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by

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Abstract

Since September 2021, investments in Danish companies have been subject to a new Danish investment screening mechanism. The screening is mandatory for investments of 10 % of the shares or voting rights in Danish companies within particularly sensitive sectors and activities such as defence, dual use, IT security, critical technologies, and critical infrastructure. An investment made by a Danish investor is not subject to screening unless the Danish investor is under control or significant influence by foreign persons or entities, including persons and entities from other EU Member States.

The regime includes an ex officio cross-sectoral screening of investments made by persons or entities from outside EU and EFTA if the investor acquires at least 25 pct. of the shares or voting rights in a Danish company. The same applies to persons or entities within EU and EFTA if they are under control or significant influence by persons or entities from outside EU and EFTA. Such investments can be submitted for voluntary screening.

While Denmark continues to welcome foreign investments, the learning curve has so far been steep for the Danish Business Authority and the Danish legal advisers in particular with regard to the scope of the mandatory screening.

Author

Rebecca Vikjær-Andresen has extensive experience in the Danish FDI rules and has dealt with the rules from many different angles, including the application process, pre-screening, risk assessments, drafting contract clauses to handle FDI related issues, handling of approval requirement in public tender procedures as well as planning internal procedures at enterprises and authorities to identify transactions that could be subject to screening requirements. Besides the Danish FDI regime, Rebecca has extensive experience in EU state aid law includes handling of notification and complaint procedures involving the European Commission and assistance with legal proceedings before the Court of Justice of the European Union (CJEU). Rebecca has further assisted Danish authorities with comprehensive reviews of national regulation with a focus on compliance with EU law and potential supererogatory implementation of EU law, among others.

Hussain Raja Abdullah as a young academic has garnered extensive knowledge into the field of international investment law, as part of his studies. Having a natural interest in international trade and investor protection, Hussain has had a substantial academic interest to further his acumen of FDI related issues. Furthermore, Hussain has worked intensively in various compliance functions handling interpretation and implementation of EU law both in private practice and in the public sector.

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1. Introduction and Political Background

From 2013 to 2018 foreign direct investments in Denmark amounted to approx. DKK 3,850 billion (approx. EUR 517 billion) corresponding to 30.9 % of Denmark's GNP in the period. Approx. 75 % are foreign direct investments from other EU Member States.¹

The Danish government actively seeks to attract foreign investments. Foreign investments are regarded as a key element in maintaining Denmark's position in the world and to ensure access to new knowledge, technology, and competencies and to promote Danish solutions around the world not least within green technology.² The national investment promotion effort is managed by the Ministry of Foreign Affairs of Denmark in an investment promotion organisation called "Invest in Denmark" anchored in the Trade Council.³ "Invest in Denmark" provides information, insights, advice, analyses, guidance etc. free of charge with the purpose of attracting, maintaining, and developing foreign investments across Denmark.⁴ The effort includes promotion staff at Danish embassies and consulates general.⁵

Prior to 1 July 2021, only investments in relation to companies producing war material and companies running pipes in Danish territorial waters were subject to investment screening.⁶ At least since 2018, it has been a focus of attention of successive Danish governments to explore the need for and the design of a general investment screening mechanism. An inter-ministerial

¹ Explanatory notes for the proposal for the Act on screening of certain foreign direct investments etc. in Denmark (Investment Screening Act), L 191/2020, 10 March 2021, section 1.

² "Strategy for attracting foreign investments 2020-2023", Ministry of Foreign Affairs of Denmark, Invest in Denmark, p. 4.

³ www.investindk.com.

⁴ "Strategy for attracting foreign investments 2020-2023", Ministry of Foreign Affairs of Denmark, Invest in Denmark, p. 2.

⁵ "Strategy for attracting foreign investments 2020-2023", Ministry of Foreign Affairs of Denmark, Invest in Denmark, p. 24.

