



Six months with the new Danish act on screening of foreign direct investments

Introduction to the new Danish act on foreign direct investment (FDI) screening and authorisation

The Danish act no. 842 of 10 May 2021 on screening of certain foreign direct investments etc. in Denmark (the "Investment Screening Act") entered into force on 1 July 2021. The act applies to certain investments and agreements completed on or after 1 September 2021.

Under the act, foreign investors are under certain circumstances required to apply for authorisation (approval) from the Danish Business Authority before completing an investment or agreement within a Danish entity which is doing business within a particularly sensitive sector or with particularly sensitive activities.

We provide information on the most important Danish rules on foreign direct investment (FDI) screening and authorisation (approval). The rules may apply when a foreign investor is acquiring or making an agreement with a Danish company.

We also provide information on experiences gained during the first five months of application of these new Danish FDI rules.

The Danish rules on foreign direct investment (FDI) screening and authorisation (approval) also comprise

three executive orders set under the Investment Screening Act:

- (1)** The executive order on the delimitation of the scope of application of the act on screening of certain foreign direct investments etc. in Denmark (the "Executive Order on Application").
- (2)** The executive order on procedures etc. when applying for authorization for or notification of certain foreign direct investments or special financial agreements in Denmark (the "Executive Order on Procedures").
- (3)** The Executive Order on the transfer of confidential information about certain foreign direct investments etc. in Denmark to other authorities (the "Executive Order on Confidential Information").

These rules provide the regulatory framework for screening and authorisation of foreign direct investments in Denmark (the "FDI rules"). The main objective of the FDI rules is to prevent foreign direct investments and certain agreements from posing a threat to national security or public order in Denmark.

The FDI rules entail two screening mechanisms. A mandatory authorisation scheme for investments in particularly sensitive sectors and activities, and a voluntary notification scheme for other sectors.

Both schemes apply to foreign investors. Foreign investors include:

- (1)** Companies not domiciled in Denmark.
- (2)** Companies domiciled in Denmark with parent companies not domiciled in Denmark.
- (3)** Companies domiciled in Denmark controlled by or under significant influence of a foreign national (person).

Sector-specific mandatory authorisation scheme

The mandatory authorisation scheme applies to a foreign investor who intends to acquire at least 10 percent of the ownership interests or voting rights in, or obtain equivalent control by other means in, a Danish company doing business within a particularly sensitive sector or with particularly sensitive activities. The foreign investor must apply for an authorisation of the investment granted by the Danish Business Authority. The mandatory authorisation scheme covers the acquisition of at least 10 percent of the capital (ownership interests) or voting rights in a Danish company or entity.

The scheme also covers cases where an investor obtains similar control in a Danish company or entity by other means. Similar control by other means may for example be obtained by control or influence based on one or more agreements with the Danish company or entity or persons or companies which exercise or may exercise control or influence in the Danish company or entity, including by purchasing assets in the Danish company or entity, or by providing a long-term loan to the Danish company or entity.

General voluntary notification scheme

The Danish FDI rules also comprise a general voluntary notification scheme. Under the scheme, an investor established outside the EU and EFTA may submit a notification to the Danish Business Authority of an intended or completed investment. The foreign investor may do so if the investment constitutes or may constitute a threat to national security or public order in Denmark, and the foreign investor directly or indirectly acquires at least 25 percent of the ownership interests or voting rights or equivalent control by other means in the company or entity in Denmark.

The Danish Business Authority initially assesses whether the notified intended or completed investment constitutes or may constitute a threat to national security or public order in Denmark. Based on that, the Danish Business Authority or the Danish Minister for Industry, Business and Financial Affairs decides whether the investment is or is not authorised under the Danish FDI rules.

Special financial agreements are also covered by the FDI rules

The mandatory authorisation scheme and the voluntary notification scheme also both apply to certain special financial agreements. The schemes apply if an agreement entails or has the effect that a foreign investor acquires financial control of or significant influence on business matters in a Danish company or entity which is doing business within a particularly sensitive sector or with particularly sensitive activities.

Such special financial agreements may be an agreement on a joint venture, acquisitions of assets, provision of services or operation of a business or activities which are entered into between a foreign investor and a Danish company or entity. Such an agreement is comprised by the Danish FDI rules if the agreement has the effect that the foreign investor acquires control of or significant influence on the Danish company or entity or business-critical areas of the company or entity (for example its development activities).

Special financial agreements are only comprised by the mandatory authorisation scheme if the foreign investor is a foreign national (person) or company established outside the EU and EFTA.

Particularly sensitive sectors and activities

The mandatory authorisation scheme only applies if the Danish company or entity concerned is doing business in one of the particularly sensitive sectors or with one of the particularly sensitive activities. The sectors and activities generally include the national defence, IT security functions, processing of classified information, production of dual-use products, other critical technology and critical infrastructure. The particularly sensitive sectors and activities are stated in the Execute Order on Applications.

Critical infrastructure includes companies and entities which are performing activities which are necessary to maintain or restore certain functions which are important (essential) for the society within certain sectors which are important (essential) for the society.

