Guide to Foreign Direct Investments - A Nordic overview

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In this article, we will shed some comparative light on recent developments in the Nordic foreign direct investment ("FDI") legislation, including highlighting key differences and important takeaways for FDI screening from a Nordic perspective. Particular attention will be attributed to the recent amendments to national provisions for Denmark and Norway, which entered into force in July 2023, and the new Swedish legislation which will enter into force on 1 December 2023.

Following the implementation of the FDI Screening Regulation on 11 October 2020, EU Member States have introduced a more unform FDI screening mechanism. This includes several of the Nordic countries which already had some form of FDI screening mechanism(s) in place.[1] Although the EU FDI Screening Regulation does not require Member States to have an FDI screening mechanism in place, it introduces minimum requirements for countries that have an FDI screening mechanism in place or are willing to adopt one, as well as a mechanism for the exchange of information between the Member States and the European Commission.

The purpose of FDI screening is generally, among other things, to protect the national security and public order interests of the country concerned and to prevent, detect and counter activities which present a threat to national security.

Denmark

Since 1 July 2021, Denmark has applied a fairly comprehensive FDI regime (only affecting transactions completed after 1 September 2021). The Danish Act no. 842 of 10 May 2021 on the screening of certain foreign direct investments etc. in Denmark (the "Investment Screening Act") and three associated executive orders provide the regulatory framework for screening and authorisation of foreign direct investments in Denmark (together the "FDI Rules"). The Danish FDI Rules entail two screening mechanisms:

1. A mandatory authorisation scheme for transactions with Danish companies or entities active in certain particularly sensitive sectors.
2. A voluntary notification system for transactions with Danish companies or entities active within other sectors.

The mandatory authorisation scheme comprises a wide range of transactions between foreign investors and Danish companies and entities, including both investments in and agreements with Danish companies and entities operating in a particularly sensitive sector. The particularly sensitive sectors include:

- National defence.
- IT security functions.
- Production of dual-use items.
- Other critical technologies.
- Critical infrastructure.

Critical infrastructure includes companies performing activities which are necessary to maintain or restore one or more of 39 socially important functions. Examples of socially important functions include electricity generation, postal and courier services, banking and insurance. The critical infrastructure sector comprises companies that perform a socially important function, as well as their critical suppliers.

The mandatory authorisation scheme applies to direct and indirect investments where a foreign investor, e.g. a non-Danish company or a Danish company with non-Danish ownership, acquires 10% or more of the shares, voting rights or similar control by other means in a Danish company or entity operating in a particularly sensitive sector. Similar control by other means may be acquired through the acquisition of assets, the right to appoint members of the board of directors or the power to make significant decisions on management, operational, financial and development matters in accordance with an agreement, or through long-term and irrevocable loans, among other things. The mandatory authorisation scheme also applies to certain increases in the existing shareholdings held by foreign investors who have already been authorized by the Danish Business Authority ("DBA") or who have acquired their shareholding in the Danish company prior to 1 September 2021. The establishment of a new Danish company or an investment in the establishment of a Danish company may also be subject to the mandatory authorisation scheme.

The mandatory authorisation also applies to special financial agreements entered into with Danish companies and entities. This includes joint venture-, supply-, operating-, and service agreements that provide a foreign investor with control of or significant influence over the Danish company or entity or its business-critical areas, such as development activities. In the context of special financial agreements, only investors domiciled in a non-EU/-EFTA country and Danish and EU/EFTA parties with direct or indirect owners who are domiciled in a non-EU/EFTA country qualify as foreign investors.

The amendment to the Investment Screening Act came into effect on July 1, 2023, after which the Danish government also decided to make changes to the implementation provisions of the law.

The amended FDI rules introduce an extended screening mechanism for agreements related to the energy island in the North Sea.[2] Special rules apply to the contract-winning party and potentially to all parties intending to submit a bid to the Danish state's tenders for construction, operation, and co-ownership of the energy island in the North Sea. As a result, such parties may be subject to the mandatory authorisation scheme regardless of whether they qualify as foreign parties to a special financial agreement; hence, Danish parties and EU/EFTA parties will have to obtain authorisation to enter into such agreements.

