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Foreign Direct Investments
New regime in Denmark

Legal area:
Direct Investments

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The global expansion of foreign direct investment (FDI) regimes provides for an ever more complex regulatory environment surrounding cross-border M&A and other transactions. In this insight, we provide an overview of the latest trends in FDI regulation in Denmark and Europe, including Kromann Reumert's general view on the new Danish FDI regime that we expect to be presented to Parliament shortly. We also give you our recommendations to mitigate the risk and deal uncertainty associated with these new regimes.

Introduction and recent trends

As set out in our recent report 10 areas of interest for your business in 2020, more and more jurisdictions are introducing or expanding their authority to investigate and control the influence of certain foreign direct investments (FDI). FDI rules are traditionally characterised by applying exclusively to foreign investments, and the screening is focused primarily on protecting the national security of the state in which the investment is to be made.

However, in recent years the scope of what constitutes a threat to national security or public interest has been and is expanding due to countries taking a more protectionist approach to international trade and due to the tumultuous geopolitical environment. This means, inter alia, that the number of jurisdictions with an FDI regime is increasing, the range of industry sectors subject to them is expanding, and the thresholds for transactions subject to notification/approval requirements are decreasing. Denmark is no exception and is expected to introduce its first FDI regime in the course of 2021, as further addressed below.

This tendency has been intensified by the COVID-19 pandemic, which, despite presumably leading to a decline in FDIs, has also severely destabilised markets, leaving a number of enterprises potentially at risk of being taken over at an artificially low price (predatory buying). It has also meant that particularly health and healthcare-related sectors and research relating to COVID-19 are now considered critical industries. As a result, many jurisdictions have temporarily amended their FDI regimes to reflect these new circumstances by increasing the industries subject to scrutiny and/or reducing their thresholds significantly and the European Commission has also highlighted the need to protect European industry against undesired takeovers.

The European FDI regulation becomes effective on 11 October 2020

This tendency is further reinforced by the European Parliament and the Council's Regulation on screening of FDIs, effective on 11 October 2020. The Regulation establishes a framework for the screening of FDI into the EU, which allows the European Commission to review (but not block) certain investments of Union interest and to issue non-binding opinions to the Member States in which the investment takes place. The Regulation does not affect each Member State's national competence over its FDI regime, i.e. the Member State is under no obligation to implement an FDI screening regime, and, if such regime is implemented, the Member State has national competence over the detailed terms of such screening, the procedural rules, and the assessment hereof, including blocking (if any), provided, however, that such FDI rules shall fulfil the following requirements:

- The rules shall be transparent and not discriminate between third countries. In particular, the rules shall set forth the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules.
- The Member States shall apply timeframes under their screening mechanisms, and such timeframes shall allow Member States to consider the comments of other Member States and the opinions of the Commission.
- Confidential information, including commercially sensitive information, made available to the Member State undertaking the screening shall be protected.
- Foreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities.
- Member States which have a screening mechanism in place shall maintain, amend, or adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions.

These requirements are applicable to the Member States and can be invoked by undertakings that believe them to be breached.

Furthermore, the Regulation sets forth a cooperation mechanism between all Member States and the Commission when screening FDIs. This includes an obligation for the Member States to notify each other and the Commission of any FDI undergoing screening in their jurisdiction. The Member States must hereafter give due consideration to the comments of the other Member States and/or an opinion from the Commission. The Commission and the Member States may also request information and provide comments to other Member States if they think that an investment taking place in another Member State should undergo a screening.

Although the Regulation places no obligation on each Member State to introduce an FDI regime, the Commission, in its guidelines on the use of the FDI Regulation, urges Member States without national screening mechanisms or whose screening mechanisms do not cover all relevant transactions to introduce a full-fledged screening mechanism, and in the meantime to use all available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs.

You can read more about the Commission's guidelines in our newsletter available here.

Denmark's current FDI rules

At present, Denmark does not have a cross-sectoral screening system, which means the Danish Act on War Materials is currently the only act directly addressing FDIs in Denmark. The act applies to undertakings manufacturing weapons and certain other equipment designed for warfare (e.g. firearms, ammunition, gunpowder and explosives). Besides the Danish Act on War Materials, the Act on the Continental Shelf and Certain Pipeline Installations in Territorial Waters is the only other act that partially takes foreign and national security interests into consideration. This act stipulates that an authorisation must be granted before placing certain pipelines in Danish waters, whether the company is Danish or foreign.

Other acts provide for screening mechanisms as well, such as the rules on merger control in the Danish Competition Act or rules regarding ownership of financial institutions, but the screening criteria set out in those acts are not based on national security or public order. Also, unlike rules on FDIs, these rules apply irrespectively of the origin of the investor.

You can read more about the Danish rules currently in force here.

The expected FDI regime in Denmark

As mentioned, Denmark has no cross-sectoral screening system, but the Danish Parliament did emphasise the need for an FDI regime in Denmark as late as in December 2019. A cross-ministerial working group set up by the previous Danish Government is currently preparing recommendations for possible FDI screening models in order for a draft bill to be presented to Parliament in 2020/2021. It is the intention that all parts of the Danish Realm will be subject to the FDI regime (i.e. including the Faroe Islands and Greenland).

The Danish Government has emphasised the need of an FDI regime, which secures Denmark's security and public order but at the same time does not undermine Denmark's position as an open economy or jeopardise our ability to attract foreign investments.

We expect the Danish Government to present its proposal for a general FDI regime in Denmark in connection with the opening of the Danish Parliament early October.

We expect that the Danish FDI regime will apply to specific sectors and potentially also across all sectors, which seems to be the trend in other jurisdictions. If a sector-specific or combination model is chosen, it needs to be considered which sectors are to be covered by the rules. Although the sectors covered by other jurisdictions' FDI regimes have some overlap, there is no unilateral approach.

