

**International
Comparative
Legal Guides**



Practical cross-border insights into FDI screening regimes

Foreign Direct Investment Regimes

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Contributing Editor:
Matthew Levitt
Baker Botts L.L.P.

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Jesper Fabricius

1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The Danish Investment Screening Act (“*Investeringsscreeningsloven*”, the “DISA”) entered into force on 1 July 2021 following the international trend to tighten control of foreign investments. Prior to the DISA, there were only a couple of sector-specific provisions in Danish law, mainly within weapons production, allowing for the control of investments on national security and public order grounds. It remains to be seen how the national policy will be administered under the new regime.

The DISA also implements the national legal framework for the cooperation mechanism envisaged by Regulation (EU) 2019/452 (the “EU FDI Regulation”) and, generally, transposes the requirements of the EU FDI Regulation.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

The DISA largely follows the factors which are laid out in art. 4 of the EU FDI Regulation as factors which may be taken into consideration. See also question 1.1 above.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

There are no current proposals to change the foreign investment review policy or the current laws.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

As mentioned in question 1.1 above, the DISA entered into force on 1 July 2021 (Danish Act No. 842 of 10 May 2021). The DISA will apply to all foreign direct investments, etc., which have not been completed prior to 1 September 2021.

The DISA allows for the Danish Minister for Industry, Business and Financial Affairs (the “Danish Business Minister”) to issue Executive Orders which – within the overall legal framework of the DISA – outlines the details of the administration

of the DISA. The Danish Business Minister has issued three Executive Orders:

- (i) Executive Order No. 1491/2021 on the delimitation of scope of application of the Act on screening of certain foreign direct investments, etc. in Denmark (Investment Screening Act).
- (ii) Executive Order No. 1455/2021 on the transfer of confidential information about certain foreign direct investments, etc. in Denmark to other authorities.
- (iii) Executive Order No. 1454/2021 on procedures when applying for authorisation for or notification of certain foreign direct investments or special financial agreements in Denmark.

The DISA supplements the previous Danish measures on screening mechanisms:

- (1) The Danish Act on War Material (The Danish Consolidated Act No. 1004 of 22 October 2012).
- (2) The Danish Act on the Continental Shelf and Certain Pipelines Installations on Territorial Waters (The Danish Consolidated Act No. 1189 of 21 September 2018).

The DISA does not apply within the scope of application of these two other measures. As these two measures are only of very limited application, the DISA must today be considered the main Danish instrument of control as regards FDI, and the other two measures will only be covered very briefly in this contribution.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

The DISA applies to foreign direct investments in and certain special financial agreements with businesses domiciled in Denmark, regardless of how the Danish business is organised (whether it is a company, a personally owned business, etc.). The DISA also applies to the establishment of new Danish businesses within certain particularly sensitive sectors or activities (Greenfield investments).

As a point of departure, foreign direct investments and special financial agreements are investments/agreements which are:

- Made or entered into by foreign citizens.
- Made or entered into by companies that are not domiciled in Denmark. This also applies even if the company has a permanent establishment in Denmark.
- Made or entered into by companies domiciled in Denmark if the company is a subsidiary or a branch of a company not domiciled in Denmark.
- Made or entered into by companies domiciled in Denmark if a foreign citizen or a company not domiciled in Denmark has control over or significant influence on it.

The DISA distinguishes between foreign direct investments in and certain special financial agreements with Danish businesses which operate:

- (i) **within** certain particularly sensitive sectors or activities (see question 2.3 below). In this area of business, prior filing to and approval from the Danish Business Authority (“*Erbvervstyrelsen*”, the “DBA”) is mandatory (the “Mandatory Regime”); and
- (ii) **outside** the particularly sensitive sectors or activities (as described in question 2.3 below). In this area of business, there is no requirement of prior filing and approval, but the DBA may make a review at any time (also after the investment has been made or the agreement entered into) and can potentially intervene if the investment/agreement represents a threat to national security or public order (the “Call-In Regime”).

The Mandatory Regime applies to all foreign direct investments as defined above.

The Call-In Regime applies only to foreign direct investments which directly or indirectly are made by investors outside EU/EFTA.

The provisions which extend the DISA’s scope of application to certain special financial agreements apply only when the agreement directly or indirectly is entered into by investors outside the EU/EFTA.

