



# Screening Foreign Direct Investment: As important as it is challenging

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## Introduction

Globalization has long been deemed a panacea for ensuring peace and prosperity for all. There has been an increasing weaponization of economic relations in recent years, however, which has been exacerbated by the COVID-19 pandemic. Gaining control over inward investment has become a crucial element in states' strategies for ensuring that malevolent influence cannot be exercised over vital sectors such as critical infrastructure by investors from certain parts of the world. As a result, actors have expanded or established investment screening procedures in a constant balancing act between ensuring national security and safeguarding open investment. The United States and the European Union are leading in this regard, while Sweden is yet to establish such a mechanism.

A study of each of these actor's state of play and ways forward paints an image of control over foreign direct investment (FDI) being as relevant as ever, and as evolving but also facing challenges. Increasing global division and fragmentation have been further propelled by Russia's war in Ukraine. This has placed Sweden in a new geo-economic reality and triggered an unprecedented investment policy shift by the EU. In parallel, the US administration is seeking further control over investments by initiating a review of US investments abroad. This accumulation of investment controls is likely to have wider societal impacts, as private

sector businesses and ultimately citizens could have to make financial sacrifices in the name of foreign (and) economic policy. In other words, FDI screening will serve as a vital and powerful tool in global rivalries but there will be difficult trade-offs. Its use and already apparent evolution are making it a central part of (future) geo-economic relations. Washington has remained aware of these issues since the end of the Cold War, which means that its systems have been subject to constant review over time.

## The United States: CFIUS and FIRRMA

The Committee on Foreign Investment in the United States (CFIUS) was established in 1975 in response to worries in Congress about investments by members of the Organisation of the Petroleum Exporting Countries (OPEC) that were perceived to be driven more by political than economic interests. In 1988 a significant transformation of the Committee introduced presidential authority to block pending acquisitions if these were deemed a threat to national security.<sup>1</sup> These screening measures were commonly used at the end of the Cold War and put in place in their modern form in the early 2000s.<sup>2</sup> Congress has since grown increasingly sceptical about Chinese investments in US firms. The Obama administration insisted on an open investment policy in its first term, justifying it as an "important component of [the] overall economy".<sup>3</sup> Its second term, however, saw a more aggressive CFIUS and

<sup>1</sup> Jackson, J.K., (2006). [The Committee on Foreign Investment in the United States \(CFIUS\)](#).

<sup>2</sup> Jackson, J.K., (2020). [The Committee on Foreign Investment in the United States \(CFIUS\)](#).

<sup>3</sup> The White House (2011). [Statement by the President on United States Commitment to Open Investment Policy](#).



a noted increase in cases subject to review and CFIUS investigations.<sup>4</sup> Nonetheless, Chinese investments in venture capital-backed start-ups reached unprecedented levels. In a worrying development, these were seemingly targeted at sectors vital to technological development, and for the US military to sustain its technological superiority, such as blockchain technology and autonomous vehicles.<sup>5</sup>

Against a backdrop of an altered “nature of the investments” and “national security landscape”, Congress introduced the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018 as a measure (once again) to revise and adjust the CFIUS process.<sup>6</sup> Updates were made primarily in three broad areas.

First, it expanded the “scope and jurisdiction” of the CFIUS. For example, CFIUS can now review transactions, including non-controlling investments in businesses that are engaged in “critical technology, critical infrastructure, or collecting sensitive data on US citizens” (referred to as TID businesses), as well as some real estate close to sensitive facilities for national security such as military facilities.

Second, it improves the Committee’s screening procedures, such as the “timing for reviews and investigations”.<sup>7</sup> This includes the opportunity for parties to get a set assessment period if they submit transaction cases by themselves. If granted such a set period, CFIUS can in return provide a “safe harbour letter” that limits the ability of the CFIUS to begin a review process of the case at a later stage.<sup>8</sup> This measure limits the impact of screening on investment flows. Private industry has often complained or worried that it might be disadvantaged. A mandatory declaration was also established for transactions concerning TID-related businesses that fall within the scope of CFIUS, where it is assessed that a non-US government might gain a “substantial interest”.<sup>9</sup> This can be compared to the process before FIRRMA, when notifications were mostly voluntary.<sup>10</sup>

Lastly, FIRRMA demands that CFIUS address national security risks linked to areas such as mitigation agreements.<sup>11</sup> This means reviewing existing agreements and ensuring that new ones entered into in the future are “effective, verifiable and enforceable”.<sup>12</sup> Part of this work means ensuring the party involved can be trusted by seeking watertight assurances. The transaction will be blocked if a reason for mistrust is found. If

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<sup>4</sup> Committee on Foreign Investment in The United States (2018). [CFIUS Annual Report to Congress – Report period: CY 2016 and CY 2017](#).

