:19 p 237.

⁴⁴ The analysis of the new Act is based on prop. 153 L 2016–2017.

services. There is also a chapter on ownership control, to which we will return.⁴⁵

2.3.1 Which acquisitions are covered?

The purpose of the new Act is to safeguard the Norwegian territory, the democratic system and national security interests.⁴⁶ In practice, this means that for functions such as production of services, products or other businesses that are of such importance, a partial or complete removal of their production would damage national security. The Act covers security-graded information as well as information, information systems, objects and infrastructure that have significant meaning for fundamental national functions.⁴⁷

Recall that the Finnish Act and the EU Regulation affect FDI more than the limit of 10 percent of the controlling power of a company. In the new Norwegian Act, only those acquisitions above qualified ownership are affected which, in the Norwegian context, means 1/3 of the stock or the right to vote or any other significant influence over the company.⁴⁸ Therefore, to be applied, the new Act requires more than three times as much ownership control than the Finnish Act or the EU Regulation. To avoid foreign owners circumventing the Act, for example by using a Norwegian mailbox company to acquire a strategically important company, the Act also covers Norwegian owners. This in contrast to the EU Regulation that only covers investments *into* the union.⁴⁹

2.3.2 Which sectors and factors are considered?

The new Act still covers critical infrastructure. Each government Ministry is responsible for identifying, classifying and monitoring objects and infrastructure worthy of protection. If an object or infrastructure were to be damaged with the result of reducing or destroying functionality that would in turn affect fundamental national functions, then the object or infrastructure identified is being worthy of protection. The different classifications of these objects and infrastructures are ‘very critical’, ‘critical’ and ‘important’.⁵⁰

⁴⁵ Chapter 10 the new Act.

⁴⁶ § 1-1 new Act.

⁴⁷ § 1-3 new Act.

⁴⁸ § 10-1 new Act

⁴⁹ Article 1 of the Regulation.

⁵⁰ Chapter 7 new Act.

If an investor would like to acquire a qualified majority of anything that a Ministry has deemed to include one or several of the following:

- security classified information;
- an information system;
- object or infrastructure that is considered to be of significance to basic national functions; or
- its operations include an activity that is considered to be of significance to basic national functions;

then the buyer must report this to the responsible Ministry.⁵¹

In the new Act, it is specified that the buyer is responsible for contacting a Ministry about the acquisition.⁵²

2.3.3 What are the reasons for rejection?

According to the Act, the Ministry receiving the notification from a potential buyer (of critical infrastructure) may ask relevant agencies for information about the buyer's 'risk potential' and 'trustworthiness in security matters'. If the Government finds that the transaction could bring about a more than insignificant risk, then the Government can decide either to forbid the acquisition or to attach conditions. This is possible even if the acquisition has already been made. The grounds for rejection are therefore the same as in the previous Act.

There is no explicit condition in the Act that a buyer could get a clearance beforehand. In contrast, it is clearly stated that a negative decision can be taken even if the parties have already entered into a contract. If the buyer goes through with the acquisition before receiving an answer from the Government, then the buyer risks being forced to sell if the acquisition is not approved.⁵³ Decisions not to approve an acquisition are only to be used in exceptional circumstances and after a proportionality test in each specific case.⁵⁴

The Act gives the authorities an insight into the owner structure of suppliers of goods and services, and the possibility to withdraw clearance to deliver if the owner structure, or a new owner structure, presents an increased security risk. However, the Act is restricted to concrete public procurement and deals less with the general need to control the ownership of strategically important companies. The Act cannot

⁵¹ § 10-1 new Act.

⁵² § 10-1 new Act

⁵³ § 10-3 new Act.

⁵⁴ Prop. 153 L (2016–2017) Lov om nasjonal sikkerhet (sikkerhetsloven) s. 152.

therefore ensure that essential national security functions will not be harmed if a foreign actor buys a strategically important company in part or in full.⁵⁵

2.3.4 The possibility to appeal

Negative decisions on the right to be or to continue to be a supplier can be appealed to the Ministry of defence.⁵⁶ In regard to acquisitions, it is the government⁵⁷ that decides if the acquisition should be approved and if there should be conditions attached.⁵⁸ The decisions taken by the government cannot be appealed.