The DISA also covers the acquisition of minority interests.

Within the Mandatory Regime, the DISA catches any foreign direct investment which leads to a foreign investor holding a qualified share in the Danish business. A qualified share is defined as direct or indirect possession of or control over at least 10 per cent of the ownership shares or voting rights of the Danish business or similar control by other means. Similar control by other means can be shareholder agreements, loan agreements, finance agreements, etc., which grant the foreign investor control over or significant influence on the managerial or financial matters of the company or on its development or operations. The obligation to file for approval applies not only if a qualified share of 10 per cent is attained, but also if the qualified share is subsequently increased to 20 per cent, 1/3, 50 per cent, 2/3 or 100 per cent.

Within the Call-In Regime, the DISA catches any foreign direct investment which leads to a foreign investor directly or indirectly obtaining possession of or control over at least 25 per cent of the ownership shares or voting rights of the Danish business or similar control by other means.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

In principle, the DISA applies to all sectors and activities.

The Mandatory Regime (see question 2.2 above) only applies when the investment/agreement relates to Danish businesses which operate within certain “particularly sensitive sectors and activities” as further outlined in the DISA and the Executive Order No. 1491/2021. This comprises Danish businesses which:

- (a) develop or manufacture weapons, ammunition or other military technology listed in the EU Common Military List, or provide services to the Danish Armed Forces that are of particular importance to the operational activities;
- (b) either themselves or as a subcontractor develop or manufacture IT-products and components used to secure classified systems or information, or provide products or services for the processing of classified information;
- (c) manufacture products for dual use listed in Annex I to Council Regulation (EC) No. 428/2009;
- (d) manufacture or develop the following “critical technologies”:

- (1) Artificial intelligence and machine learning for autonomous vessels, human imitation, analysis of positioning data and biometric identification.
 - (2) Advanced industrial robot technology, including for production robots or for the healthcare sector, as well as advanced drone technology.
 - (3) Semiconductors for use in integrated circuits, including technologies that support their production.
 - (4) Technologies for the protection of cyber- and information security for accessibility, integrity, or confidentiality in IT-systems, as well as defence against IT-attacks.
 - (5) Space technology for launching satellites, personnel and communication technology that supports the same.
 - (6) Technologies for industrial energy storage, energy conversion and energy transport.
 - (7) Quantum technology in connection with quantum computers, quantum sensors, quantum cryptography and quantum communication.
 - (8) Nuclear technology, excluding products for the healthcare sector.
 - (9) Nanotechnology, including advanced graphene materials.
 - (10) Biotechnology in synthetic biology.
 - (11) 3D printing for the manufacture of components for industrial use.
- (e) operate within “critical infrastructure”, i.e. which are necessary to maintain or restore important functions of society within the following sectors:
- (1) The energy sector:
 - Electricity production, electricity storage capacity, transport and supply of electricity.
 - Production, transport and storage of heating and cooling.
 - Production and storage capacity as well as transport and delivery of gas.
 - Production, storage, and transport of crude oil as well as oil products for transport and the petrochemical industry.
 - (2) The information and communication technology sector (ICT):
 - Publicly accessible electronic communications networks and services as defined by the Act on Security in Networks and Services, section 2 (1), nos 3–4, (*cf.* Statutory Order no. 153 of 1 February 2021).
 - Central data storage (data storage centres).
 - Satellite, radio, and television transmission.
 - Common public master data, including geodata, personal registration and central business registration.
 - Domain name functions which are covered by Executive Order no. 453 of 8 May 2018 on network security and information systems for operators of essential services in the domain name area.
 - News coverage covered by a public service broadcaster pursuant to the Radio and Television Broadcasting Act.
 - Central public digital identification and communication.
 - IT and communication solutions to support crisis preparedness.
 - Classified government communications.
 - Closed communication networks and services between authorities covered by section 3 (3), no. 1, not covered by subsection (3), no. 2, letters h and i, and no. 11, letter a, of the Executive Order.