<sup>5</sup> Brown, M. & Singh, P. (2018). [China’s Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of US Innovation](#).

<sup>6</sup> Jackson, J.K. (2020). [The Committee on Foreign Investment in the United States \(CFIUS\)](#).

<sup>7</sup> Ibid.

<sup>8</sup> US Department of the Treasury. [CFIUS Overview](#).

<sup>9</sup> US Department of the Treasury (2020). [Fact Sheet: CFIUS Final Regulations Revising Declaration](#)

[Requirement for Certain Critical Technology Transactions](#).

<sup>10</sup> Committee on Foreign Investment in The United States (2021). [Annual Report to Congress – Report period: CY 2020](#), pp. IX.

<sup>11</sup> Jackson, J.K. (2020). [The Committee on Foreign Investment in the United States \(CFIUS\)](#).

<sup>12</sup> US Department of Justice (2020). [Assistant Attorney General for National Security John C. Demers Delivers Keynote at ACI’s Sixth National Conference on CFIUS: Compliance and Enforcement](#).



a mitigations agreement is violated, CFIUS now has the authority to reopen the transaction to review again or issue penalties.<sup>13</sup> It should also be noted that CFIUS can adapt its review processes depending on the origin of transactions. The member countries of the Five Eyes intelligence alliance, Australia, the United Kingdom, Canada and New Zealand, are currently exempt,<sup>14</sup> albeit only from transactions concerning non-controlling stakes and some real estate transactions.<sup>15</sup> These more recent changes are a demonstration of the Committee's evolving work. Investment screening has been in place for decades but is constantly adjusted to new risks and threats over time. This is far from the case in the equivalent European system.

## The European Union's FDI Regulation

The EU adopted its Regulation on screening FDI in 2019 and the mechanism has been in force since October 2020.<sup>16</sup> Like the US introduction of FIRRMA and update of the CFIUS process, the EU initiated the creation of a mechanism due to the significant increase in Chinese investments in its

member states. Chinese investors were incentivized to diversify in order to limit "over-exposure" to the declining Chinese economy and sought upgrades of "technology, brands and other strategic assets".<sup>17</sup> While the investment pattern involved a variety of sectors, from advanced manufacturing to entertainment, it was primarily investments in high-technology and critical infrastructure such as energy and transportation that triggered a debate on the national security implications.<sup>18</sup>

Regulation 2019/452 sets out the aspects that EU member states' screening mechanisms must include.<sup>19</sup> They must inform the European Commission about investments subject to national screening, share information concerning these investments if asked, and can themselves ask for comments and opinions from both the Commission and other member states. Ultimately, it is for the member state where the investment is being screened to decide whether to approve (as it is or with conditions) or deny. It must, however, take any comments and opinions given (if any) into account before deciding.<sup>20</sup> The Commission lists the sectors<sup>21</sup> in which investments might have an impact on "security or public order".<sup>22</sup> Many of these

<sup>13</sup> Ibid.

<sup>14</sup> US Department of the Treasury (2022). [CFIUS Exempted Foreign States](#).

<sup>15</sup> Politi, J. & Platt, E. (2020). [US exempts allies from some national security deal reviews](#). *Financial Times*.

<sup>16</sup> European Commission (2020). [EU foreign investment screening mechanism becomes fully operational](#).

<sup>17</sup> Hanemann T. & Huotari, M. (2017). [Record Flows and Growing Imbalances-Chinese Investment in Europe in 2016](#). *Rhodium Group & MERICS*.

<sup>18</sup> Ibid.

<sup>19</sup> The European Parliament and the Council of The European Union (2019). [REGULATION \(EU\) 2019/452](#)

[OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union](#).

<sup>20</sup> European Commission (2019a). [Foreign Direct Investment EU Screening Framework](#).