3 Sweden and the Protective Security Act

On the 1st of April 2019 a new Protective Security Act will replace the current Act.⁵⁹ The new Act, with the same name as the previous one, primarily has the same aim to protect security-sensitive information of essential interest to Sweden's security. In this regard, the Act is quite similar to the Norwegian Act, in that it is not an investment screening mechanism; instead it covers situations such as public procurement and public building contracts. Unlike the Norwegian Act, it does not cover acquisitions of critical infrastructure. That said the Swedish Act is even less of an investment screening mechanism than the Norwegian Act.

The Protective Security Ordinance⁶⁰ will complement the Act and enters into force on the same date as the Act. In the Protective Security Ordinance it is regulated that the seller of a security sensitive operation must report to the Swedish Security Service or the Swedish Armed Forces before the acquisition is completed.⁶¹

According to the new Act, an operator⁶² of a public or private business sensitive for national security is obliged to make a security analysis. Based on the results of such analysis, the operator must take actions

⁵⁵ Sikkerhetsutvalgets rapport NOU 2016:19 *Samhandling for sikkerhet – Beskyttelse av grunnleggende samfunnsfunksjoner i en omskiftelig tid*, kapitel 12.2.

⁵⁶ § 9-3 new Act.

⁵⁷ Kongen i statsråd.

⁵⁸ § 9-4 och 10-3 new Act.

⁵⁹ Protective Security Act (1996:627) – Säkerhetsskyddslagen – replaces Protective Security Act (2018:545).

⁶⁰ Protective Security Ordinance (2018:658) – Säkerhetsskyddsförordningen – replaces Protective Security Ordinance (1996:633).

⁶¹ Chapter 2 § 9 Protective Security Ordinance.

⁶² “Verksamhetsutövare” in Swedish language.

related to what is required considering the specific operation, the existence of classified information, and other circumstances.⁶³ If there are security concerns, then the operator and the other party needs to enter into a protective security agreement. The new Act therefore places the onus on the business operator – not the acquirer. Furthermore, there are no sanctions connected to the new Act. The new Act focuses on information and is not an investment screening mechanism. If an acquisition concerns sensitive information, there is a requirement to inform the State, but the acquisition in itself does not need to be approved.⁶⁴

3.1 A proposal for a new Act

However, the Government commissioned an investigator to analyse the need to amend the new Act well in advance of the Act being approved by Parliament. The result of the investigator's work was a report⁶⁵ that identified situations where sensitive operations can be exposed to outsiders, and when there is no obligation to enter into protective security agreements. The report suggested that the obligation to enter into such agreements should be extended. The conclusions of the report have been sent to the responsible authorities, NGOs and other concerned parties for comments. For this reason, it is difficult to predict the end result of the report. Even so, since it is quite probable that some version of the proposal will be implemented, we will look into what is suggested below.

3.2 Which acquisitions are (or should be) monitored?

As indicated above, Sweden does not currently have a general mechanism for screening FDI or acquisitions. The simple answer to what acquisitions are being monitored today is, therefore, none.⁶⁶

The report mentioned above proposes that the requirement to enter into a protective security agreement should be extended to procedures other than public procurements *and to other acquisitions*. This extended requirement means that the operator undertaking security-sensitive activities needs to enter into a protective security agreement with other

⁶³ 2 Chapter 1 § Protective Security Act (2018:545).

⁶⁴ There are other Acts that impact ownership, such as the Act on war material (1992:1300), the law on acquisition of land (1979:230) and others, but these Acts do not.

⁶⁵ Betänkande av Utredningen om vissa säkerhetsskyddsfrågor (särtryck), SOU 2018:82. Chapter 3 is based on an official summary of 2018:82.

⁶⁶ There are however regulations regarding export control; lag (1992:1300) om krigsmateriel and förordning om krigsmateriel.

parties. This requirement must be fulfilled as soon as the operator intends to conduct a procurement, conclude an agreement, or commence any other form of cooperation or collaboration with an outside party when the procedure:

1. involves the possibility of the outside party gaining access to classified information with a security classification of Confidential or higher; or
2. relates to or could give the outside party access to security-sensitive activities of corresponding importance for Sweden's essential security interests in any other respect.