- (3) The transportation sector:
- Central traffic control units within public transport, passenger, and freight transport (road, rail, air, and sea).
 - Central ports, bridge connections, airports, train stations, road and railway networks, combined terminals, and transport centers as well as metro and light rail.
 - Central monitoring units and units for infrastructure maintenance (bridges, tunnels, train stations, airports, etc.).
 - Maritime surveying.
 - Post and courier services.
- (4) The sector for emergency preparedness and civil protection:
- Alarm and alert services.
 - Fire and rescue services.
- (5) The sector for healthcare:
- Hospital systems.
 - Pre-hospital care.
 - Monitoring and warning of infectious diseases.
 - Purchase, storage, distribution, and supply of vaccines.
 - Purchase, storage, distribution and supply of protective equipment and testing equipment for the health and care sector in connection with epidemic/pandemic management.
 - Production, registration, distribution, and monitoring of prescription drugs.
- (6) The sector for drinking water and food:
- Extraction, production, storage, control and supply of clean drinking water and monitoring of groundwater.
 - Monitoring and control of food safety with the exception of companies' own control.
- (7) The sector for wastewater and waste disposal:
- Wastewater management and treatment.
- (8) The sector for finance and economics:
- Payment solutions and financial market infrastructures, including clearing and settlement of payments and securities trading.
 - Banking and insurance.
 - Marketplaces, *cf.* section 3, no. 5, of the Capital Markets and Securities Depositories (CSDs) Act, *cf.* section 3, no. 10, of the Capital Markets Act.
 - Joint data centres as defined in section 343 q, of the Financial Business Act.
- (9) The sector for meteorology:
- Meteorological service, advice and warning of society, defence, contingency planning and civil aviation with knowledge and data on weather, climate and sea.
- (10) The sector for general exercise of authority:
- Systems for conducting elections.
 - Supporting functions for law enforcement, crime protection and police preparedness (communication, logistics and IT).
 - Support functions for the criminal case chain and execution of sentences (logistics, etc.).
- (11) The sector for transversal crisis management:
- Supporting functions for interdepartmental and coordinating crisis preparedness and management within the government.

Formation of new businesses within the above-mentioned sectors is also caught (Greenfield investments).

2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

See question 2.2 above.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU / non-WTO), including state-owned enterprises (SOEs)?

The Mandatory Regime applies to all foreign investors, whereas the Call-In Regime as well as the rules on certain special financial agreements only apply to foreign investors which directly or indirectly are citizens outside EU/EFTA. See also question 2.2 above.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

The DISA only applies to foreign direct investments in and certain special financial agreements with Danish businesses. See question 2.2 above.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Yes, they are.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

Greenfield investments are not caught by the DISA if (i) the foreign direct investment does not exceed DKK 75 million (appr. EUR 10 million) over a three-year period from the formation of the Danish business, and (ii) the Danish business is not a subsidiary of the foreign investor.

Other than that, there are no monetary or market share-based thresholds under the DISA.

See also question 2.2 on thresholds for shares of ownership/voting rights for the foreign investor.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

The DBA does not have discretion to review a Greenfield investment which is below the threshold as mentioned in question 3.1.

See also question 2.2.

3.3 Is the filing voluntary or mandatory and is there a specific filing form? Are there any filing fees?

Filing is mandatory within the Mandatory Regime as described in question 2.2.

A voluntary filing is possible within the Call-In Regime as described in question 2.2.

All filings must be made using the forms which are made available by the DBA on the authority's website.

The requisite form(s) must be completed and subsequently sent to the DBA's special e-mail address for FDI-filings FDI-screening@erst.dk.

Applications are currently (August 2021) not subject to the payment of any fees.

3.4 In the case of transactions, who is responsible for obtaining the necessary approval?

The foreign direct investor.

3.5 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

It is possible to formally apply for “pre-screening”, i.e. to obtain beforehand a statement from the DBA as to whether or not a Danish business can be said to operate within “critical technology” or “critical infrastructure” (see question 3.3, c) and d) above). Pre-screening applications must be made using the form which is made available by the DBA on the authority's website.

According to general principles of Danish administrative law, the DBA has a duty to offer reasonable guidance and assistance to citizens and businesses who are or may be subject to the DISA. Although the scope of this duty is relatively opaque, the DBA is generally quite forthcoming in rendering informal guidance on the application of the DISA.