⁶ Act No. 1004 of 22 October 2012 on war materials (War Materials Act) and Act No. 1189 of 21 September 2018 on the continental shelf and certain pipelines in the Territorial Sea (Continental Shelf Act).

working group presented its recommendations in a report⁷ in October 2020, and these recommendations laid the foundations for the following proposal for a general investment screening mechanism.⁸

The work of the working group and the following proposal for a general investment screening mechanism, referred to the European Commission's call upon the EU Member States to set up a full-fledged screening mechanism and to include cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs.⁹

Based on the proposal, the Danish Parliament adopted the Act on screening of certain foreign direct investments etc. in Denmark (Investment Screening Act) on 4 May 2021.¹⁰ The act entered into force on 1 July 2021 and applies to investments etc. that take place from 1 September 2021.¹¹ The aim of the act is to prevent foreign direct investments etc. from posing a threat to the national security or public order in Denmark.¹² No other policy considerations are included in the screening. The Act is designed within the framework established by 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.¹³

⁷ Report on the Upcoming General Arrangement for the Screening of Foreign Investments (October 2020), The Business Committee of the Danish Parliament, 2020-21 Collection, General Part Appendix 120, Appendix 8.

⁸ Explanatory notes for the proposal for the Act on screening of certain foreign direct investments etc. in Denmark (Investment Screening Act), L 191/2020, 10 March 2021, section 2.

⁹ Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) (2020/C 99 I/01).

¹⁰ Act No. 842 of 10 May 2021 on screening of certain direct investments etc. in Denmark (Investment Screening Act).

¹¹ Article 49 of the Investment Screening Act.

¹² Article 1(1) of the Investment Screening Act.

¹³ OJ L 79I, 21.3.2019, p. 1

The screening is performed by the Danish Business Authority.¹⁴ If the Danish Business Authority assesses that an investment etc. constitutes a threat to national security or public order, and that the threat may not be mitigated by agreed terms, the Minister for Industry, Business and Financial Affairs will decide whether the investment etc. will be authorised. The decision will be made following negotiations with the Minister for Finance, the Minister for Foreign Affairs, the Minister for Justice the Minister for Defence and other relevant ministers.¹⁵

A key feature of the Danish screening mechanism is that it also applies to certain supply and service agreements etc. (so-called “Special financial agreements”). It includes a number of commercial contracts that are not generally seen as giving a foreign contracting party controlling rights over a Danish entity.

2. Domestic Framework

2.1. Overview of Domestic Screening Mechanisms

The Danish 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.

The Act does not apply if other legislation contains rules on sector-specific screening and authorization.¹⁶ There are currently two sector-specific screening mechanisms with a very limited scope in the War Material Act and the Continental Shelf Act:

In general terms, the screening under the War Material Act applies to private companies producing:

- materials meant for military use, without civilian functions,
- firearms and materials equivalent hereto, unless said materials are produced for hunting or sport,
- ammunition meant for military use,
- gunpowder and explosives, and
- components and parts, which are constructed for military use and serve no civilian function.

¹⁴ Article 32(1) of the Investment Screening Act

¹⁵ Article 32(2) of the Investment Screening Act.

¹⁶ Article 1(2) of the Investment Screening Act.

The screening is required e.g., if a foreigner will acquire more than 20 % of the company, or if the “Danish ownership” is 60 % or less.¹⁷

The screening under the Continental Shelf Act applies to companies seeking to run pipes in Danish territorial waters. An authorisation will only be granted if it would be compatible with Danish foreign policy interest, security policy interest and defence policy interest.¹⁸

For investments not covered by these specific screening mechanisms, the Investment Screening Act applies. The Act entails two screening mechanisms:

- A mandatory screening for foreign direct investments within particularly sensitive sectors and activities and
- an ex officio screening for other foreign direct investments.

2.2. Mandatory Screening under the general Danish Investment Screening Act

It is mandatory for foreign investors to apply for authorisation from the Danish Business Authority if the investor intends to acquire directly or indirectly at least 10 % of the shareholding or voting rights of a Danish company within particularly sensitive sectors and activities.¹⁹ The requirement also applies to obtaining equivalent control by other means. This seems to include among others the power to make significant decisions on managerial, operational, financial or development matters, the right to appoint or remove board members.²⁰

Subsequent investments by the foreign investor in the same company are subject to screening requirements if the shareholding or voting rights in the Danish company increases to one of the following thresholds that will trigger the screening: 20 %, 1/3, 50 %, 2/3 or 100 %.²¹

Foreign investors are defined as:²²

¹⁷ Article 3, cf. Article 1 of the War Materials Act.

¹⁸ Article 3a(2) of the Continental Shelf Act.

¹⁹ Article 5(1) and 5(2) of the Investment Screening Act.

²⁰ Explanatory notes for the proposal for the Act on screening of certain foreign direct investments etc. in Denmark (Investment Screening Act), L 191/2020, 10 March 2021, section 2, p. 55-56.

²¹ Article 5(4) of the Investment Screening Act.