<sup>21</sup> critical infrastructure, critical technologies, the supply of critical inputs, such as energy or raw materials, access to sensitive information or the ability to control information, the freedom and pluralism of the media

<sup>22</sup> European Commission (2019a). [Foreign Direct Investment EU Screening Framework](#).



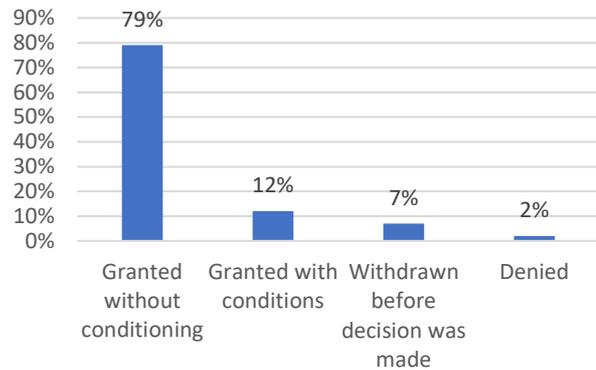
sectors stretch over several member states, meaning ill-intentioned investment in one country could have negative effects on several.<sup>23</sup>

There may nonetheless be cases where investments are not screened by one member state but another member state or the Commission assesses that they could impact “security or public order” or are “projects or programmes of Union interest”.<sup>24</sup> This could be the case if the investment does not fall within the scope of the member state’s screening mechanism, if the member state has decided not to screen this specific investment, or occur in a member state that does not have a screening mechanism.<sup>25</sup> A request can then be filed that requires “a minimum level of information” about the investment to be provided.<sup>26</sup> If there is a case where the European Commission finds that an investment could affect its projects or programmes, it can send an opinion to the member state concerned. The latter must then “take utmost account” of it and provide an explanation if it chooses not to align itself with the Commission but to allow the investment.<sup>27</sup>

The first annual report by the Commission to the European Parliament following the

### Result of Member States' investment screening CY 2020 (eligible cases)

Source: European Commission (2021). First Annual Report on the screening of foreign direct investments into the Union



introduction of the Regulation specified that member states had reviewed 1793 investment dossiers. The majority of the investments were not formally screened, as it was clear that they had no impact on security or public order, or because they were not deemed eligible for screening by the member state’s mechanism. Of the remaining cases, almost 80 percent were granted without conditions and only 2 percent were denied.<sup>28</sup> The Commission was sent 265 cases, which were processed in two steps. Phase one separated the non-controversial cases that could be passed without additional control measures from those that could not.<sup>29</sup> The second phase required more information from the member states,<sup>30</sup> and a more meticulous

<sup>23</sup> European Commission (2019b). [Frequently asked questions on Regulation \(EU\) 2019/452 establishing a framework for the screening of foreign direct investments into the Union.](#)

<sup>24</sup> For list of projects and programmes, see Regulation (EU) 2019/452 Annex.

<sup>25</sup> European Commission (2019b). [Frequently asked questions on Regulation \(EU\) 2019/452 establishing a framework for the screening of foreign direct investments into the Union.](#)

<sup>26</sup> Ibid.

<sup>27</sup> The European Parliament and The Council of The European Union (2019). [REGULATION \(EU\) 2019/452](#)

[OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, Article 8.](#)

<sup>28</sup> European Commission (2021a). [First Annual Report on the screening of foreign direct investments into the Union.](#)

<sup>29</sup> European Commission (2021b). [COMMISSION STAFF WORKING DOCUMENT - Screening of FDI into the Union and its Member States.](#)

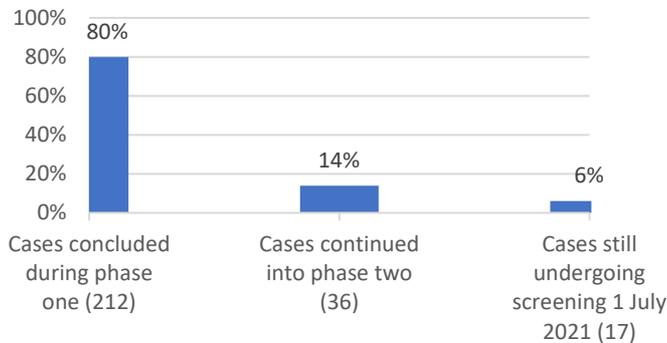
<sup>30</sup> European Commission (2021b). [COMMISSION STAFF WORKING DOCUMENT - Screening of FDI into the Union and its Member States.](#)



analysis of the potential impact on security, public order, and EU projects. This process then resulted in a Commission opinion as described above. The vast majority of cases were concluded at the end of the first phase.<sup>31</sup>

### Result of European Commission's screening 11 October 2020 - 30 June 2021

Source: European Commission (2021). First Annual Report on the screening of foreign direct investments into the Union.



