

ACCURA



Foreign Direct Investments - FDI

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Regulation of foreign direct investments (FDI) in Denmark and internationally is a **core area of our legal services**.

The Danish authorities' processing of FDI notifications is for the most part confidential, and, therefore, knowledge of such processing will first and foremost be acquired through **practical experience from specific cases**. Our position as a leading law firm in Denmark in the M&A market, both in terms of the number and the amount of transactions, has provided us with **unique knowledge and experience** of the Danish authorities' processing of FDI notifications.

Danish businesses' foreign investments may be subject to FDI regulation in other countries, and international transactions may require **FDI approval in several countries** with different sets of rules. In Accura, we collaborate closely with leading law firms all over the world on dealing with cross-border FDI regulation.

Our FDI team **advises on all aspects of FDI regulation**, including:

- analysing the need for authorisation and/or notification of foreign investments etc. in Denmark or abroad
- structuring, drafting and handling pre-screenings, authorisations and notifications
- drafting and negotiating any commitment, carve-outs or other solutions
- ongoing project management throughout the FDI process

Foreign Direct Investments

Background

On 1 July 2021, the new Act on Screening of Certain Foreign Direct Investments etc. (the "Danish Investment Screening Act") (investeringsscreeningsloven) entered into force in Denmark.

In recent years, foreign direct investments have become a focus area all over the world. Particularly in view of the Covid-19 crisis, the energy crisis, political concerns about the effects of foreign investments and the wish to protect important national interests have resulted in many countries having introduced or expanded existing FDI screening schemes for the purpose of ensuring that foreign direct investments do not **threaten national security or public order**.

In October 2020, a general set of rules on FDI screening was introduced at EU level which e.g. lays down certain framework for the EU countries' national rules on screening of foreign direct investments.

Accordingly, in the EU alone, 21 out of 27 member states have now introduced FDI screening schemes in some form¹ for the purpose of ensuring that foreign direct investments do not threaten national security or public order – and several countries are in the process of doing this.

The Danish Investment Screening Act is one of the most extensive regimes for FDI screening in the world. The Act applies to foreign investments and certain special financial agreements completed or concluded after 1 September 2021 and e.g. entails that, in future, several investments in and agreements with Danish businesses must be notified to and approved by the Danish Business Authority or the Danish Minister for Industry, Business and Financial Affairs.

With one of the **largest deal flows among Danish law firms**, Accura has identified FDI regulation both in Denmark and internationally as a core area for our legal services from the very beginning.

¹ The European Commission: "List of screening mechanisms notified by Member States" updated on 13 October 2023

The Danish FDI screening scheme

Overview

The Danish FDI screening scheme consists of the following two parts:

1 A mandatory authorisation scheme

This scheme requires prior authorisation for the conclusion of special financial agreements with and foreign direct investments in Danish businesses operating within particularly sensitive sectors and activities. Further, the scheme requires prior authorisation for the conclusion of contracts regarding construction, joint ownership and operation of the energy island in the North Sea.

2 A voluntary notification scheme

Foreign direct investments and special financial agreements may be notified if they potentially pose a threat to national security or public order.

”Special financial agreements” includes certain supplier, operating or service agreements and certain joint ventures/cooperative agreements on research and development. To be subject to the Act, the foreign supplier/contracting party must obtain control of or significant influence on the Danish business, including on business-critical areas of the business.

”Foreign direct investment” includes acquisition of control over or significant influence on a Danish business by directly or indirectly holding or controlling shareholdings or voting rights in the business or similar control by way of other means. Similar control by way of other means may include acquisition of assets and long-term loan agreements.

”Contracts regarding construction, joint ownership and operation of the energy island in the North Sea” includes all contracting parties, including Danish-controlled entities, which are about to conclude a contract regarding construction, joint ownership and operation of the energy island in the North Sea.