The aim is to protect activities that are in the greatest need of protection. Protective security also encompasses activities covered by an international protective security commitment that is binding to Sweden.

Furthermore, the report suggests a mechanism that targets access to information by parties other than the current owner/manager. Hence, it is not the acquisition of a business that holds such information that is at the heart of the proposal.

The report also identified concerns regarding, among other things, outsourcing and concessions. The report suggests that there should be an obligation for the current business operators to identify security-classified information and to assess whether or not it is appropriate that the other party gains access to such information (a special security assessment). This is referred to as checkpoint 1.

If the operator finds that there is sensitive information involved, then there should be an obligation to consult with the supervising authority, which is referred to as checkpoint 2 (this is mandatory in regard to acquisitions of security sensitive companies). The responsibility to consult is shared with the shareholders/stockholders if the company is privately owned. This is not the case if it is a public limited company. If it is a public limited company, then the Act does not apply.

One of the reasons for this is that public limited companies can have many uninformed shareholders and they should not be held accountable. Another reason is that there would be too many transactions to cover. The supervising authority should have the power to either place conditions on what is at stake or to forbid the same.

The third checkpoint is a kind of an ‘emergency brake’ that gives the supervisory authority the possibility to intervene in an ongoing procedure, for example, in outsourcing or another collaboration that is in progress. If such an ongoing procedure for which a protective security agreement is required is unsuitable from a protective security point of view, the supervisory authority may order the operator, or the outside party involved in the procedure, to take such measures as are necessary to prevent damage to Sweden’s security.

Among other things, this order may require the entire procedure or part of the procedure to be discontinued. An order may only be given if the reasons for the measure outweigh the damage or other disadvantages that the measure might entail for public or private interests. This is similar to the proportionality test in the Norwegian Act.⁶⁷

In regard to acquisitions, the report proposes that checkpoints 1 and 2 should also apply when an operator subject to the provisions of the Protective Security Act intends to transfer ownership of 1) all or any part of its security-sensitive activities, or 2) any property involved in its security-sensitive activities that is of importance to Sweden’s security or to an international protective security commitment that is binding to Sweden.

In the case of a transfer of ownership, consultation may also include an order stipulating that the transfer may only be carried out under certain conditions; therefore, the result of failing to comply is that the transfer will be declared void. In this respect, the proposal is quite equivalent to an investment screening mechanism.

There are, however, differences between the proposal and an investment screening mechanism in the sense that it is only acquisitions in privately owned security sensitive companies that are targeted by the proposal and not the transfer of stocks in public limited companies. Another difference compared to many investment screening mechanisms, such as the Finnish, is that it is the business operator who is targeted by the proposal and not the buyer/investor. Also, the Norwegian Act regulates that it is the buyer who is responsible for contacting a Ministry about the acquisition.⁶⁸ And not the seller as in the Swedish case.

⁶⁷ Section 2.3.3 above.

⁶⁸ Section 2.3.2 above.

Furthermore, the proposal concerns matters related to the essential security of the nation and not matters related to the security of the society or, for that matter, 'security or public order'.

3.3 Which sectors and factors are considered?

The proposal is general in its application and does not target specific sectors. However, the new Act identifies the authorities responsible for supervision, and since the proposal suggests that these should remain the same, we can infer which sectors are the most affected such as energy production, distribution of energy, mail and telecom, defence materials and nuclear safety.

3.4 Competence and reasons for rejection

The proposal is based in its entirety on matters related to national security and because of that is based on article 4.2 TEU. (It is the right of each Member State to protect their national security.) When considering a rejection, it should be considered whether the foreign party is appropriate and whether the measure is proportional to the potential damage.

3.5 The possibility to appeal

The report proposes that an appeal against an order taken by a supervisory authority should be made to the Administrative Court in Stockholm, with the supervisory authority as the respondent. Permission to appeal should be required for any appeal to the Administrative Court of Appeal. A condition attached to an acquisition or a prohibition to acquire a company should instead be appealed to the Government. It is proposed that an appeal against a prohibition should be done to the Government. Private individuals, including companies and other judicial individuals, can request a review of the Government's decision under the Act on Special Judicial Review of Certain Government Decisions (2006:304). The review is conducted by the Supreme Administrative Court.