During the first year of the EU's investment screening Regulation, however, certain challenges have become evident. These can be divided into those at the national level and those at the EU level. At the national level, there are differences between member states in how they have chosen to form their screening mechanisms,<sup>32</sup> the sectors in which investments are screened, and the resources allocated to due-diligence research. Commission opinions and member states' comments can serve to fill these gaps. While a member state's de-alignment from Commission opinions requires an explanation, however, the final decision on

whether to allow the investment still lies with the individual member state. This permits differences in investment decisions despite the screening mechanisms, and in practice means that investments that some states would have deemed hostile could be allowed by others. An evening out of differences between member states should therefore be sought, but the biggest issue can be observed at the EU level. Here, a difference is emerging between those that apply some sort of screening, and those which adopt no mechanism at all. The Commission ends its first annual report by stating that it is "merely a question of time before all 27 member states"<sup>33</sup> will have established and implemented a screening mechanism. One year after the regulation became applicable, however, three member states (Bulgaria, Croatia, Cyprus) have no "publicly reported initiative" to establish such a mechanism under way. Without entering into a discussion on the reasons for such inaction, this could not only undermine the protection of the EU as a whole, but also essentially deprive the member state of the opportunity to conduct screening of any investments. In parallel, this creates entries into the EU where, as noted above, many sectors span several member states.

The Commission also notes in its annual report the need for additional resources for conducting screening.<sup>34</sup> Testimonies from several national screening units show that budget constraints remain a significant issue. Screening officers are aware of "what

<sup>31</sup> European Commission (2021a). [First Annual Report on the screening of foreign direct investments into the Union](#).

<sup>32</sup> European Parliament (2022a). [SEDE / INTA 07/02/2022 16:45 - 18:45](#).

<sup>33</sup> European Commission (2021a). [First Annual Report on the screening of foreign direct investments into the Union](#), pp. 21.

<sup>34</sup> European Commission (2021a). [First Annual Report on the screening of foreign direct investments into the Union](#).



must be done”, but these tasks are seemingly not prioritized at the budget decision-making level.<sup>35</sup> This ultimately means that the work is not being conducted as diligently as it could be. In the long term, not being able to ensure risk-free investments has negative implications for security and public order. Together with the lack of screening processes in some member states, this will likely weaken the EU. It also begs the question how well-equipped the EU really is to protect itself from belligerent investments, and questions its strength as a geo-economic actor. Ultimately, it moves in the opposite direction of the quest to become more strategically autonomous. On the other hand, expectations must always be adapted to the structure of the EU. These permit joint action and decision making while ensuring that member states retain their sovereignty. EU decisions are therefore a result of member states’ accumulated positions. Individual states can then choose to build further on what has been decided at the EU level. This may have contributed to what is now a huge difference between discrimination over investment origin in Washington and Brussels. While the US exempts its Five Eyes allies, the EU Regulation states that screening mechanisms “should not discriminate between third countries”.<sup>36</sup> Loyalties to non-EU countries differ between member states, but many share the inclusion of scrutinizing

investments that originate in countries such as China. The Regulation’s language seemingly hinders the latter group’s tailoring of their national mechanisms to their threat assessments, which after all might differ between member states.