The Danish FDI screening scheme

Mandatory authorisation scheme

1 Mandatory authorisation scheme

Overall, the **particularly sensitive sectors and activities** have been delimited to Danish businesses operating within:

- the defence sector
- IT security functions or processing of classified information
- production of dual-use items, i.e. products which can be used for both civil and military purposes, including
- software and technology which can be used for "*design, development, production or use of nuclear, chemical or biological weapons or their means of delivery*", as regulated in Regulation (EU) 2021/821 of the European Parliament and of the Council, as amended
- other critical technology, e.g. AI, quantum technology, nano- and biotechnology and technologies for the protection of cyber and information security
- critical infrastructure necessary to maintain or restore socially important functions within e.g. the following sectors: energy, ICT, transport, contingency planning and civil defence, healthcare, drinking water and food, wastewater and waste disposal, finance and economics and banking and insurance

The following foreign suppliers/contracting parties must apply for an authorisation to conclude **special financial agreements** with a Danish business if the Danish business is operating within the particularly sensitive sectors and activities:

- Foreign citizens with the exception of citizens from EU/EFTA countries
- Businesses based outside EU/EFTA countries
- Businesses based in Denmark and other EU/EFTA countries if the business is controlled by persons or businesses from countries outside the EU/EFTA
- National authorities and governmental bodies outside the EU/EFTA, including public institutions and state-owned investment funds
- Non-profit associations, non-profitmaking funds and similar legal persons outside the EU/EFTA

The Danish FDI screening scheme

Mandatory authorisation scheme

The following foreign investors must apply for prior authorisation if they are contemplating to directly or indirectly acquire **at least 10%** of the shareholdings or voting right in or similar control by way of other means over a Danish business, and the Danish business is operating within the particularly sensitive sectors and activities:

- Foreign citizens
- Businesses not based in Denmark. The requirement for authorisation also applies if the foreign business has a permanent establishment in Denmark
- Businesses based in Denmark being a subsidiary or a branch of a business outside Denmark
- Businesses based in Denmark if a foreign citizen or a business outside Denmark has control of or significant influence on it
- National authorities and governmental bodies in countries outside the EU/EFTA, including public institutions and state-owned investment funds
- Non-profit associations, non-profitmaking funds and similar legal persons outside the EU/EFTA

Foreign investors having previously obtained authorisation for an investment must apply for an authorisation for **subsequent investments** resulting in the foreign investor's shareholding or voting rights in the Danish business constituting 20%, a third, 50%, two-thirds or 100% after the acquisition.

With certain exceptions, the requirement for authorisation applies correspondingly to "**Greenfield investments**", i.e. when a foreign investor invests in the establishment of a new Danish business within the particularly sensitive sectors.



The defence sector



IT security functions or processing of classified information



Dual-use items



Other critical technology



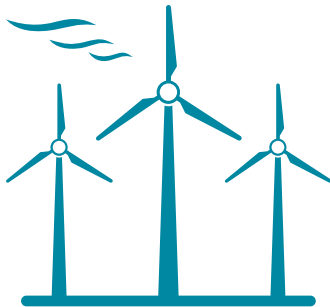
Critical infrastructure

The Danish FDI screening scheme

Mandatory authorisation scheme

The contracting party must apply for an authorisation to conclude a contract regarding **construction, joint ownership and operation of the energy island in the North Sea** before concluding such contract.

Furthermore, at the request of the Minister for Climate, Energy and Utilities, the Minister for Industry, Business and Financial Affairs may decide that all participants in the tenders in relation to construction, joint ownership and operation of the energy island in the North Sea must apply for an authorisation to conclude the said contracts.



Subcontractor(s)

The Danish Business Authority may demand that the contracting party or participant provide information regarding subcontractor(s) in terms of name, contact details and legal representative when filing the application.

If the subcontractor(s) is/are not known at the time of application, an approval to conclude a contract regarding construction, joint ownership and operation of the energy island may be conditioned on that/those specific subcontractor(s) who is/are employed in relation to completion of the contracts being approved at a later point.



”Contracting party”

All contracting parties who are about to conclude a contract regarding construction, joint ownership and operation of the energy island in the North Sea are obligated to apply for an authorisation. Accordingly, this obligation applies to all entities regardless of where they are domiciled, including entities which are controlled by a Danish individual or company. The same applies if the Minister for Industry, Business and Financial Affairs has decided that all participants in a tender regarding the said contract must apply for an authorisation.