The proposal is based on national security it is Sweden's right to limit the possibility of appeal decisions to the Government (and not to the courts, which would normally be required in accordance with article 19 TEU). However, as we have seen above, the EU Regulation does not have such a requirement. Instead, it is regulated that foreign investors and the undertakings concerned shall have the possibility to seek recourse against

screening decisions of the national authorities.⁶⁹ Also, since the decision of the Government can be reviewed through the Act on Special Judicial Review of Certain Government Decisions, this should satisfy article 19 TEU.

4 Denmark

In Denmark, the security protection is regulated by the Prime Minister's security Circular⁷⁰ covering both Danish information worth protecting as well as information from other countries and organizations. The Circular contains Regulations concerning classifications of information, IT-security, personal and physical security. The Circular focuses on information-security and does not give protection in other regards.⁷¹ The Danish Circular is therefore reminiscent of the present Swedish Act. Information is divided into four categories as follows: top secret, NATO/EU secret, NATO/EU confidential and NATO/EU restricted.⁷² The categorization is decided on the basis of both the level of sensitiveness and the source of the information.⁷³

Industry security is not regulated by law, but the Circular contains a Regulation stating that the National Security Authority can enter into agreements regarding security approval. Another Act⁷⁴ gives the secret service of the Defence Authority the same rights. These agreements are entered into between the state and a private contractor. The Secret service of the Defence Authority decides whether or not the treatment of classified information is allowed or not.

Hence, Denmark does not have a national system in place for national security or screening of foreign investments. There are some area-specific rules concerning screening of foreign investments in regard to the production of war materials, cyber-security, electricity and gas, and financial operations.

The current Danish Acts mentioned above are entirely based on national security, as is the Swedish Act.

⁶⁹ Article 3(5) of the Regulation.

⁷⁰ Statsministeriets Cirkulære om sikkerhedsbeskyttelse af informationer af fælles interesse for landene i NATO eller EU, andre klassificerede informationer samt informationer af sikkerhedsmæssig beskyttelseinteresse i øvrigt, CIR nr. 10338 af 17/12/2014.

⁷¹ SOU 2018:82 s. 115.

⁷² 1 § the Cirkulære.

⁷³ 3 § the Cirkulære.

⁷⁴ LOV nr. 602 af 12/06/2013.

The Danish government has recently convened an inter-ministerial working group tasked with proposing legislation on a national screening mechanism in Denmark. The working group consists of several ministries including the Ministry of Justice, Ministry of Foreign Affairs, Ministry of Business, Ministry of Defence and Ministry of Finance. The Ministry of Justice heads the working group.

The work is still in an early phase and information from other countries with screenings systems, including Germany, UK and the other Nordic countries, is being compiled as inspiration for possible screening models for the Danish system.

5 Similarities and differences

Norway, Sweden and Denmark have systems focusing on protecting sensitive information in the form of protective security agreements. In Norway there also exists, to some extent, a protection for critical infrastructure (which also is at the heart of the EU Regulation) and Sweden is slowly moving in that direction. Denmark is also in the process of modernizing its Acts but has just recently started.

Of these three countries, Norway has most recently updated its security Act, moving further in the direction of investment screening of critical infrastructure. Sweden will probably soon have an Act that also covers critical infrastructure. However, none of these three countries have presently anything close to an investment screening mechanism nor will they have such a mechanism in the near future.

Out of the four countries described above, only Finland has what could be defined as a proper investment screening mechanism. But also Finland is working to modernise this mechanism.

In addition to security-sensitive information, critical infrastructure is at the core of the Acts covering protective security agreements. Moreover, critical infrastructure is mentioned in the EU Regulation as an example of what is targeted by the Regulation. In the future, it will be of interest to follow the differences between what is covered by national security (national competence) and what is covered by the Regulation (EU competence), and how these competencies will interact.

The world wide transition from production of goods to production of services seems to make security agreements a necessary complement to investment screening mechanisms, since in reality the protection given

by the agreements are of different nature to screening mechanisms even if there are some overlapping.