That said, the room available to adapt and adjust must be used to better face up to the challenges. A change in Chinese investment patterns is already evident. These were previously characterized by large transactions, and mergers & acquisitions of European companies, but a shift towards more greenfield investments<sup>37</sup> has been noted.<sup>38</sup> The EU Regulation in its current form permits scrutiny of these, but this shift and new focus is yet to translate into a shift in member states’ screening procedures.<sup>39</sup> In parallel, Chinese companies are shifting their purchasing patterns, more and more going through offshore structures.<sup>40</sup> Member states commonly lack the capacity to discover these at the time of screening, only doing so at a later stage. This is as much of a challenge for Europeans as it is for the US CFIUS review process and its mitigation agreements. In one Italian example, 75 percent of the drone producer Alpi Aviation was acquired in 2018 by what was then assessed to be a Hong Kong-based company,<sup>41</sup> but in 2021 the Italian authorities discovered that the actual owners were two state-owned Chinese companies that had

<sup>35</sup> European Parliament (2022). [SEDE / INTA 07/02/2022 16:45 - 18:45](#).

<sup>36</sup> The European Parliament and The Council of The European Union (2019). [REGULATION \(EU\) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union](#).

<sup>37</sup> Largely described as opening a subsidiary in a foreign country and thereby establishing new

facilities, rather than acquiring or investing in already existing ones.

<sup>38</sup> Kratz, A. et al. (2020). [Chinese FDI in Europe: 2019 update](#). *Rhodium Group & MERICS*.

<sup>39</sup> European Parliament (2022). [SEDE / INTA 07/02/2022 16:45 - 18:45](#).

<sup>40</sup> Pop, V. (2021). [Concerns raised on tightness of EU FDI rules amid Chinese investments](#). *Financial Times*.

<sup>41</sup> Kington, T. (2021). [Italian police raid drone maker over alleged Chinese takeover](#). *Defense News*.



made the acquisition through “offshore vehicles”.<sup>42</sup> The challenges involved in understanding ownership structures are therefore evident. In Sweden, additional emphasis was therefore placed on this aspect of national screening as the process of implementing a screening mechanism unfolded.<sup>43</sup>

## Sweden’s process

Sweden is one EU member state currently implementing a legislative process “expected to result in the adoption of a new mechanism”.<sup>44</sup> A Commission of inquiry was launched in August 2019 to propose a screening system for investments in areas deemed worthy of protection. Its work had two aims: to suggest adjustments and complementary provisions to make the EU Regulation applicable in Sweden and to outline the possible shape and form of a national screening system. The first was concluded in 2020 and legislative adjustments were put in place on 1 November the same year.<sup>45</sup> By this time, further assignments had been given to the Inspectorate of Strategic Products (ISP) and the Swedish Defence Research Agency (FOI).<sup>46</sup>

FOI<sup>47</sup> was asked to examine investment associated risks in “sensitive” areas, map out these areas and provide a typical profile of investors that might constitute a risk.<sup>48</sup> Its report found factors such as nationality, sector dominance and antagonistic behaviour to be examples of the latter.<sup>49</sup> However, no definition of protected sectors was outlined. Discussion of what might define such a sector referenced the Swedish Civil Contingencies Agency’s (MSB) definition of societally crucial operations.<sup>50</sup> It was found to be unnecessary to place an entire sector under protection. Instead, it was advised to protect specific companies within each sector.<sup>51</sup>

The second part of the Swedish Commission’s work was concluded a year later when a final report was published in December 2021. In making several references to the FOI report and studies of other countries’ mechanisms, the report underlines that Sweden is a “small, open economy that is dependent on trade with other countries”.<sup>52</sup> It describes the screening of FDI as crucial to Sweden. Pre-empting subsequent criticism, it denies that establishing a mechanism would mean protectionism or banning all such

<sup>42</sup> Pop, V. (2021). Concerns raised on tightness of EU FDI rules amid Chinese investments. *Financial Times*.

<sup>43</sup> Ibid.

<sup>44</sup> European Commission (2021a). First Annual Report on the screening of foreign direct investments into the Union.

<sup>45</sup> Government Offices of Sweden (2021a). Granskning av utländska direktinvesteringar - Slutbetänkande av Direktinvesteringsutredningen (SOU 2021:87).

<sup>46</sup> Government Offices of Sweden (2020). Government to take action against foreign direct investments in sensitive areas.

<sup>47</sup> The study was written in consultation with the Inspectorate of Strategic Products, the Swedish

Armed Forces, the Swedish Defence Materiel Administration and the Swedish Security Service, and in cooperation with the National Board of Trade

<sup>48</sup> Government Offices of Sweden (2020). Government to take action against foreign direct investments in sensitive areas.

<sup>49</sup> FOI (2020). Flera risker med utländska direkt-investeringar i skyddsvärda verksamheter.