The Danish FDI screening scheme

Voluntary notification scheme

2 Voluntary notification scheme

If the foreign direct investment or special financial agreement is not subject to the mandatory authorisation scheme, it should be considered whether the investment or the agreement should be notified under the voluntary notification scheme instead. In principle, this scheme **includes all other sectors than the particularly sensitive sectors.**

The voluntary notification scheme **only includes the following foreign investors and contracting parties:**

- Foreign citizens with the exception of citizens from EU/EFTA countries
- Businesses based outside EU/EFTA countries
- Businesses based in Denmark and other EU/EFTA countries if the business is controlled by persons or businesses from countries outside the EU/EFTA
- National authorities and governmental bodies outside the EU/EFTA, including public institutions and
- state-owned investment funds

The notification scheme is relevant if the foreign direct investment may pose a threat to national security or public order, and the foreign investor directly or indirectly obtains possession or control of **at least 25%** of the shareholdings or voting rights in or similar control by way of other means over a Danish business.

Moreover, the notification scheme is relevant if a **contemplated or completed special financial agreement** with a Danish business is deemed to pose a threat to national security or public order.

In practice, exactly what is required for the investment or the agreement to pose a threat to national security or public order is unclear. In our assessment, e.g. foreign direct investments in businesses whose supplies are important to the Danish authorities, (but which are not covered by the particularly sensitive sectors) may be covered by the voluntary notification scheme.

Investments or agreements which are covered by the voluntary notification scheme but which have not been notified may become subject to examination by the Danish Business Authority for a period of up to 5 years after the completion or conclusion thereof, and the Authority may potentially demand that they be rolled back.

The Danish FDI screening scheme

The processing time

The processing time for an application for an authorisation and notification for foreign direct investments and special financial agreements is divided into two phases. The same applies to an application for an authorisation to conclude a contract regarding construction, joint ownership and operation of the energy island in the North Sea.

Phase I must be completed within 45 calendar days counting from the day when the Danish Business Authority has declared the application complete. Phase I may end with either an approval or a transfer to phase II.

Phase II must be completed within an additional 125 calendar days from the end of Phase I (or from the day when any supplementary information requested by the Danish Business Authority in connection with the transfer to Phase II has been declared complete). Phase II may end with either an approval, negotiations of commitments between the Danish Business Authority and the foreign investor or a submission of the case to the Minister for Industry, Business and Financial Affairs for a final decision.

There is no legal effect if the time limits stated are exceeded.

Application for an authorisation and notification for foreign direct investments and special financial agreements must be filed with the Danish Business Authority. Likewise, an application for an authorisation to conclude a contract regarding construction, joint ownership and operation of the energy island in the North Sea must be filed with the Danish Business Authority.