In addition, the new FDI rules entail a more efficient application process, which will result in fewer administrative burdens for applicants and a shorter deadline for the DBA's decision in more uncomplicated cases.

Finland

The Act on the Monitoring of Foreign Corporate Acquisitions (172/2012, as amended) provides the rules for FDI screening in Finland. The most recent amendments to the Act were made in 2020 following the entry into force of the EU Regulation mentioned above. Generally, a positive attitude towards foreign investment is the guiding principle of the Act. The authorities can exercise control over transfer of influence to foreigners or foreign organisations or foundations in Finnish companies and businesses considered essential for security of supply and national security and, if necessary, restrict foreign ownership therein. Please note that acquisition of real estate in Finland by foreign buyers outside the EU and the EEA are subject to an additional separate permission procedure.

The screening is conducted by the Ministry of Economic Affairs and Employment (the "MEAE"). The MEAE must approve an acquisition unless it may threaten a key national interest. In this case, the MEAE must refer the matter for consideration to the government plenary session. The key national interests that are taken into consideration in the FDI screening are mainly the following:

1. securing military national defence;
2. the safeguarding of functions vital to society (including the safeguarding critical infrastructure and security of supply); and
3. safeguarding national security and public order.

The MEAE may, as part of its approval, impose conditions that are necessary to safeguard a key national interest. The conditions must be accepted by the parties to the acquisition. The Act does not include list of possible conditions but according to the preparatory works the conditions may, for example, relate to retaining

a registered office, production, services or R&D in Finland, the divestment and sale certain activities of the target company to a third party, or the exclusion of certain activities from the transaction.

The FDI screening does not eliminate or replace other potential regulatory procedures. For example, the acquisition may require a parallel merger control notification and approval by competition authorities such as the Finnish Competition and Consumer Authority.

According to the statistics publication of the MEAE, 35 new applications or notifications were filed at the MEAE during 2022 (in one case, the applicant withdrew the application from the process). According to the statistics publication, a total of 211 foreign company acquisitions were carried out in Finland during 2022 so 16.6% of foreign corporate acquisitions were submitted to the MEAE for assessment (incl. cases declared inadmissible). 11.9% of foreign corporate acquisitions were included in the full process under the Act (excl. cases declared inadmissible). All applications under the Act passed the confirmation process and the average processing time was 59 days in 2022.

Norway

The Norwegian Security Act from 2008 (LOV-2008-06-01-24) has an FDI-regime in chapter 10 which encompasses all sectors and applies to both EU and non-EU investors who directly or indirectly acquire ownership or control of (currently) at least one third (qualified part) of the share capital, equity or voting rights. It may be applied, in whole or in part, to undertakings that (i) handle classified information, (ii) have control of information, information systems, assets or infrastructure that are vital to essential national functions, or (iii) carry out activities that are vital to essential national functions. Typically, this may apply to undertakings that play a particularly important role in maintaining key societal functions and interests, such as infrastructure for key utilities such as water and electricity, electronic communications, defence, health, etc. As a starting point, The Security Act only applies to investments in target companies that have been brought within the scope of the Act by means of an individual decision addressed to the company.

Nonetheless the Act contains a safety valve which may be used irrespective of whether a company has been brought within the scope of the Act. If an acquisition of an undertaking covered by the Act poses a not insignificant risk to national security interests, the Norwegian authorities may intervene and stop the relevant transaction. The purpose of the right to stop acquisitions is to enable the authorities to control the ownership of strategically important businesses.

A key element in ensuring this is ownership control enshrined in the Security Act, which is designed to prevent undesirable parties from gaining insight, influence and/or control over assets and functions that are of importance to national security. Ownership control pursuant to the Security Act entails that there is an obligation to notify the acquisition of a qualified ownership interest in undertakings subject to the Act.