<sup>50</sup> MSB. Vad är samhällsviktig verksamhet?.

<sup>51</sup> FOI (2020). Flera risker med utländska direkt-investeringar i skyddsvärda verksamheter.

<sup>52</sup> Government Offices of Sweden (2021a). Granskning av utländska direktinvesteringar - Slutbetänkande av Direktinvesteringsutredningen (SOU 2021:87), pp. 42.



investments. Only investments with a clear risk to identified sensitive sectors would be denied.

Going through details of how screening should be applied to different legal structures and relevant legal frameworks, the report makes several design recommendations and raises points for further deliberation. A noteworthy section concerns the EU Regulation's article 4 on examples of areas where investments could have a negative impact on security or public order, which includes "the freedom and pluralism of the media".<sup>53</sup> Sweden recognizes the freedom of the press and freedom of expression, and both are strongly protected by the constitution. The latter includes fundamental principles such as the prohibition of censorship (texts can always be published before any potential action against its content) and freedom of establishment (all natural and legal persons have the right to print and distribute texts). The Commission therefore concluded that media is one sector that does not have to be categorized as sensitive in its entirety, but rather only certain companies. This narrower scope was thought to make it possible to avoid conflict with the constitution.<sup>54</sup>

The final report was referred to relevant bodies for consideration. The Inspectorate of Strategic Products (ISP), which would be tasked with conducting the screening,

pointed out that the financial penalties were too low, and its lack of sufficient resources to enforce any conditions imposed on an investment. Imagining a situation where a company in a sensitive sector has an acute capital shortage, the agency suggests some form of government intervention to keep the company afloat until it finds a satisfactory investor.<sup>55</sup> This could play a crucial role as the world emerges from the pandemic, and links to comments by the Armed Forces, which note that the final report makes no mention of how the Swedish screening mechanism would function in a situation of heightened preparedness – a scenario that has become increasingly relevant in recent months due to the ongoing Russian invasion of Ukraine.<sup>56</sup>

To prevent conditions that may contribute to such escalation, screening measures can nonetheless be implemented in peace time. In their referral, FOI counters the Commission's final report's idea of not labelling the entire media sector as sensitive. The agency refers to studies it has conducted of how Russian state-run media has been used in the Baltic states as propaganda for Russian speaking citizens, seeking to divide the population and serve other Russian interests. Similarly, the acquisition of Swedish media companies would have an exceptional and negative impact on national

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<sup>53</sup> The European Parliament and The Council of The European Union (2019). [REGULATION \(EU\) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union](#), Article 4 (1)(e).

<sup>54</sup> Government Offices of Sweden (2021). [Granskning av utländska direktinvesteringar - Slutbetänkande av Direktinvesteringsutredningen \(SOU 2021:87\)](#).

<sup>55</sup> Inspectorate of Strategic Products (2022). [Remissvar: Granskning av utländska direktinvesteringar – slutbetänkande av direktinvestingsgranskningsutredningen \(SOU 2021:87\)](#).

<sup>56</sup> The Armed Forces (2022). [Yttrande över betänkandet Granskning av utländska direktinvesteringar \(SOU 2021:87\)](#).



security.<sup>57</sup> EU sanctions are by mid-2022 in place on state-controlled Russia Today and Sputnik. Both outlets are banned in the EU because of their “essential and instrumental [role] in (...) the destabilisation of its neighbouring countries”.<sup>58</sup> This calls for a careful balancing act that meets both constitutional and security requirements.

Over 100 referral opinions were received, and some common denominators were identified that function as equally important contributions. First, the need to clarify scope, definitions, and other details, including suggestions for which sectors should be declared sensitive. Second, the need to avoid creating parallel legal structures, and thus conflicting legal applications and decision-making bodies. Finally, many concluded that extra financial resources would be required for them to carry out the new (direct or indirect) tasks that would come with the screening mechanism. This serves as a reminder of, and reference back to, testimonies from other member states’ screening officers and the issues they are already facing. Adding another member state to the list of those insufficiently prepared to carry out their work could lead to more belligerent investors being approved, negatively affecting the EU further as a geopolitical

actor, and with potentially far-reaching consequences for security and public order.