The new EU Regulation on FDIs mentions the following sectors as particularly vulnerable in an FDI context:

Critical infrastructure:
physical and virtual, e.g. power supplies and transportation

Critical technologies:
including AI, robotics, autonomous vehicles, and dual-use products

Supply of critical input:
including energy and raw materials

Access to sensitive information:
including personal data, or the possibility of controlling such data

Media:
protecting freedom of speech and pluralism

It is still uncertain which sectors will be included in the Danish regime. The former Minister of Justice has stated that the new rules should be broader than the rules currently in place and should cover "critical infrastructure" such as energy, IT, telecom, transport, health, but also advanced technologies and artificial intelligence. Thus, our current expectation is that the Danish FDI regime will encompass a large number of industries.

In addition to which sectors to be covered, the regulation needs to address the thresholds that should apply (if any), including whether such thresholds should be based on certain minimum shareholding percentages acquired and/or control/decisive influence over the company invested in. Furthermore, the regulation needs to address whether covered transactions should encompass other forms of activities than investments/acquisitions, e.g. long-term operating agreements, lease agreements, license agreements, etc., with foreign investors.

Kromann Reumert's view on the new Danish FDI regime

Kromann Reumert appreciates the relevance of introducing a Danish FDI regime. However, it should also be recognized that FDIs are vital to the Danish economy and the regime must be tailored to encourage continued investments into Denmark and provide for a transparent, predictable, and effective review procedure. As such, we will in the upcoming parliamentary process use our influence to promote that the following principles are applied.

Transparency and foreseeability

We recommend that the FDI regime is structured in a way which ensures transparency and foreseeability for the parties to the greatest extent possible. The FDI rules should be drafted so that the parties and their advisors can assess the likely outcome of a screening/notification, e.g. by including the possibility of a pre-approval process. Furthermore, we recommend that the rules include a precise and, to the extent possible, exhaustive list of companies/assets and investors that will be subject to the regime. Our recommendation is that a sector-specific model is applied to advance transparency and foreseeability, but we acknowledge that it may need to be supplemented by a cross-sector regime.

Position of lenders etc.

In order to secure continued capital flow from foreign lenders, it is important that an FDI regime allows for such lenders - at least temporarily - to take possession of their collateral if the company invested in becomes distressed. Furthermore, the FDI regime should take into account the more complex ownership structures that apply in cross-border transactions in order not to prevent or deter investments from private equity funds and other professional investors.

"Fair" considerations and proportionate enforcement

It is important that the FDI regime provides for a "fair" process and will not be used as a tool to promote extraneous considerations, including broader political considerations, in particular to secure that foreign investors, including their financial lenders, are still inclined to make investments and loans available in Denmark. Moreover, it is important that the enforcement of the FDI rules are proportionate and fair. We recommend that the parties should be able to offer remedies as such measures will often be sufficient to mitigate the concerns connected to the investment as well as not placing unnecessary constraints on foreign investments in Denmark.

Threshold

As a starting point, the FDI regulation should include objective thresholds. However, we recognize that any threshold - similar to the threshold in the Danish Act on War Materials - may need to be supplemented with a criterion on the ability to exercise decisive influence/control in order to avoid circumvention. If the FDI rules introduce such criteria, we recommend that the concept of control under the FDI rules is aligned with the concept of control under the EU merger control rules. This would provide investors and their advisors with a certain level of foreseeability on the FDI rules' applicability by allowing investors, advisors and the public authority enforcing the rules to draw on the existing interpretation guidance provided for in the Commission's Merger Regulation and its associated Consolidated Jurisdictional Notice as well as the extensive case law on the subject matter.

Procedure

We recommend that the regime provides for a pre-approval procedure to avoid any post-closing interventions and to mitigate the deal uncertainty and risks associated with a post-closing procedure. Moreover, we recommend that the authority to review and decide on an FDI is vested in one public authority, which will then be responsible for the necessary coordination with other public authorities. This will help ensure a consistent practice and promote transparency and foreseeability. We recommend that the rules set out a clear timeframe for the approval process and that any undue delay is avoided. We also recommend that the access to recourse should be through the courts in Denmark, potentially a special court established for this purpose, and that such recourse should be a full examination of the decision made.

Kromann Reumert's recommendations and assistance

In light of the recent developments and the anticipated new FDI regime in Denmark, we recommend that Danish companies that receive foreign investments or invest abroad, as well as foreign companies investing in Denmark, monitor the developments in the FDI regimes.

In order to address the increased focus on FDI, we recommend integrating an FDI-screening, assessing if and where the investment is subject to FDI notification requirements, in connection with other due diligence procedures, including merger control screening. As is the case with a merger control screening, we recommend conducting a thorough assessment early on to avoid any surprises or deal uncertainty. An early assessment allows for proper feasibility analysis to be conducted, prepare sufficient remedies (if necessary) and plan the deal timetable accordingly.

Kromann Reumert has extensive experience advising clients on all aspects of cross-border transactions, investments and international trade across various sectors and industries, which includes planning and structuring merger control and FDI approval procedures in Denmark and abroad. We work extensively with our global network of foreign law firms, including our Lex Mundi network, the world's biggest international network of lawyers. In light of the increased scrutiny of foreign investments and the anticipated new FDI regime in Denmark, we have established a practice group dedicated to FDI in order to provide Danish and international clients with the latest updates on FDI and to assist them in developing a successful strategy to navigate the complex regulatory environment surrounding cross-border M&A and other transactions.

Our skilled team of experts are monitoring the developments in FDI regimes in Denmark and abroad and will provide updates through our website. Sign up for our FDI-newsletter to stay updated on the latest trends and developments within Foreign Direct Investments in Denmark and abroad.

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