



PROPOSAL FOR NEW DANISH ACT ON SCREENING OF FOREIGN DIRECT INVESTMENTS IN DENMARK

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Introduction

9 December 2020, the Danish Business Authority published the proposed new Danish Act on Screening of Foreign Direct Investments in Denmark (the “Act”) for market participant consultation purposes. The consultation process deadline is 6 January 2020. Moalem Weitemeyer expects to issue a hearing statement on the proposed Act and is currently in dialogue with the Danish Bar Association about a potential hearing statement (joint or sole). The Act is set to be submitted for the Danish parliament’s approval process in February 2021.

The Act introduces a mandatory clearance process for foreign direct investments into certain sensitive Danish enterprises where the investor obtains control of at least 10% of the

enterprises' share capital or voting rights. Further, a notification process is proposed wherein investors residing outside EU/EFTA voluntarily can notify to the Danish Business Authority if by the investment the investor obtains more than 25% of the enterprises' share capital or voting rights and assesses that the transaction may pose a threat to national security or public order in Denmark.

Purpose of the Act

The primary purpose of the Act is to ensure that foreign direct investments in Denmark are screened on the grounds of security or public order and to set the basis for a potential blocking or mitigating actions towards the investor for the purpose of ultimately accepting the investment by virtue of certain conditions.

The Act is the culmination of the work by the working group founded on 1 April 2020 by the Danish Minister Nick Hækkerup, the purpose of which was to consider, assess and present proposals for a possible Danish screening model. As highlighted in our previous newsletters [Foreign Direct Investments: A new Practice Area for international M&A?](#) and [The EU urges intensified Screening of foreign Investments in the EU](#), the focus within the area has only increased since the publication of the EU legislative act for a framework for the screening of foreign direct investments on EU territory by the impact of COVID-19 and the foreign investors pursuit of especially healthcare/medical EU enterprises.

Proposed Main Terms of the Act

- *Mandatory notification process.* The Act introduces a mandatory approval scheme for foreign direct investments within particularly sensitive sectors/enterprises. A foreign direct investor who intends to acquire, directly or indirectly, at least 10% of the share capital or voting rights, or equivalent control by other means (e.g., joint ventures, loan arrangements, supply or service arrangements, joint research efforts etc.) in an enterprise in Denmark within particularly sensitive sectors must apply in advance to the Danish Business Authority for transaction clearance. Renewed approval is required if the ownership stake increases to 20%, 1/3, 50%, 2/3, or 100%.

The obligation applies to any foreign direct investor not residing in Denmark, or any subsidiaries or branches owned and/or controlled by any foreign enterprise or natural person, and to all foreign direct investments into any enterprise residing in Denmark irrespective of type.

Sensitive sectors explicitly cover enterprises within the defense industry, IT security or processing of classified information, dual use products, certain other critical techs, and critical infrastructure as well as greenfield investments.

- Voluntary notification scheme. The Act introduces a cross-sectorial (and outside of sectors covered by the mandatory notification scheme) voluntary notification scheme where investors residing outside the EU/EFTA can notify the Danish Business Authority of an intended or completed investment if the investment may pose a threat to national security or public order in Denmark, and the foreign investor directly or indirectly obtains possession of or control over at least 25% of the share capital or voting rights or equivalent control by other means in an enterprise in Denmark.

By its nature, the scheme is voluntary and therefore does not impose any obligation on the (outside of EU/EFTA) foreign direct investor, but due to the five-year scrutinization period described below, there is a risk that the Danish Business Authority will open a case on the already completed transaction and “rule” on the grounds of national security and public order that the investment shall be annulled (against compensation to the investor suffering from the “roll-back”).

On the Act’s entry into force, guidance on whether a transaction reasonably falls within the application of the voluntary notification scheme will be given by the Danish Business Authority in the form of a delegated act/guidance paper which is intended to support the Act with more granular legislation/wording on certain interpretive sections.

- Control through other means than equity. Both the mandatory and the voluntary notification scheme are proposed to apply to certain special financial arrangements if such arrangements causes the foreign direct investor to obtain financial control or significant impact on the operation of the enterprise that may pose a threat to national security or public order. Such arrangements are proposed to include joint ventures, acquisitions of assets, supplier, service provider and operating agreements.
- Governmental body. The Danish Business Authority has been granted the decision-making power in terms of approving the foreign direct investments, such approval grounded on the Danish Business Authority’s assessment that the investment does not threaten national security or public order. The Danish Business Authority can negotiate with the foreign direct investor on terms that can mitigate the

threats meaning e.g., that there may be conditions that limit the possibilities of influencing the management of the enterprise in question. Decisions/orders to reject or prohibit, to annul a completed transaction, or to approve subject to certain conditions, shall, however, be made by the Danish Ministry of Industry, Business, and Financial Affairs after consultation with other Danish ministries.

- Court ruling/“client privilege”. Any unfavorable decisions can be brought before the Danish courts in the first instance. In this context, it is worth mentioning that for purposes of securing national interests, it is proposed that information potentially jeopardizing these interests will only be shared with certain special appointed Danish attorneys who will assess the information on behalf of the investor without sharing such information with the investor. Also worth mentioning in this context is that the Danish Business Authority without having obtained court order can “visit” affected enterprises to collect information etc. for assessment of the application with the Act - which must be considered a quite far-reaching measure now proposed legalized.
- 5-year scrutinization period. For foreign direct investments which are covered by the Act, but not notified, it is proposed that the Danish Business Authority be given the opportunity to examine the investment for up to five years after the implementation of the investment, and with the possibility to order that the investment be annulled if it threatens national security or public order.
- Applicability. The Act will enter into force on 1 July 2021.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:



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