

**International  
Comparative  
Legal Guides**



# **Foreign Direct Investment Regimes**

# **2024**

**Fifth Edition**

Contributing Editors:

**Bernardine Adkins and Samuel Beighton**  
Gowling WLG

**glg** Global Legal Group

# Expert Analysis Chapter

1

## National Security Deference Given in the US and EU Foreign Direct Investment Regimes

Stephenie Gosnell Handler, Robert Spano, Sonja Ruttman & Hugh Danilack, Gibson, Dunn & Crutcher LLP

## Q&A Chapters

8

### Australia

Clayton Utz: Geoff Hoffman & Megan Williams

15

### Austria

Schoenherr: Volker Weiss & Sascha Schulz

21

### Bahrain

Hassan Radhi & Associates: Fatima Al Ali & Saifuddin Mahmood

27

### Belgium

Liedekerke: Vincent Mussche, Nina Carlier & Benedetta Prina Mello

35

### Brazil

Pinheiro Neto Advogados: Fernando Alves Meira & Gustavo Paiva Cercilli Crêdo

40

### China

Gowling WLG: Vivian Desmots

48

### Czech Republic

Wolf Theiss: Jitka Logesová, Robert Pelikán, Tereza Naučová & Tereza Mrázková

55

### Denmark

Accura Law Firm: Jesper Fabricius & Rikke Sonne

62

### Finland

Waselius & Wist: Lotta Pohjanpalo & Sami Hartikainen

68

### France

Jeanetet: Stephen Walters & Vincent Netter

75

### Germany

ADVANT Beiten: Philipp Cotta, Lelu Li & Christian von Wistinghausen

83

### Greece

Georgaki and Partners Law Firm: Christina Georgaki & Paula Koteli

88

### Hungary

Wolf Theiss: János Tóth

94

### Ireland

Mason Hayes & Curran LLP: Tara Kelly, Laura Durning & Liam Heylin

101

### Japan

Anderson Mōri & Tomotsune: Hiroaki Takahashi & Koji Kawamura

110

### Korea

Yoon & Yang LLC: Jiwook Kim, Kwang-Wook Lee, Jason W. Lee & David Lee

119

### Luxembourg

NautaDutilh Avocats Luxembourg: Vincent Wellens, Margaretha (Greet) Wilkenhuysen, Romain Sabatier & Sigrid Heirbrant

125

### Malaysia

Rahmat Lim & Partners: Lum Sher Vin

131

### Netherlands

Houthoff: Gerrit Oosterhuis, Jori de Goffau & Yvo de Vries

139

### Nigeria

Ikeyi Shittu & Co.: Taofeek Shittu, Josephine Tite-Onnoghen, Esther Omo Dania & Destiny Chukwuemeka

145

### Norway

Advokatfirmaet Thommessen AS: Eivind J. Vesterkjær, Heidi Jorkjend & Hedvig Moe

153

### Poland

Wolf Theiss: Jakub Pietrasik & Jacek Michalski

160

### Romania

Wolf Theiss: Anca Jurcovan, Maria Ionescu & Claudia Andreescu

166

### Singapore

Allen & Gledhill LLP: Darren Low & Rachel Wong

173

### Slovenia

Schoenherr: Matej Črnilec & Manja Hubman

179

### Sweden

Advokatfirman Vinge KB: Martin Johansson & Victoria Fredén

187

### Switzerland

Schellenberg Wittmer: David Mamane, Tobias Magyar, Josef Caleff & Philippe Borens

194

### Taiwan

Lee and Li, Attorneys-at-Law: Yvonne Hsieh & Gary Chen

199

### United Kingdom

Gowling WLG: Samuel Beighton & Bernardine Adkins

207

### USA

Cravath, Swaine & Moore LLP: Benjamin G. Joseloff, George F. Schoen & G.J. Ligelis Jr.

# Denmark

Accura Law Firm



Jesper Fabricius



Rikke Sonne

## 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 of tightening 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. The DISA is very comprehensive in scope.

On 2 June 2023, the Danish Parliament adopted amendments to the DISA which entered into force on 1 July 2023. The amendments, *inter alia*, include the introduction of mandatory screening of contracts regarding construction, joint ownership and operation of the energy island located in the exclusive economic zone in the North Sea (the “Danish Energy Island”). Furthermore, the amendment introduced a new two-phased scheme for the processing of cases under the DISA.

The DISA implements the national legal framework for the cooperation mechanism envisaged by Regulation (EU) No. 2019/452 (the “EU FDI Regulation”) and, generally, transposes the requirements of the EU FDI Regulation.