The consultation period in Sweden concluded in February 2022 and responses are as of mid-2022 being taken into consideration. It is proposed that the legislative framework will enter into force in January 2023.<sup>59</sup> This may seem a long time, even more so as this spring has shown how swiftly the European security landscape can change, with global effects. This has also involved stark shifts in investment screening, and an evolution of the global order that Washington had already anticipated.

## Looking ahead: Russia, outbound investment screening and potential sacrifices

As Russia’s war in Ukraine continues, the EU in April took a step away from its position on non-discrimination. The European Commission cited the war as reason for augmented caution towards investments from both Russia and Belarus.<sup>60</sup> The FDI Regulation states that factors such as whether a potential investor “is directly or indirectly controlled by the government (...) of a third country including through ownership structure or significant funding”<sup>61</sup> should be considered during the screening

<sup>57</sup> FOI (2022). [Remissvar gällande betänkandet Granskning av utländska direktinvesteringar \(SOU 2021:87\)](#).

<sup>58</sup> Council of the European Union (2022). [EU imposes sanctions on state-owned outlets RT/Russia Today and Sputnik’s broadcasting in the EU](#).

<sup>59</sup> Government Offices of Sweden (2021b). [Förslag på ett nationellt system för granskning av utländska direktinvesteringar](#).

<sup>60</sup> European Commission (2022). [COMMUNICATION FROM THE COMMISSION](#)

[Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions](#).

<sup>61</sup> The European Parliament and The Council of The European Union (2019). [REGULATION \(EU\) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union](#).



procedure. The Commission believes that current events provide a reason for both governments to use their influence to negatively impact the EU. Investments from these two countries thus come with an elevated risk. This therefore constitutes 'reasonable grounds' for denial in line with the Regulation, and member states are advised to have these investments "systematically checked and scrutinized very closely". Investments already in place from actors in these states in critical sectors such as infrastructure should also be spotlighted.<sup>62</sup> This altered threat assessment is as relevant in the US, which has similar elements in place in its investment review.

The Commission has called on member states to adopt relevant instruments to ensure that these issues can be addressed.<sup>63</sup> This highlights the problem of not all member states having a screening mechanism, and a situation like this demonstrates how quickly threat assessments can change. An EU member state may not be interested in screening investments from China, for example, which has been the main investment origin of concern until now, and therefore not sought to establish a mechanism. However, as threat assessments change and new malfeasant origins and investments arise, it would surely be of interest to assess, and potentially block, these. As noted above, it would still ultimately be down to the

individual member state whether to deny an investment, leaving room to allow an investment in line with national priorities.

As for countries that already have a mechanism, or are on their way to establishing one, the issue of existing investments by malfeasant investors should be a cause of concern (and also be expected to shift over time). As a result of the war, the Swedish government has asked FOI to map Russian investments and financial interests in Sweden.<sup>64</sup> This could serve as a foundation for putting measures in place in case investors steered by foreign governments or other interests seek to damage security or public order. It should also create an increased sense of urgency to establish a screening mechanism. The war has similarly demonstrated the importance of not being dependent on countries with which one might be, or could end up being, in conflict.

This ties into the new initiative concerning outward investment screening. Moving beyond the screening of inward FDI, the US is looking to screen *outgoing* investments. A proposed bill is described as seeking to create a CFIUS for outbound investments in order to limit the impact and leverage of adversaries.<sup>65</sup> The US National Critical Capabilities Defense Act (NCCDA), as it is formally known, will seek to screen US investments in "countries of concern" that might "threaten national critical

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<sup>62</sup> European Commission (2022). [COMMUNICATION FROM THE COMMISSION Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions.](#)

<sup>63</sup> Ibid.

<sup>64</sup> SVT (2022). [Listan till regeringen – 75 företag med ryska ägare.](#)

<sup>65</sup> Atlantic Council (2022). [Designing an outbound investment screening mechanism.](#)



capabilities".<sup>66</sup> In Brussels, outbound investment control was raised for the first time in the beginning of February 2022. It was argued that European investments in Chinese companies come with the same kind of technology and knowledge transfers as Chinese investments in European companies.<sup>67</sup> In the Russian context, a European outbound investment review could serve as an important measure to ensure that it does not finance the war machine more than it is already doing through gas and (partially phased out) oil purchases, while also reducing its supply chain dependency at a time when its strategic autonomy may be more relevant than ever.

