

NEW RULES ON SCREENING OF FOREIGN INVESTMENTS

Introduction

The European Council approved a new Directive on 5 March 2019 containing new rules on common screening of foreign investments in the European Union.

There is no obligation on member states to implement mandatory investment screening on foreign investments, and the decision to approve foreign investments will still lie with each member state.

The work on the new rules have been in progress since September 2017 when the Commission president Jean-Claude Juncker held a speech on the state of the Union in which he presented the Commission's thoughts on future investment screening. The background for the rules is an intention to guard against foreign investments in the European Union's strategic sectors, namely infrastructure and telecommunications, that may be harmful to the security or the public order within the European Union or its member states.

The Directive is a result of third-party negotiations between the Commission, the European Parliament and the European Council, and according to Jean-Claude Juncker the agreement is a reflection of an urgent wish to implement common rules on screening so as to create an opportunity to safeguard strategic interests and monitor foreign companies' acquisitions of EU strategic assets.

The main content of the Directive is the creation of the opportunity for the EU member states and the Commission to cooperate and exchange information on investments by third countries that may affect the security or the public order within the European Union.

The Directive does not obligate the member states to implement or enforce national screening mechanisms, nor does it obligate the member states to carry out specific screenings.

The purpose is to create a common framework for the member states that wish to strengthen cooperation on foreign investments and grant the Commission more influence in this respect. In practice the new rules mean that national authorities and the Commission may exchange information on foreign investments that may have an effect on the security and public order across borders. For instance, the other member states will be given a reason to make comments to specific investments in the event that such investments are considered to have an impact on any given member state. The Commission may also comment on such investment.

The information which member states must make available is mainly information on the ownership structure of the relevant foreign investor, the value and the financing model as well as information on goods and services of the parties to the transaction. Comments by the member states or the Commission must under any circumstance be made to the member state in question no later than 35 calendar days within receipt of the information of the intended investment. On receipt of such comments, the member state must take them into reasonable consideration.

The Directive also set forth a number of principles which are to apply to the member states that decide to make investment screenings, namely that the screening must be transparent and not discriminate among third countries. Further, consideration must be made to the fact that this work is done under short commercially friendly deadlines and strict confidentiality.

The Directive states that especially critical infrastructure (e.g. electricity and transportation), critical technology, supply of critical commodities and media are to be viewed as vulnerable sectors. The Directive also states that in the event of a screening, member states must investigate, and make a decision in respect of, whether the foreign investment is fully or partly controlled by a third country government, whether it has previously been involved in unsafe activities, or whether there is a risk that the investor engages in criminal activities.

Irrespective of the new rules, the authority to make decisions in respect of foreign investments will continue to lie with the individual member states, and as such the decision to block an investment will also lie with the member state.

The Directive comes into force in April 2019, after which point Denmark will have 18 months to implement the rules set forth by the Directive.

Investment Screening in Denmark

Denmark does not currently apply a general obligation to carry out screenings of foreign investments in Danish companies. Certain sectors do have special rules, including an obligation to screen foreign investors. This is namely the case for war material, cybersecurity, supply security, and investments in financial institutions.

Following the approval of the Directive, Minister of Justice Søren Pape Poulsen has stated that he will work on drafting a bill for an act which would enable the authorities to block investments in which foreign companies with close connections to third-party states attempt to acquire critical infrastructure in Denmark, e.g. within energy, telecoms, IT, transportation, or health.

Søren Pape Poulsen also stressed that such potential Danish rules must provide a balance between ensuring a continued high level of foreign investment readiness in Denmark and the wish to protect national security.

Our Comments

It remains to be seen to which extent the Directive and any future Danish act on investment screenings may lead to a change in the duty of notification in relation to foreign investors' acquisitions in Denmark.

Any implementation of an extended range of application for mandatory investment screenings will create an element of uncertainty as regards completion of future transactions. Investment screening will also constitute a matter to be handled prior to any closing.

In the event that an extended procedure for notification or approval is implemented in respect of foreign investors' acquisitions in Denmark, it is reasonable to believe that such procedure, in form and content, will share major similarities with the current merger control obligations, not least due to the type of information that we expect such notification must contain. Further, the description of the investment's consequences for the purpose of assessing the investment's societal consequences is also likely to have similarities. In this event, it would be appropriate to handle notification regarding investment screening in connection with any merger control notification.

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Contacts



[Pernille Nørkær](#), Partner

Tel. +45 33 77 90 40

Mob. +45 30 37 96 40

Email pno@mwblaw.dk