The relevant authority for administering the DISA is the Danish Business Authority (the “DBA”).

### 1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

The DISA largely follows the factors laid out in art. 4 of the EU FDI Regulation that may be taken into consideration.

The purpose of the DISA is to prevent foreign direct investments, special economic agreements and contracts regarding construction, joint ownership and operation of the Danish Energy Island from posing a threat to national security or public order in Denmark, through screening and possible interventions with such investments and agreements.

“National security” is defined in the DISA as *matters relating to Denmark’s territorial integrity and survival of the population. Threats to national security include actions that constitute or may constitute the risk of disruption of international relations, the peaceful coexistence of nations or threats to military interests, as well as actions intended to cause damage to Denmark, including crimes against the state’s independence or crimes against the constitution and the supreme state authorities.*

“Public order” is defined in the DISA as *conditions relating to Denmark’s ability to maintain an independent, democratic and secure society without affecting national security.*

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

It is expected that an overall evaluation of the DISA will be initiated in 2023 and a report in this regard will be submitted to the Danish Parliament. The report will form the basis for considerations of whether there is a need to amend the DISA further.

It is furthermore expected that, in 2023, the DBA will issue further guidance on areas where the DBA has now gained more experience from the practical handling of the DISA, including, *inter alia*, guidelines on the application of the DISA to group-internal transfers.

## 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? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

The DISA (Danish Act No. 842 of 10 May 2021) as amended, entered into force on 1 July 2021 and applies to all foreign direct investments, etc., that were not completed prior to 1 September 2021.

Three Executive Orders have been issued to supplement the DISA:

- (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.
- (ii) Executive Order No. 959/2023 on the transfer of confidential information about certain foreign direct investments, etc., in Denmark to other authorities.
- (iii) Executive Order No. 958/2023 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 (Danish Consolidated Act No. 1004 of 22 October 2012).
- (2) The Danish Act on the Continental Shelf and Certain Pipelines Installations on Territorial Waters (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 not be further covered in this chapter.

The DISA will apply to domestic-to-domestic transactions where foreign investors exceed the relevant ownership or influence thresholds (see question 2.2 below). The other two additional measures mentioned above may also apply to domestic-to-domestic transactions.

**2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?**

The DISA applies to foreign direct investments, 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 (Greenfield investments) within certain particularly sensitive sectors or activities.

Finally, the DISA applies to contracts regarding the construction, joint ownership and operation of the Danish Energy Island. The obligation to file and obtain approval under the DISA applies to **all** contracting parties, regardless of where they are domiciled; thus, the obligation also applies to pure Danish contracting parties.

As a point of departure, foreign direct investments and special financial agreements are investments/agreements that 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 and certain special financial agreements with Danish businesses that 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 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 (including 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 that are, directly or indirectly, made by investors outside the EU/EFTA.

The provisions that extend the DISA’s scope of application to certain special financial agreements apply only when the agreement is, directly or indirectly, 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 that 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 equivalent control by other means. Equivalent control by other means can be shareholder agreements, loan agreements, finance agreements, etc., that 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 that leads to a foreign investor obtaining, directly or indirectly, 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.

Internal reorganisations may, in certain cases, be exempted from the DISA, provided that the reorganisation does not lead to any increase in any foreign investor’s shareholding or voting rights that exceed(s) the applicable limits or a corresponding increase of the foreign investor’s control by other means. The DBA interprets the exemption for internal reorganisations narrowly, so many internal reorganisations may in fact be caught.

The DISA may also apply to asset purchases.

**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 that operate within certain “particularly sensitive sectors and activities” as further outlined in the DISA and Executive Order No. 1491/2021. This comprises Danish businesses that:

- (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. 821/2021;
- (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 is 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:
    - 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 that 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 centres, 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 healthcare sector:
    - 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 healthcare 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 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 interdepartmentally 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 Are terms such as ‘foreign investor’ and ‘foreign investment’ defined 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 and the rules on certain special financial

agreements only apply to foreign investors that are, directly or indirectly, citizens outside the EU/EFTA.

The fact that a foreign investor is an SOE is one of the factors that may be taken into account by the DBA when deciding whether to approve the foreign investment, *cf.* section 15 (2) (1) of the DISA. See also question 2.2 above.