The determination of the sectors, activities and functions which are comprised by the rules on critical infrastructure

may give, and in practice often gives, rise to difficulties when it is assessed whether a company is comprised by the rules, that is to say whether the goods or services provided by the company are necessary in order to maintain or restore a specific function in a specific sector. In our current experience, the Danish authorities interpret the scope of application of the rules on critical infrastructure rather broad. For example, companies producing equipment or components used in critical sectors of society may be comprised by the definition.

Case handling process

The Danish Business Authority examines whether an investment or a financial agreement constitutes a threat to the national security or public order. This applies to all investments or agreements no matter whether they are subject to the mandatory authorisation scheme or the voluntary notification scheme.

The Danish Business Authority bases the assessment on information regarding the target company or entity, the immediate foreign investor and the ultimate foreign investor. In relation to the foreign investor, the Danish Business Authority will, among other matters, base its assessment and decision on whether the investor is directly or indirectly controlled by a foreign government, body or armed forces, through ownership, financing or other means of control, or is involved or has been involved in activities affecting the national security or public order in another EU member state or allied country of Denmark.

If an investment does not constitute a threat to national security or public order, the Danish Business Authority grants an authorisation. In our experience, the Danish Business Authority will very often grant an authorisation of the investments.

If the Danish Business Authority finds that the investment may pose a threat and that the possible threat can be mitigated by specific terms or commitments set by the investor, the authority may contact the investor to negotiate and seek to make an agreement on such terms. Such terms may for example be on or related to economic or management matters. The Danish Business Authority may then grant an authorisation of the investment, provided that the investor complies with the terms on which the authorisation is based.

If the Danish Business Authority finds that an investment or agreement may pose a threat, the application is then submitted to the Minister for Industry, Business and Financial Affairs. After any relevant consultations with other ministers, the Minister for Industry, Business

and Financial Affairs makes a decision on whether the minister grants or does not grant an authorisation of the investment or agreement.

The Danish Business Authority shall provide its decision within 60 working days from the day a complete application is received. This time limit may be extended by an additional 30 working days if further investigations are required or commitments are proposed by the investor.

In addition to a full application, the mandatory authorisation scheme entails a formal pre-screening option. It gives an investor the opportunity to obtain a decision from the Danish Business Authority on whether the investment relates to "critical technology" or "critical infrastructure", which are two of the five particularly sensitive sectors and activities. There is no formal time limit for the making of a pre-screening decision.

The Danish Business Authority is not required to make a decision on the matter comprised the application for the pre-screening decision.

Effects of non-compliance

Failure to apply for FDI authorisation of an investment or agreement subject to the mandatory authorisation scheme can have serious consequences. If an investment has been made without the necessary authorisation, the Danish Business Authority can order the non-compliance to be brought to an end, that is to say that the investor must apply for an FDI authorisation within a specified period. In addition, the Danish Business Authority may order the termination and winding up (liquidation or dissolution) of the investment or the agreement.

If an investor does not comply with an order to terminate and wind up an investment or agreement, the Danish Business Authority may revoke any voting rights which the investor may have in the Danish company or entity. An agreement which is comprised by an order to terminate the agreement is without legal effect (invalid) between the parties. In addition, the Danish authority may inform the authorities of the other EU Member States that the investor has not complied with the Danish FDI rules.

The Danish Business Authority may investigate whether an investment or agreement have been completed without the necessary prior authorisation. The authority may publish information that it has commenced such an investigation.

Confidentiality

Cases processed under the FDI rules are exempt from the Danish rules on public access to documents of authorities. This means that Danish authorities cannot grant access to case document to any third party in a case processed under the FDI rules. The exemption from public access applies to all documents in the case, including an application for an FDI authorisation, an FDI authorisation and any agreed terms for an authorisation.

An FDI application is submitted and processed in confidentiality by the Danish authorities. The decision on whether to grant or not grant a FDI authorisation will not be published. The minister and the employees of the authorities who process the application and make the decision are subject to confidentiality obligations.

An investor may apply for and will generally be granted access to case document in the investor's own case. However, the Danish Business Authority and the Minister for Industry, Business and Financial Affairs may decide that the investor shall not be granted access to case document in the investor's own case if this is necessary for reasons of national security or public order.

Sector-specific screening mechanisms

The FDI rules of the Investment Screening Act do not apply to investments comprised by other Danish rules on any sector-specific screening and authorisation mechanism for foreign direct investment. Such other sectorspecific FDI rules include rules thereon in the following acts and regulations:

The War Material Act under the Ministry of Justice. This Act applies to materiel designed for military use (and which cannot be used for civilian purposes) and ammunition which can be used for military purposes.

The Continental Shelf Act under the Ministry of Climate, Energy and Utilities. This Act applies to Danish and foreign companies that want to lay power cables or pipelines to transport foreign-produced hydrocarbons on Danish maritime territory.

For the telecoms industry, there is sector-specific regulation concerning suppliers in critical telecommunication infrastructure under which suppliers must notify the Danish Centre for Cyber Security prior to negotiating agreements concerning the infrastructure.

You are welcome to contact our FDI specialists

DLA Piper Denmark has extensive experience in advising on FDI related matters.

You are welcome to contact us if you would like to have a meeting on any matter or to discuss the possibility of us hosting a webinar on the Danish FDI rules and practice

Contact

You are welcome to contact us



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