On 31 March 2023, the Norwegian Government proposed to amend Chapter 10 of the Norwegian Security Act in order to ensure increased scrutiny of acquisitions of undertakings relevant to national security interests (see Preparatory Works Prop. 95 L (2022-2023)).

The main amendments which are expected to come into force late 2023 or early 2024 are:

1. providing the ministries with greater opportunities to make the Security Act, including the provisions on ownership control in Chapter 10 of the Security Act, applicable to more undertakings than at present;
2. to lower the threshold of when acquisitions must be notified to the authorities in cases where the acquirer directly or indirectly collectively acquires 10% of the share capital, shareholding or voting rights in the undertaking (previously one-third), with subsequent thresholds and notification requirements for late acquisitions at one-third, 50%, two-thirds, and 90%;
3. that both the seller and the undertaking, in addition to the acquirer, are obliged to file a notification to the relevant ministry;
4. a prohibition on the exchange of information that could be used for security-threatening activities;
5. a prohibition on carrying out and completing the acquisition before the authorities have processed the notification (introducing a standstill obligation); and
6. giving the authority with the right to impose fines for breach of the notification obligation, and the right to impose penalties for breach of a prohibition or order in a decision.

The full Norwegian text of the amendments is available here.

Sweden

Since 1 January 2021, there have been provisions in the Swedish Protective Security Act (Sw: *säkerhetsskyddslagen* (2018:585)) with a mandatory screening procedure for the transfer of security-sensitive activities. There are also sector-specific provisions in the Swedish Electricity Act (1997:857) that require operators to have a special permission (a concession) to construct or operate high-voltage electricity lines. If the transfer of such a permission involves a foreign connection, the decision to grant the permission is made by the government.

The Swedish Protective Security Act contains a mandatory screening procedure for the transfer of security-sensitive activities. The provisions are not sector-specific; their applicability depends on the operations of the transferred business. Under the Swedish Protective Security Act, operators planning to transfer all, or any part of their security-sensitive activities must conduct and document (i) a security assessment and (ii) a suitability assessment.

On 13 September 2023, the Swedish Government voted in favour of a new FDI Act (Sw: *lag (2023:560) om granskning av utländska direktinvesteringar*) to review foreign direct investments. The FDI Act introduces a mechanism for screening foreign direct investments that may pose a risk to Sweden's security. The screening authority is the Inspectorate of Strategic Products (Sw: *Inspektionen för strategiska produkter*). The legislation enters into force on 1 December 2023 and will be applicable to transactions concluded on or after that date.

The FDI Act covers direct and indirect investments leading to the acquisition of voting rights of, or exceeding, 10%, 20%, 30%, 50%, 65% or 90% or more in eligible companies.

The FDI Act covers the following:

1. essential services, e.g. activities, services or infrastructure that maintains or ensures societal functions necessary for the basic needs, values or security of society;

2. security-sensitive activities as defined in the Swedish Protective Security Act;
3. activities related to critical raw materials, e.g. investments in companies that prospect for, extract, enrich, or sell critical raw materials, metals or minerals that are strategically important to Sweden;
4. processing large amounts of sensitive personal data or location data;
5. manufacturing, developing, researching or supplying military equipment or providing technical support for military equipment;
6. manufacturing, developing, researching into or supply of, or technical assistance for, dual-use products; and
7. emerging technologies and other strategic protected technologies.

The Swedish FDI Act is available here.

[1] e.g. in Finland FDI screening mechanism(s) has been in force for decades. Current Act is from 2012 and it repealed the 1992 act which in turn repealed three acts (two from 1939 and one from 1973), Norway introduced a new act in 2018 which has been amended in 2023 with new provisions constituted 20 June 2023. It is to be decided when chapter 10 enters into force. There have been recent amendments to both the Danish and Swedish FDI regime which has/will enter(ed) into force during 2023.
[2] Which is an artificial island consisting of off shore wind park amongst other see more information here: Energy Island in the North Sea | Energistyrelsen (ens.dk)

If you have any questions related to ownership control/FDI please contact our Nordic team.

Fagområder EU/EØS- og Konkurranserett, Bank og finans, Corporate M&A