

### New Danish investment screening regime



## → Executive summary

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The Danish Parliament has recently adopted legislation that introduces two sets of rules pertaining to investments in Danish enterprises; a mandatory set of rules that apply to investments within so-called “critical sectors” and an optional set of rules that apply to all other investments.

The **mandatory authorization scheme** applies to investments in and agreements with Danish enterprises, that have activity within “critical sectors”. There are no thresholds or limitations regarding the affiliation to the “critical sectors” and as such, we expect that a significant number of investments will be covered by the mandatory authorization scheme. If an investor is subject to the rules, but does not request for authorization, the Danish Business Authorities have a wide range of possible actions to hinder or reverse the investment.

The **optional notification scheme** applies to all non-EU/non-OECD residents that invest in Danish enterprises, which are doing business within all other sectors but the “critical sectors”. If the foreign investor does not notify the Danish Business Authorities prior to proceeding with an investment and the Danish Business Authorities consider the investment to be a “threat to national security or public order”, the Danish Business Authorities may order the investment to cease.

The Danish Business Authorities have a case handling time of up to 60 days, unless additional necessary information is required.



## → News

### THE INVESTMENT SCREENING ACT

On 4 May 2021, the Danish Parliament adopted legislation, which in effect introduces a new investment screening regime that in certain situations requires foreign investors to obtain approval or to notify the Danish Business Authority prior to making investments in Danish enterprises. The new regime will apply to transactions completed on 1 September 2021 or later.

The high-level object of the new Investment Screening Act is to prevent certain, undesired foreign investors from gaining control or significant influence over critical Danish enterprises and public services.

The new regime is based on two sets of rules:

- ▶ A mandatory authorization scheme
- ▶ A optional notification scheme

### THE MANDATORY AUTHORIZATION SCHEME

The mandatory authorization scheme obliges all foreign investors in Danish companies within sectors defined as “critical sectors” to obtain authorization from the Danish Business Authorities prior to proceeding with an investment in the enterprise. The mandatory rules apply to investments by way of **acquisition of “control”** of a Danish enterprise as well as entering into a **“special economic agreement”** with a Danish enterprise.

**Acquiring control** is defined as obtaining more than 10 pct. of the ownership, voting rights or “similar” control” of the Danish entity. In addition, the foreign investor must obtain a new authorization from the Danish Business Authorities if certain, additional thresholds are exceeded later: 20%, 33,3%, 50%, 66,6% and 100% of the ownership, voting rights or “similar control” of the Danish entity.

The mandatory scheme applies to all non-Danish investors, including investors headquartered within the EU or in the OECD areas. Further, the regime also applies to Danish subsidiaries of foreign parent companies.

The mandatory authorization scheme also applies when foreign companies conclude so-called **“special economic agreements”** with Danish companies. “Special economic agreements” include both joint ventures, supplier agreements, operating agreements etc., to the extent that such agreements lead to a decisive control or influence over the Danish entity.

In the preparatory works of the bill, it is mentioned that decisive control may exist, if e.g. the foreign entity has influence over the business-critical parts of the operations of the Danish enterprise, if the supplier is difficult to replace or if the agreement’s notice of termination is very long.

The rules regarding “special economic agreements” do not apply to investors headquartered within the EU or in the OECD areas, however, EU and OECD subsidiaries of non-EU and non-OECD headquartered parent entities may be covered.

The obligation to apply for and obtain authorization rests with the foreign investor. The Danish enterprise does therefore – as a main rule – not have any obligations under the new regime.

If a transaction is proceeded without approval, the Danish Business Authorities have a range of possibilities to prevent such investments, which includes expropriation of assets and cancelling the legal effect of the agreements.

### “CRITICAL SECTORS”

The mandatory authorization scheme only applies to agreements and control of Danish enterprises, which have their business within “critical sectors”. There are no lower brackets or thresholds of the relation with such “critical sectors”, and entities with only small percentages of the total revenue originated from “critical sectors” may as such also be covered.

The Danish bill includes a non-exhaustive and very broadly defined list of critical sectors (see below).