²² Article 2(1) and 2(2) of the Investment Screening Act.

- Foreign citizens (non-Danish citizens)
- Entities domiciled outside Denmark
- Entities domiciled in Denmark subject to control or decisive influence by entities domiciled outside Denmark or foreign citizens

An investment is only subject to mandatory screening if the investment is made in a Danish entity within five particularly sensitive sectors and activities:²³

- Companies in the defence sector
- Companies in the field of IT security functions or the processing of classified information
- Companies producing dual-use items as defined in Article 2(1) of the Council Regulation (EC) No 428/2009 of 5 May 2009, as amended
- Companies within other critical technologies, such as advanced industrial robot technology, space technology for launching satellites, quantum technology and nuclear technology
- Companies within critical infrastructure, such as the energy sector, information and communication technology, transport, civil defence, healthcare, drinking water, wastewater, banking and insurance etc. It should be noted that the scope of critical infrastructure is subject to uncertainty

The Danish Business Authority can authorise an investment if the authority assesses that the investment does not pose a threat to national security or public order. An authorisation may be subject to agreed terms to mitigate a threat to national security or public order.

2.3. Ex officio screening

The ex officio screening applies to foreign investors, however neither to citizens from countries within EU and EFTA nor entities established within EU and EFTA unless under control or significant influence from citizens or entities outside EU and EFTA. In other words, the ex officio screening applies to:

- Investors who are citizens outside EU and EFTA
- Entities domiciled outside EU and EFTA

²³ Article 6(1) of the Investment Screening Act and Article 3(3) and Articles 7-11 of Executive Order no. 1491 of 25 June 2021 on the delimitation of the scope of application of the Act on screening of certain foreign direct investments etc. in Denmark.

- Entities domiciled within EU and EFTA and under control or significant influence from citizens outside EU and EFTA or entities domiciled outside EU and EFTA

The screening is cross sectoral and may be conducted in relation to investments whereby the investor directly or indirectly acquires at least 25 % of the shareholding or voting rights (or equivalent control by other means) of a Danish company.²⁴ The Danish Business Authority can conduct an ex officio screening up to five years after the investment if the authority assumes that the investment may pose a risk to national security or public order.²⁵

In order to avoid the risk of a subsequent ex officio screening, an investor may apply for a voluntary screening.²⁶

2.4. Screening of special financial agreements

Special financial agreements include certain supply agreements, operating or service agreements, and joint ventures on cooperation regarding research and development activities to be concluded with both private Danish entities and Danish public authorities.²⁷ Screening of such agreements are triggered if the “foreign investor” (i.e. contracting party) is a citizen from outside EU and EFTA, a company domiciled outside EU and EFTA, or a company domiciled within EU and EFTA and under control or significant influence from citizens outside EU and EFTA or entities domiciled outside EU and EFTA.²⁸

The screening of special financial agreements is mandatory within the five particularly sensitive sectors and activities mentioned above. Agreements outside the scope of the mandatory screening may be subject to ex officio screening and a contracting party may apply for a voluntary screening.

²⁴ Article 10(1) of the Investment Screening Act.

²⁵ Article 14 of the Investment Screening Act.

²⁶ Article 10(1) of the Investment Screening Act.

²⁷ Articles 12-14 of Executive Order no. 1491 of 25 June 2021 on the delimitation of the scope of application of the Act on screening of certain foreign direct investments etc. in Denmark.

²⁸ Article 7 of the Investment Screening Act. The administrative practice of the Danish Business Authority indicates that a shareholding or voting rights corresponding to 25 % will be considered as “control or significant influence”, cf.

3. Developments to follow

The Investment Screening Act has only applied to investments etc. since 1 September 2021. It is expected that the Executive Order no. 1491 of 25 June 2021 on the delimitation of the scope of application of the Act on screening of certain foreign direct investments etc. in Denmark might be amended to reflect the experience and practice developed by the Danish Business Authority.

According to the preparatory works of Act, the Danish Ministry of Industry, Business and Financial Affairs will evaluate the Act in 2023 and include the results of the Commission's evaluation of the FDI Regulation which are to be reported by 12 October 2023. The purpose of the national evaluation will be to provide the Danish Parliament with a basis for assessing whether there is a need to amend the Act. The evaluation is expected to take place in the autumn of 2023.

