



PROPOSAL TO EXPAND THE FIELD OF APPLICATION OF THE DANISH FOREIGN DIRECT INVESTMENT REGIME

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Introduction

A proposal for adjusting the field of application of the Danish Act on Screening of Foreign Investments (the “Act”) was recently put forward by the Danish Business Authority with 29 March 2023 as the deadline set for responding.

The Danish foreign direct investment regime has been in force since 1 July 2021 and implies that all foreign investors intending to invest into certain sensitive companies will need to obtain approval from the Danish Business Authority before the investment is completed.

The proposal adds another dimension to the current regime which will require parties entering into public contracts related to critical infrastructure with a public customer to obtain prior approval of the contract. As a start, this will only apply to parties contracting within the energy sector. It is, however, the intention that this should also apply to other sectors, and a decision is expected to be made in this regard by the end of 2023.

Out of consideration for the tender process regarding the construction of the North Sea Energy Island, the Danish Business Authority has proposed that the proposal should come into force on the day after the announcement in the Danish Official Journal. This shall secure that all bidders are screened before a partnership agreement is entered into between a private participant and the Danish Energy Agency.

The overall purpose of this additional regime is to increase control with parties contracting with public customers active within management, servicing, and/or delivery of critical infrastructure, which is defined as infrastructure which is necessary to maintain or restore essential societal functions, and this covers sectors as transportation, health, drinking water and food, finance and economy, information technology, etc.

In addition to the above, the proposal suggests certain changes to the procedures for handling notification under the Danish Foreign Direct Investment Regime.

Screening and Approval of Public Contracts

A public customer is defined as any governmental, regional, and local authority, including public bodies. A public contract is defined as an installation, supplier, or servicing agreement entered into with a public customer.

According to the proposal, it will be a requirement for *all* contracting parties intending to enter into a public contract with a public customer to file for approval before entering into the contract. Thus, the approval must be obtained before signing of the contract.

The proposal applies to all contracting parties. It is worth noting that the regime applies not only to non-EU and EU investors but also to Danish contracting parties. Furthermore, the proposal does not set any lower threshold as regards to the contract value.

It will, as a main rule, only be required for the contracting party to apply for approval before a public contract is signed. Under certain circumstances, however, the Danish Business Authority may require that all participants in a public tender process apply for approval in order to avoid any sharing of critical information to a bidder that may not have been approved by the Danish Business Authority.

If the counterparty plans to use sub-contractors, such sub-contractors are similarly required to be approved in accordance with the rules provided for in the Act before commencing any work. If the sub-contractor is not known at the time when a notification is filed, the Danish Business Authority is entitled to make it a condition in its approval that the sub-contractor is approved before commencing its work.

Phase-divided Case Processing of Notifications filed under the Act

The proposal suggests a changed case processing by the Danish Business Authority for notified investments and special financial agreements. This change will apply to notifications filed with the Danish Business Authority and will disregard whether the notification is filed under the mandatory or voluntary regime.

Unlike other regimes, for instance the regime in France, the current Danish regime provides only a one phase review, meaning that when the Danish Business Authority deems that it has all necessary information to make a decision, the review period will be 60 business days.

The proposal suggests that the case processing is divided into a phase 1 and a phase 2 review. Phase 1 will include a 45-business day review and allow for the Danish Business Authority to decide whether the investment can be approved, or if a subsequent phase 2 review is required in order to investigate the investment further.

If a phase 2 review is required, the Danish Business Authority is entitled to request any further information that it deems necessary. Once such information has been provided, a 125-business day review period will start, meaning that the case processing could potentially add up to a total of 170 business days.

In the event that the Danish Business Authority finds that a particular investment might pose a threat to the national security – and that this cannot be remedied – the Danish Business Authority is required to refer the investment to the Danish Minister of Trade and Industry.

The purpose of the phases 1 and 2 review is that simple cases may be reviewed within 45 business days – as opposed to the current 60 business days. Further, the proposal contemplates that the phase 1 review be based on a simplified notification form and require less extensive information than according to the current regime. Contrary, the phase 2 review period will be more extensive and require more information and documentation.

Our Comments

The proposal provides for a significant broadening of the Act.

Currently, the Act only requires that an investor making an investment or entering into a special financial agreement must obtain approval from the Danish Business Authority if said investor obtains control with, or significant influence on, a company and the investor is a non-EU/EFTA member.

With the proposal, all contracting parties to a public contract within critical infrastructure will be required to obtain an approval from the Danish Business Authority, the value of the public

contract and the nationality of the counterparty notwithstanding. Clearly, this will make entering into public contracts within critical infrastructure more complicated than so far.

Another consequence of the proposal is that the Danish Business Authority will not only require information about the counterparty – but also information about any sub-contractors that the counterparty intends to use, which further expands the scope of the Act. Accordingly, any company intending to participate in a public contract within critical infrastructure should have a clear picture of any sub-suppliers and sub-contractors used in order to be able to specify this during the review by the Danish Business Authority. Furthermore, this should even be taken into consideration when choosing sub-suppliers and sub-contractors.

Further, it is worth noting that, as the approval is required to be obtained before the signing of the public contract, it could significantly delay the effective date of the agreement. This should be taken into account when structuring the process – both for the counterparty and the public customer.

As for the proposed phase-divided case processing of notifications filed under the Act, this could result in a shorter review period for less complicated investments than what we see today.

However, the phase 2 review period of 125 business days could potentially result in a longer period between signing and closing of an investment, which the parties to an agreement should take into consideration during their negotiations.

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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