CRITICAL SECTORS				
Defence sector	IT security functions	Dual-use products	Critical technology	Critical infrastructure
<b>Description</b> <i>Development of weapons, warfare materials or other technologies and services that are important for the Danish Defence.</i>	<b>Description</b> <i>Development, production or maintaining of products with IT security functions or services used to process classified information.</i>	<b>Description</b> <i>Products that can be used for both military and civil purposes.</i>	<b>Description</b> <i>Other and similar critical technology, such as artificial intelligence, 3D printing, energy storage, and quantum and nuclear technologies.</i>	<b>Description</b> <i>Functions that are essential to society functions as well as rebuilding such essential functions. The definition of "infrastructure" is very broad.</i>
<b>Example</b> <i>Development of blueprints for military ships used by the Danish Defence</i>	<b>Example</b> <i>Maintaining IT security programs for other Danish enterprises.</i>	<b>Example</b> <i>Development of night-vision technology</i>	<b>Example</b> <i>Development of robots</i>	<b>Example</b> <i>Telecommunication would likely be considered as "critical infrastructure"</i>

## THE OPTIONAL NOTIFICATION SCHEME

As mentioned above, the mandatory authorization scheme only covers investments within "critical sectors". For all other sectors than the ones defined as "critical", there is a possibility – not an obligation – to notify the Danish Business Authorities on a voluntary basis, if there may be a risk of the investment constituting a "threat to the national security or public order".

The optional notification scheme does not apply to EU/OECD investors and is only triggered in case the ownership or control exceeds 25% of the Danish enterprise.

If an investment has not been notified to the Danish Business Authorities and if the Danish Business Authorities within a deadline of 5 years from the investment find that the investment constitutes a "threat to the national security or public order", the Danish Business Authorities may order the investment to cease.

As such, the optional notification scheme allows investors to clarify in advance whether an investment could potentially be considered as a threat to the national security or public order.

## AUTHORIZATION AND NOTIFICATION PROCESS

From the 1 September 2021, all the mentioned investments and special economic agreements must be

approved through an application process at [www.virk.dk](http://www.virk.dk).

As part of the application process, the Danish Business Authority will request to receive all necessary information from both the requesting foreign investor as well as the Danish enterprise in order to assess whether the investment constitutes a "threat to the national security or public order". The request will – among others – regard:

- Information regarding the nature of the investment and agreement
- Names and identification of the owners of the investors.
- The business purpose of the Danish enterprise.

The Danish Business Authority also requires appliers to submit certain documents along with the application, e.g. before and after structure charts of the investor as well as of the Danish enterprise.

The Danish Business Authority has 60 days to review authorization/notification requests but can extend the case handling time if necessary. In case the authority has not requested any further information or rejected/declined the application within the deadline of 60 days, the application is considered approved.

The Danish Business Authorities may issue an approval under certain requirements and assumptions, e.g. that

the investor has to follow certain restrictions regarding the investment.

## INTERNATIONAL DEVELOPMENTS

The recent international developments show a great increase in the public focus on so-called 'FDI screening regimes' such as the new Danish legislation. As such, we expect that such regimes will be introduced very widely across multiple jurisdictions – including other EU

countries - with regards to M&A transactions and public tender bids from foreign entities.

The introduction of FDI screening regimes will no doubt impact the investment and transaction market and add complexity to the cross-border investments.

At LEAD | Rödl & Partners, we have M&A experts across many different jurisdictions, who are ready to assist and advice on investment screening regimes.

	The mandatory authorization scheme		The optional notification scheme	
	Foreign investments - critical sectors	Special economic agreements - critical sectors	Foreign investments - other sectors	Special economic agreements - other sectors
Applies only within the "critical sectors"	✓	✓	✗	✗
Control thresholds	10% / 20% / 33,3% / 50% / 66,6% / 100%	"Decisive influence"	25%	"Decisive influence"
Requires additional approval when new threshold is exceeded	✓	✗	✗	✗
Applies to EU/OECD investors	✓	✗	✗	✗
Approval from the Danish authorities required	✓	✓	✗	✗
Case handling time	60 days (with some exceptions)			



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## CONTACT FOR FURTHER INFORMATION

*Our team of experts at LEAD | Rödl & Partner advises both Danish and foreign companies on private equity investments and we are ready to assist you both on the legal and tax perspectives of the investments. For further information, please contact LEAD | Rödl & Partner at +45 44 45 50 00, or send an email to:*



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