3.6 What type of information do investors have to provide as part of their filing?

Foreign direct investors must provide relatively detailed information regarding the foreign direct investor (in particular, on direct or indirect owners/participants), the investment and the Danish business in which the investment is made.

Where the application relates to a special financial agreement, details on the agreement must be included in the application.

The submission of incorrect or misleading information to the DBA may be a criminal offence under the Danish Penal Code.

3.7 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

There are no fines or other criminal sanctions which may be imposed on a foreign direct investor who does not comply with the obligation to file its investment in or special financial agreement with a Danish business.

If a foreign direct investment should have been filed but was not filed to the DBA, the DBA may request the foreign direct investor to dispose of its investment and may – if this is not affected within a specified deadline – repeal any voting rights on the foreign direct investor's shares.

If a special financial agreement should have been filed but was not filed to the DBA, the DBA may request the foreign direct investor to terminate the agreement. If the agreement is not terminated within the specified deadline, the agreement is null and void.

As the DISA is new, there is no administrative practice (September 2021) to show how these sanctions will be administered.

3.8 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

Within the Mandatory Regime (see question 2.2 above), approval from the DBA must be obtained prior to completion of the investment.

The DBA has 60 working days from when a full and final filing has been submitted to make a decision as to whether or not the DBA will approve the investment or whether the investment must be submitted to the Minister of Business for further consideration. DBA may in certain circumstances extend the period with an additional 30 working days to 90 working days. It has no legal consequence if the DBA does not make its decision before the deadline. If the investment is submitted to the Minister for approval, there is no deadline for the Minister's approval.

Within the Call-In Regime, a voluntary filing may be made at any time, before or after completion of the investment. The DBA has 60 working days once a full and final filing has been submitted to make a decision as to whether or not the DBA will approve the investment or whether the investment must be submitted to the Minister of Business for further consideration. If no decision has been made by the DBA within the 60 working days, the investment is considered approved. The 60 working days may in certain circumstances be prolonged.

3.9 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction?

Within the Mandatory Regime (see question 2.2 above), approval from the DBA must be obtained prior to completion of the investment.

3.10 Are there any penalties if the parties implement the transaction before approval is obtained? Can the parties close the transaction at global level prior to obtaining local clearance?

There are no penalties, but in principle the foreign direct investor could be ordered to dispose of its investment if implemented prior to approval.

As the DISA only applies to direct or indirect investments in Danish businesses, it will in principle be possible to make a carve-out of the investment in the Danish business as long as such carve-out genuinely allows the Danish business to continue under the previous owner if approval is not obtained.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

In principle, the procedure is between the foreign direct investor (who is responsible for obtaining approval under the Mandatory Regime) and the DBA.

There is no specific legal basis for private third parties to intervene in the process, but the DBA has a wide margin of discretion and may take into account contributions from the Danish target as well as from the seller or other relevant parties (co-investors, etc.).

There is a specific legal basis for involving other public authorities and the authorities of other EU Member States in the procedure.

3.12 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

The Danish Act on Public Access to Information (“*Offentlighedsloven*”) does not apply to cases which are treated under the DISA.

Employees of the DBA, as well as of the Ministry of Business, are obliged to keep any information they become aware of confidential through the performance of their official duties under this Act, *cf.* para. 39(1) of the DISA, and this includes information submitted by the foreign direct investor related to a filing or investigation under the DISA.

The DBA and/or the Ministry of Business may pass on information to other public authorities or to other EU Member States according to Executive Order No. 1455/2021, in which case such recipients are also bound by the obligation of confidentiality.

It is expected that the DBA will publish some information on decisions made according to the DISA, but as the DISA is new, it is not yet known how such publication will be made in practice. The DISA does not provide for any derogation from the obligation of confidentiality, so any publication must respect the confidentiality obligation.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

See question 2.1 above.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The DBA is the primary responsible authority. The DBA may submit a decision to the Minister of Business.

4.2 What is the applicable test and who bears the burden of proof?

The applicable test is whether the foreign direct investment constitutes or may constitute a threat to national security or public order.

The DISA does not include specific provisions on the burden of proof. In principle, the DBA/the Minister of Business can be said to have the burden of proof as the DBA/the Minister must have a sufficient legal basis for any decision not to approve an investment or in order to intervene in an investment. The DBA’s/the Minister’s decisions are subject to legal review by the Danish courts.