This should, however, be seen in a wider context. Outbound investment screening adds to the evolution of controlling international business flows. From export controls to inbound screening and now outbound screening, a societal perspective emerges. The accumulation of controls adds to the pressure on private sector companies as they need to stay up to date with complex rules that frequently change, violations of which can carry heavy penalties. This complicates the possibility of attracting investments that might be required for a company's continued operations, as well as where and how investments can be made, which is also likely to negatively affect its operations. As a result, progressing these measures should be expected to have a dampening impact on global trade and technological development. They can also be expected to increase the burden on citizens working in the affected companies,

for example through job losses or financial sacrifices linked to a stricter foreign (and) economic policy. There will also be fragmentation and a rerouting of supply chains to friendly countries, as well as retaliation from the states most hit by investment restrictions (in both directions), in turn spurring further action. As actors such as the US and the EU cluster together with the like-minded, a counter-network of non-allies is likely to emerge, thereby increasing the impact on business and households.

Concrete progress is already visible in the EU-US Trade and Technology Council (TTC). Initiated in 2021, a dedicated working group (one of many) has been established to explore greater cooperation on investment screening. The forum served as a base for the coordination of action against Russia in the spring, which indicated a rapid strengthening and deepening of the forum as an institution. The potential development of a 'T12' technology alliance is likely to be a further step in the clustering together of the US and the EU, while adding a number of similar countries. If this becomes a reality, it could bolster the work of the TTC while also improving practices together with other countries; either way, this would enhance joint investment screening policies between Washington and Brussels. Streamlining efforts will in many ways lead to the alignment of the two systems, which provides a reason for greater efforts to regulate outbound investment screening by Brussels sooner rather than later.

This development, however, is in many ways the opposite of EU strategic autonomy.

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<sup>66</sup> US Congress (2021). [H.R.6329 - National Critical Capabilities Defense Act of 2021](#).

<sup>67</sup> European Parliament (2022). [SEDE / INTA 07/02/2022 16:45 - 18:45](#).



Increasing coordination and collaboration with the US does not, after all, foster the sought-after autonomy that often is interpreted as gaining partial independence from Washington. Although perhaps not primarily with regard to investment screening, in recent months Europe's dependence on the US has been made fairly obvious. The struggle for strategic autonomy is therefore in many ways something that can only be afforded in (European) peace time. The sudden shift in and current state of Europe require more pragmatic and urgent measures. As a result, the struggle for strategic autonomy has experienced a setback that is likely to persist for months if not years.

In the case of investment screening, it should be noted however that autonomy is not necessarily beneficial. Cooperation permits an exchange of information, such as on trends concerning investing entities' ownership structures or sector focus, that contributes to a deepened knowledge of associated risks and the need for outbound investment screening. Conducting this work in a transatlantic or other international format, rather than in a European silo, would allow swifter action and, ultimately, enhance European security.

## Conclusion

Geo-economic rivalry, competition and weaponization are here to stay. The US has long had an investment screening procedure, while the EU and thus Sweden have developed theirs more recently. The dynamic between member states and Brussels could make for weaker screening processes. Some member states are still in the process of establishing a mechanism, while others appear to have no such plans, but the trend for potentially hostile investments is already demanding adjustments. While the CFIUS has moved further than its European (and Swedish) equivalents, it has undergone changes to which both governmental and private sector entities may require time to adjust.

The new European security landscape has nonetheless challenged all three actors, and their investment screening processes. The struggle for European strategic autonomy has been hampered but also somewhat deprioritized as more pragmatic or urgent choices have been made. The EU has also moved away from its previous position on non-discrimination to ensure the protection of its security and public order. For Sweden, this has meant examining Russian interests in the country.

The division of the world as a result of the war in Ukraine had arguably been anticipated by Washington for some time. It had therefore already taken steps to place controls on outbound investments, and the EU and Sweden are likely to follow suit. The potential impacts of increased controls on business raise the need for caution, however, as they could have greater consequences



than desired or are currently foreseen. A strong positioning against adversaries could have undesired impacts on society, the private sector and ultimately citizens.

Nonetheless, FDI screening, both inward and outward, is an increasingly important and powerful tool with a guaranteed place in the toolbox for years to come.



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# brief



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