**2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (sales, existence of subsidiaries, assets, etc.)?**

The DISA only applies to foreign direct investments in Denmark and certain special financial agreements with Danish businesses and contracts regarding the construction, joint ownership and operation of the Danish Energy Island. 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 (e.g. where a parent company is acquired which has a local subsidiary in the jurisdiction)?**

Yes, such cases are caught.

### 3 Jurisdiction and Procedure

**3.1 What conditions must be met for the law to apply? Are there any financial 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 (approx. 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 that is below the threshold, as mentioned in question 3.1.

See also question 2.2.

**3.3 Is there a mandatory notification requirement? Is it possible to make a notification voluntarily? Are there specific notification forms? 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 forms made available by the DBA on the authority's website.

The requisite form(s) must be completed and sent to the DBA's email address: [FDI-screening@erst.dk](mailto:FDI-screening@erst.dk).

There are no filing fees.

**3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?**

Investments that must be filed under the Mandatory Regime (see question 2.2 above) may not be completed prior to clearance.

There are no specific sanctions for breach of the standstill provision in the DBA, but the DBA might issue an order or injunction against completion of the transaction.

Sanctions, as mentioned in question 3.8, may apply if approval of the investment is not granted.

If a foreign investor does not respect the standstill provision, it may potentially be taken into account by the DBA when deciding whether to approve the investment, *cf.* DISA section 15 (2) (4).

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

The foreign direct investor is responsible.

**3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance (e.g. whether a mandatory notification is required, or whether the authority would object to the transaction)?**

It is possible to apply for "pre-screening", i.e. to obtain a decision from the DBA as to whether a Danish business can be said to operate within "critical technology" or "critical infrastructure" (see question 2.3, (d) and (e) above). Pre-screening applications must be made using the form made available by the DBA on its website.

According to general principles of Danish administrative law, the DBA has a duty to offer reasonable guidance 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. If circumstances are sensitive, however, very little upfront guidance can be expected.

**3.7 What type of information do parties to a transaction have to provide as part of their notification?**

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 or a contract regarding construction, joint ownership and operation of the Danish Energy Island, 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 Criminal Code.

**3.8 What are the risks of not notifying? Are there any sanctions for not notifying (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?**

There is no legal basis for imposing fines or other criminal sanctions on a foreign direct investor who does not comply with the obligation to file an investment or a special financial agreement.

In case of breach of the filing obligation related to an investment, the DBA may request the foreign direct investor to dispose of its investment and may – if this is not effectuated within a specified deadline – repeal any voting rights on the investor's shares.

In case of breach of the filing obligation related to a special financial agreement, 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.

We are not aware of any sanctions that have been imposed in practice, but the DBA does not publish its decisions.

**3.9 Is there a filing deadline, and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?**

There is no filing deadline within the Mandatory Regime (see question 2.2 above); however, approval from the DBA must be obtained prior to completion of the investment.

The process for both the Mandatory Regime and the Call-In Regime is divided into two phases:

Phase 1: Begins once the DBA declares the foreign investor's application for approval complete and it must be concluded within 45 calendar days. A Phase 1 screening may result in either: (i) approval; or (ii) opening of Phase 2 proceedings.

Phase 2: If the DBA cannot approve the transaction within the prescribed deadline for Phase 1, but sees a need for further investigation/information, the DBA will initiate Phase 2 proceedings. The DBA may request additional information for Phase 2. Phase 2 will not start until the DBA has declared that all the requested information has been submitted. Phase 2 must be concluded within 125 calendar days from the opening of Phase 2. A Phase 2 screening may result in: (i) approval; (ii) a decision to negotiate terms with the foreign investor; or (iii) the application being submitted to the Minister of Industry Business and Financial Affairs for a final decision. There is no formal deadline for the Minister's review.

**3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?**

There is no formal legal basis for an expedited review. According to general principles of Danish administrative law, the DBA may take into account special circumstances of a case that warrant expedited treatment, e.g. the risk that the Danish business may become insolvent.

**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 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 how is commercial information, including business secrets, protected from disclosure?**

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

Employees of the DBA, as well as of the Ministry of Business, are obliged to keep confidential any information they become aware of through the performance of their duties according to the Danish Criminal Code, sections 152–152e, *cf.* para. 39(1) of the DISA. This includes information submitted by a 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. 959/2023, in which case such recipients are also bound by the obligation of confidentiality.

See further question 4.3 below on the publication of decisions.

**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 the decision to the Minister of Business.

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

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/Minister of Business can be said to have the burden of proof as the DBA/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/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 as to whether 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? Do the authorities publish decisions of approval or prohibition?**

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.* section 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's position on the Danish market, including opportunities for substitution;
- (4) whether the Danish business belongs to the defence industry, or 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 controlled, directly or indirectly, 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.