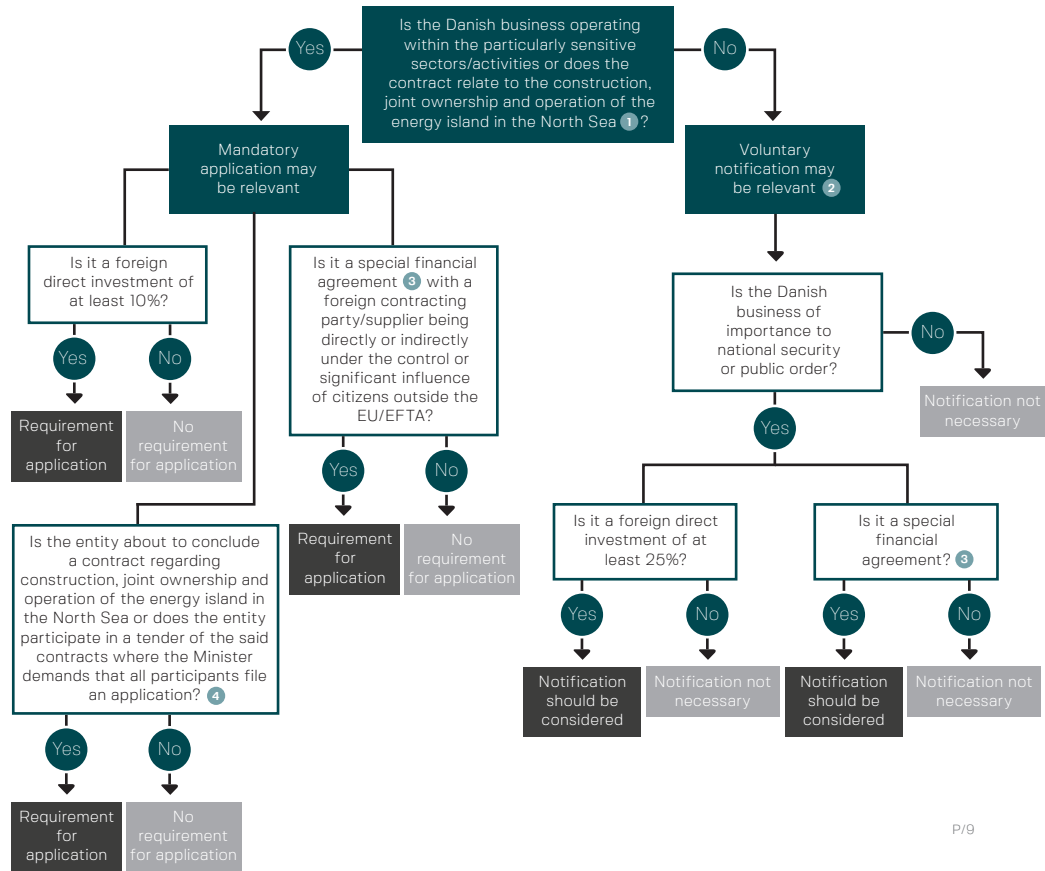
Prohibition against "gun jumping"

An investment or special financial agreement subject to notification must not be completed or concluded until an authorisation has been granted. Therefore, the parties must not implement the investment or the agreement before such authorisation has been obtained. If the investment or the agreement is completed without authorisation, an order may be issued for the investment or the agreement to be rolled back. If the order is not complied with, the foreign investor's voting rights in the Danish business may be revoked and an agreement may be declared invalid.

The Danish FDI screening scheme

High-level assessment of whether an application or notification is relevant under the Danish Investment Screening Act

- 1 Particularly sensitive sectors/activities/energy island**
 (1) The defence sector; (2) IT security or processing of classified information; (3) dual-use items; (4) other critical technology, e.g. AI, quantum technology, nano- and biotechnology and technologies for the protection of cyber and information security; (5) critical infrastructure necessary to maintain or restore socially important functions within e.g. the following sectors: energy, ICT, transport, healthcare, drinking water and food, wastewater and waste disposal and finance and economics.
- 2 The voluntary notification scheme**
 Applies to all other sectors than the particularly sensitive sectors if the relevant Danish business may be of importance to national security or public order. In that case, the authorities may intervene but only if the foreign investor/contracting party is directly or indirectly under the control or significant influence of citizens outside the EU/EFTA. A voluntary notification may guarantee that the authorities will not intervene.
- 3 Special financial agreement**
 Operating, supplier or service agreements and joint ventures/cooperative agreements on research and development. As a result of the agreement, the foreign contracting party must obtain control or significant influence on the Danish business, including on business-critical areas of the Danish business.
- 4 Contracts regarding construction, joint ownership and operation of the energy island**
 All contracting parties or, at the request of the Minister for Industry, Business and Financial Affairs, all participants in a tender must file an application concerning the conclusion of contracts regarding construction, joint ownership and operation of the energy island. This obligation applies regardless of whether the entity is controlled by a Danish individual or company.



The image shows a modern building facade with a grid of windows. The word "ACCURA" is prominently displayed in large, dark letters at the top of the building. The building's exterior is composed of light-colored, rectangular panels. The sky is a deep blue with some clouds.

ACCURA

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and cannot replace legal advice in specific matters.*