

NEW GUIDELINES ON SCREENING OF FOREIGN INVESTMENTS IN THE EU

BACKGROUND

According to Regulation (EU) 2019/452, the EU member states and the Commission may cooperate and exchange information on investments by third countries that may affect the security or the public order within the European Union. The regulation introduced in 2019 was a framework regulation, without any obligation on the member states to establish procedures for screening of foreign investments. The framework for the cooperation is described in more details [here](#).

As a direct consequence of the current public health crisis and related economic vulnerability, the Commission issued additional guidelines to this regulation on 25 March 2020, with the purpose of protecting critical European infrastructure assets, systemic important companies and technology in the current COVID-19 crisis. Business and industries mentioned in particular are health, medical research, biotechnology and infrastructures that are essential for our security and public order.

In the guidelines issued on 25 March 2020, the Commission urges member states that already have an existing screening mechanism in place to use all tools available to them in order to prevent capital flows from non-EU countries that could undermine Europe's security or public order.

Further, it is urged that the member states that still do not have a screening mechanism in place to set up a fully-fledged screening mechanism and to consider all options to address cases where the acquisition or control by a foreign investor of a particular business, infrastructure or technology would potentially create a risk to security or public order in the EU. The new guidelines do however still not impose any formal obligation on member states to implement investment screening on foreign investments, and the decision to approve foreign investments remains with the member state.

INVESTMENT SCREENING IN DENMARK

Regulation on screening of foreign investments is currently in place in 14 member states, including Denmark.

Although being a part of the 14 member states which the Commission considers to have investment screening in place, Denmark does not have a general screening mechanism applying to foreign investments in Danish companies.

The obligation to screen foreign investments in Denmark only applies to specific sectors. This is namely the case for war material, cybersecurity, supply security, and investments in financial institutions¹.

The Danish government has not yet initiated any further steps as a consequence of the new guidelines issued by the European Commission.

1 April 2020, the Danish Minister of Justice Nick Hækkerup announced that a working group has been appointed to safeguard national security interests for certain investments which will present proposals for possible models for an upcoming Danish investment screening process.

¹ Act on War Material (The Danish Consolidated Act No. 1004 of October 22 2012) and Act on the continental shelf and certain pipelines installations on territorial waters (The Danish Consolidated Act No. 1189 of September 21 2018)

The Danish government expects to introduce this in the 2020/2021 sessional year of the Danish Parliament (6 October 2020- 5 October 2021).

OUR COMMENTS

The European Union transactions market, private as well as public, is highly impacted by the imminent COVID-19 pandemic leading to substantial uncertainty, influencing decision-making on both sides of the fence. The full impact is yet to be seen but the market is presently experiencing deals being postponed or simply cancelled due to acquisition financing obstacles, purchase price decreases and FX fluctuations. Such trading environment often attracts certain bidder types on the hunt for certain critical and vital assets (infrastructure, systemic important companies and certain technologies) which operate with a purpose for the greater well. Accordingly, protection of such is vital for a well-functioning market and European society post-pandemic.

It remains to be seen to which extent the new guidelines issued by the European Commission and the current EU Directive Regulation (EU) 2019/452 on investment screenings will lead to a change in the duty of notification in relation to foreign investors' acquisitions in Denmark.

Earlier this week, the Australian government adopted rules effective from 29 March 2020 which temporarily requires approval of any investment in an Australian company. Threshold amounts which apply in determining whether particular foreign investments made are subject to Australia's foreign investment framework are set at AUD 0, regardless of the nature of the investor or the type of transaction².

Any implementation of such kind of rules will create an element of uncertainty as regards completion of future M&A transactions. For M&A transactions in particular investment screening will constitute a matter to be handled along side with any merger control requirements prior to any closing.

As also mentioned in our previous [article](#), 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.

Such processes could, however, potentially be more complicated and time consuming than merger control procedures, as there would be a risk, that member states would be reluctant in accepting specific foreign investments if the member state runs a risk of being critiqued by the other member state afterwards.

² The scope, however, is still limited by existing voting or equity percentage thresholds that remain in effect.

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