However, the DBA and the Minister of Business must be expected to enjoy a wide margin of discretion when it comes to deciding whether or not an investment constitutes or may constitute a threat to national security or public order.

4.3 What are the main evaluation criteria and are there any guidelines available?

When assessing whether a foreign direct investment constitutes a threat to national security or public order, all relevant circumstances must be considered, including the following criteria, when applicable, *cf.* para. 15 of the DISA.

Circumstances regarding the Danish business in which the investment is made:

- (1) whether the Danish business operates or influences critical infrastructure;
- (2) whether the Danish business processes or has access to classified information or sensitive personal information;
- (3) the Danish business’ position on the Danish market, including opportunities for substitution;
- (4) whether the Danish business belongs to the defence industry, manufactures dual-use products, or other critical technology of importance to national security or public order; or
- (5) whether the Danish business handles or contributes to the supply of critical raw materials, including energy or raw materials, as well as food safety.

Circumstances regarding the foreign investor:

- (1) whether the foreign investor is directly or indirectly controlled by a government, including government bodies or armed forces, of a third country, including through ownership or substantial financing;
- (2) whether the foreign investor is or has been involved in activities affecting security or public order in an EU Member State or in other friendly or allied countries;
- (3) whether there is a serious risk that the foreign investor will participate in or have links to illegal or criminal activities of importance for national security or public order; or
- (4) whether there are indications that the foreign investor is deliberately trying to circumvent the screening rules, e.g., by using front agent constructions.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

The DBA may take all relevant circumstances into account.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

The DBA (or the Minister of Business, as the case may be) may:

- (1) Approve an investment.
- (2) Approve an investment subject to conditions/undertakings.
- (3) Reject to approve an investment, either finally or temporarily.
- (4) Prohibit an investment, either finally or temporarily.
- (5) Issue orders to stop an infringement of the DISA.
- (6) Order a foreign direct investor to dispose of its investment.
- (7) Issue a decision that the voting rights attached to a foreign investor’s shares are repealed.

The DBA may in certain situations amend or revoke an approval, in particular, if the decision on approval has been made based on incorrect or misleading information or if the parties to the decision do not comply with conditions for approval/undertakings.

The Minister of Business may amend or revoke an approval if changed circumstances entail serious threats to national security or public order.

The DBA and the Minister of Business must be expected to enjoy a wide margin of discretion when it comes to deciding whether or not an investment constitutes or may constitute a threat to national security or public order.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

The decisions of the DBA/the Minister of Business are not subject to any further administrative appeal but may be brought before the Danish Courts.

There are no specific provisions on legal standing as regards judicial review of decisions under DISA. The foreign direct investor to which a decision is addressed, has legal standing. Whether other parties (e.g. the Danish target, the seller, co-investors, etc.) may be permitted to bring a decision before the courts depends on general rules of Danish procedural law (a test of “requisite legal interest” in the outcome of the case).

An appeal of a decision must be made within six months from the decision has been announced to the party in question.

4.7 Is it possible to address the authorities’ objections to a transaction by providing remedies, such as undertaking or other arrangements?

Yes, it is envisaged that an investment may be approved subject to undertakings/conditions.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

As the DISA entered into force on 1 July 2021, there is currently no enforcement practice from the authorities.



Jesper Fabricius is a partner in Accura's EU & Competition Law Team and Accura's contact person for Danish FDI-matters. He advises Danish and international clients on matters of FDI, competition law, merger control and public procurement. His regular client base includes a broad spectrum of Danish and international businesses, e.g., within the consumer goods industry, the media business, engineering and technical services, construction, logistics and mail operations. His client base also includes various public authorities, utilities suppliers and public private partnerships.

Jesper is the author of several books and articles on competition law and public procurement regulation. He is the former Chairman of the Danish Association for Public Procurement Law and was a member of the Danish Government Committee charged with drafting the proposal for the Danish Act on Public Procurement which implemented the EU public procurement directives into Danish law.

Accura Law Firm
Tuborg Boulevard 1
2900 Hellerup/Copenhagen
Denmark

Tel: +45 3078 6786
Email: jesper.fabricius@accura.dk
URL: www.accura.dk

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