Meanwhile a change to the screening procedure has entered into force on 1 July 2023.²⁹ The procedure has now become a two phase-procedure. In the first phase lasts 45 days. If the authorisation cannot be granted based on the review in the first phase, the second phase is launched and may last for 125 days.³⁰

²⁹ [Act No. 736 of 13 June 2023 regarding amendment of the Investment Screening Act etc.](#)

³⁰ Chapter 3 a in the amendment to the Investment Screening Act

Annex 1: Relevant laws, ordinances, regulatory guidelines

The Investment Screening Act

- Act no. 842 of 10 May 2021 on screening of certain direct investments etc. in Denmark (the Investment Screening Act):
 - <https://www.retsinformation.dk/eli/lta/2021/842>.
 - Unofficial English translation by the Danish Business Authority: https://assets.ctfassets.net/kunz2thx8mib/12NNUnRR36F4tb239ipRlp/d938e94df980165ae561e5c792d8fdf1/Act_on_screening_of_certain_foreign_direct_investments_etc_in_Denmark_the_Investment_Screening_Act.pdf.
- Executive Order no. 1491 of 25 June 2021 on the delimitation of the scope of application of the Act on screening of certain foreign direct investments etc. in Denmark:
 - <https://www.retsinformation.dk/eli/lta/2021/1491>.
 - Unofficial English translation by the Danish Business Authority: https://assets.ctfassets.net/kunz2thx8mib/37hAG0P0wmyKAMCNmftFzA/bc300367195498e0dcc6c2fc96dd34e9/Executive_Order_on_the_delimitation_of_the_scope_of_application_of_the_Act_on_screening_of_certain_foreign_direct_investment.pdf.
- Executive Order no. 1454 of 24 June 2021 on procedures etc. when applying for authorisation for or notification of certain foreign direct investments or special financial agreements in Denmark:
 - <https://www.retsinformation.dk/eli/lta/2021/1454>.
 - Unofficial English translation by the Danish Business Authority: https://assets.ctfassets.net/kunz2thx8mib/3fQBQ8CKCyMjcv4k9sHL61/8934ea400bdb1404c1c6e9426ecdae00/Executive_Order_on_procedures_etc_when_applying_for_authorisation_for_or_notification_of_certain_foreign_direct_investments.pdf.
- Executive Order no. 1455 of 24 June 2021 on the transfer of confidential information about certain foreign direct investments etc. in Denmark to other authorities:
 - <https://www.retsinformation.dk/eli/lta/2021/1455>.

- Unofficial English translation by the Danish Business Authority: https://assets.ctfassets.net/kunz2thx8mib/6Tnbeg9ErctLH8znK9Jle/ec627efb3efe65cbe61dcc405a1dded2/Executive_Order_on_the_transfer_of_confidential_information_about_certain_foreign_direct_investments_etc_in_Denmark_t_o_oth.pdf.
- Circular No. 9613 of 9 August 2021 on Danish authorities' cooperation regarding screening of foreign direct investments in accordance with the Investment Screening Act:
 - <https://www.retsinformation.dk/eli/retsinfo/2021/9613>.
- Guidance from the Danish Business Authority on the Investment Screening Act:
 - <https://danishbusinessauthority.dk/screening-investments-danish-companies>.

Other legislation

- Act no. 1004 of 22 October 2012 on War Material (consolidated)
- Act no. 1189 of 21 September 2018 on the Continental Shelf and certain pipelines installations on territorial waters (consolidated)

Annex 2: Relevant administrative and court cases

No relevant administrative cases or court cases on the subject of foreign investment screening in Denmark have been published.

Annex 3: Relevant literature

- Nielsen C C Ø, Espensen S K (2021) Ny dansk investeringsscreeningslov: en praktisk gennemgang Nordisk Tidsskrift for Selskabsret 2021/3:37–52.
- Mouyal L W (2020), Investeringsscreening på sundhedsområdet i kølvandet på COVID-19-krisen, Erhvervsjuridisk Tidsskrift, 2020/3:126–131.
- Ølykke G S, Holdgaard R (2019) Er EU's forkærlighed for frihandel og international åbenhed blevet for naiv? Advokaten 3 April 2019:34–36.

About the CELIS Institute

The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. More about the Institute's activities under www.celis.insitute.

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CELIS Country Reports (hereafter "Report") are produced by leading experts for any European and select non-European jurisdiction following an elaborate model, allowing for comparison and evaluation across jurisdictions. The project's aim is to identify and suggest best practice and to propose a common European (model) law on investment screening.

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