The DBA does not publish its decisions. There is a specific legal basis for publishing certain investigations and decisions ordering a foreign investor to wind up its investment.

#### 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? Can the authorities impose conditions on approval?

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 the approval of 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 and the Minister of Business must be expected to enjoy a wide margin of discretion when it comes to deciding whether an investment may constitute a threat to national security or public order and whether conditions must be imposed.

#### 4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

Yes, approval may be granted subject to commitments from the foreign investor to satisfy any concerns of the DBA. Commitments could, *inter alia*, include terms (i) of a financial nature,

e.g. limitation of the foreign investor's shareholding in the target company, (ii) of a managerial nature, e.g. limiting the foreign investor's participation in the management of the target company, (iii) restricting the foreign investor's ability to gain access or insight to information about certain parts of the target company's activities or physical locations, (iv) preventing the foreign investor from using its influence for certain purposes, such as stopping the supply, moving production, etc., and (v) restrictions in relation to whom the foreign investor may choose as a sub-supplier of, e.g., specified products and software.

Settlement arrangements are not published.

#### 4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? 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 according to a special procedure.

There are no specific provisions on legal standing as regards judicial review of decisions under the 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 date on which the decision was announced to the party in question.

#### 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?

The DBA does not publish its decisions and is generally extremely secretive about its administrative practice. Decisions are generally not well reasoned when it comes to specific details in the assessment. It is therefore difficult to give a clear and precise description of the DBA's practice.

However, it is the authors' overall impression, based on a large number of filings, that the DBA generally works reasonably well, quickly and pragmatically, but to a large extent relies on input from other authorities that may not always be working as quickly or be as pragmatic.

While the Danish regime is still comparatively new, practice has shown that it may well be a stumbling block in M&A transactions. In May 2023, for the first time, the Minister of Business blocked a foreign investment in a Danish company although that investment had been approved by regulators in Germany, the UK and the US.

Hamamatsu Photonics K.K., a Japanese corporation listed on the Tokyo Stock Exchange, was denied approval for its indirect acquisition of NKT Photonics A/S, a subsidiary of Danish industrial corporation NKT A/S. Both companies are active in fields related to optical sensors, optical components and lasers.

The Minister of Business's rationale for rejecting the investment has not been published, and both the Minister of Business and the DBA have refused to shed additional light on the decision, citing national security concerns.

The decision has stirred up controversy in the Danish business community. The Danish business media have also expressed criticism, in relation both to the lack of transparency in the decision-making process, and to the length of the administrative process (the deal was signed in the summer of 2022).





**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**  
Alexandriagade 8  
2150 Copenhagen  
Denmark

Tel: +45 3078 6786  
Email: [jesper.fabricius@accura.dk](mailto:jesper.fabricius@accura.dk)  
URL: [www.accura.dk](http://www.accura.dk)



**Rikke Sonne** is a director in Accura's EU & Competition Law Team. She advises Danish and international clients on matters of FDI, competition law, public procurement and regulatory due diligence in connection with M&A transactions. Furthermore, Rikke has extensive experience in handling commercial negotiations and contracts and in providing general legal advice from her previous position for many years as head of legal in one of the Nordic's largest media groups.

**Accura Law Firm**  
Alexandriagade 8  
2150 Copenhagen  
Denmark

Tel: +45 3945 0575  
Email: [rikke.sonne@accura.dk](mailto:rikke.sonne@accura.dk)  
URL: [www.accura.dk](http://www.accura.dk)

As a leading Danish law firm, Accura Law Firm is known for its high-quality, solution-oriented legal advice and its strong sense of urgency and great understanding of deal dynamics. Accura is Denmark's leading transactional law firm and represents foreign and domestic companies, investors and private equity funds when acquiring or investing in Danish private and listed companies.

The EU & Competition Law Team at Accura, which also handles FDI matters, is praised for its commercial and strategic understanding and practical, deal-focused approach.

[www.accura.dk](http://www.accura.dk)

ACCURA

# International Comparative Legal Guides

The **International Comparative Legal Guide (ICLG)** series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

**Foreign Direct Investment Regimes 2024** features one expert analysis chapter and 30 Q&A jurisdiction chapters covering key issues, including:

- Foreign Investment Policy
- Law and Scope of Application
- Jurisdiction and Procedure
- Substantive Assessment