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CELIS Country Note

on

Norway, 2023

by

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25 October 2023

Abstract

Since 1 January 2019, investments in Norwegian companies that are subject to the Security Act, have been screened by Norwegian authorities. The screening provisions of Chapter 10 in the Security Act have recently been amended, though they have not entered into force yet. The amendments include broadening the scope of companies subject to screening and lowering the threshold for notification to the relevant Ministries. The Security Act and its adhering Regulations do not stipulate which sectors and activities are covered by screening, as the decisive criterion is whether the company is subject to the Security Act or is a security-certified supplier. There is no publicly available list of the companies covered by the Security Act.

The screening regime applies to foreign, EU- and Norwegian investors, provided the acquisition relates to a company covered by the Security Act. For foreign investments relating to Norwegian companies not subject to the Security Act, Norwegian authorities can nevertheless stop or impose restrictive conditions on the acquisition pursuant to § 2-5 of the Security Act. However, there is no notification obligation related to this provision, and the crucial criterion for applying the provision is if the acquisition may present a not insignificant risk of a threat to national security interests.

Norwegian authorities have recently revised the screening regulations in the Security Act, and a governmental appointed committee is currently considering the need for further revisions and regulations pertaining to investments and transactions relating to companies not covered by the Security Act. Consequently, there is a possibility of additional changes to the Norwegian screening regulations and -mechanism in the near future.

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Charlotte has 14 years of experience working for the Norwegian government, including from the secretariat of the Norwegian Oil Fund's Council on Ethics, where she conducted investigations of multinational corporations involved in gross corruption and human rights abuses. She then worked as a lawyer in the Norwegian Armed Forces and supported the operational activities through legal advice relating to cyber, technology, privacy and security law. Since 2020, she has worked as a lawyer at Ræder Bing law firm, where she advises clients on national security laws and regulations, cyber and privacy, as well as foreign direct investment screening rules.

Charlotte has a master's degree in law from the University of Oslo, specializing in WTO law, corporate law and international humanitarian law from the Humboldt University in Berlin. She also has a master's degree from the War department at King's College in London with a specialization in state's handling of international security threats such as terrorism, espionage etc. She wrote her dissertation under the supervision of Sir David Omand.

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To cite this report: Charlotte Hafstad, CELIS Country Report on Norway, 2023, 25 October 2023.

CELIS Country Note on Norway

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1. Introduction and political Background

Since 2013 the value of foreign direct investments in Norway has increased with 23 %, and in 2022 the total value of foreign direct investments in Norway amounted to NOK 1,542 billion (approx. EUR 154 million).¹ The clear majority of the investments stem from EU Member States, followed by the US.²

The Norwegian government welcomes foreign direct investments.³ According to the OECD regulatory restrictiveness index, which among other things measure how restrictive states are towards foreign direct investments (FDI), Norway is slightly more regulatory restricted compared to other OECD countries.⁴

Through the state- and municipality-owned *Innovation Norway*, the government promotes business developments throughout the country. Innovation Norway has offices in 20 countries worldwide,⁵ and *Business Norway*, which is run by Innovation Norway, helps international companies to gain access to the Norwegian market and brings Norwegian companies to the attention of international customers, investors, and partners.⁶

Norway established screening regulations for FDI in 2019, in the revised Security Act, Chapter 10. The screening regulations in Chapter 10 consists of three sections, in addition to one regulatory provision in the Security of Undertakings Regulation § 93. The provisions have recently been amended, though the new provisions and the changes have not yet entered into

¹ Statistisk Sentralbyrå (SSB): <https://www.ssb.no/utenriksokonomi/fordringer-og-gjeld-overfor-utlandet/statistikk/direkteinvesteringer>.

² Norsk utenrikspolitisk institutt (NUPI): <https://tidsskriftet-ip.no/index.php/intpol/article/view/3240/6371>.

³ The Norwegian Government: <https://www.regjeringen.no/no/aktuelt/regjeringen-vil-utrede-behovet-for-narmere-sikkerhetsvurderinger-av-utenlandske-investeringer/id2942007/>.

⁴ The index rates countries from 0, which is completely open, to 1 which is closed. In 2020 Norway scored 0.085, while the average score for OECD countries was 0.06. OECD: <https://www.oecd.org/investment/fdiindex.htm>.

⁵ Innovation Norway: <https://en.innovasjon Norge.no>.

⁶ Business Norway: <https://businessnorway.com/about-us>.

force. The screening regulations in Chapter 10 only applies to acquisitions of Norwegian companies which through administrative decision have been subjected to the Security Act. There is no publicly available list of these companies.

As the EU's trade policy is not covered by the EEA agreement, Norway is not subject to the EU FDI Screening Regulation (2019/452). Norwegian authorities have nevertheless referred to the FDI Screening Regulations on several occasions and have expressed an intent to cooperate closely with the EU in such matters.⁷ The Norwegian government has been in contact with the EU regarding screening of FDI, as it is interesting for Norway to seek cooperation with the EU, i.e., for the exchange of information and experiences related to the screening of foreign investments, given the international and dynamic nature of the field.⁸

Prior to 2019, there were several national regulations that aimed to control ownership in Norwegian companies. However, none had the purpose of generally controlling the ownership in strategically important companies, or screening with the intention of protecting national security interests.⁹ After the revised Security Act was enforced in 2019, the government established an inter-ministerial working group which, amongst others, was to identify whether there was a need for changes to existing regulations. The working group consists of representatives from the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry of Finance and the Ministry of Trade and Fisheries and is led by the Ministry of Justice and Emergency Preparedness.

In October 2021 the Norwegian Justice Ministry in cooperation with the Defense Ministry, presented a consultation paper where several changes to the screening regulations of the Security Act were suggested.¹⁰ In June 2023, the Parliament considered the government's proposal for amendments to the Security Act, which was put forward in Prop. 95L (2022-2023)

⁷ The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc)*, page 6: <https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf>.

⁸ The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc)*, page 8: <https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf>.

⁹ Norges Offentlige Utredninger, «Samhandling for sikkerhet» 2016:19, page 225: <https://www.regjeringen.no/contentassets/03960058f3f94f9d290593bee22c1a/no/pdfs/nou201620160019000dddpdfs.pdf>.

¹⁰ The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc)*: <https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf>.

on 31 March 2023. The amending Act was sanctioned by the King in Cabinet on 20 June 2023, but the changes in Chapter 10 have not yet entered into force.

The recent amendments of the Security Act increase the scope of companies which are subject to the act, by including companies that are of significant or decisive importance for fundamental national functions or national security interests, as well as companies that are suppliers of goods or services which are connected with security graded acquisitions. Furthermore, when the amendments enter into force, the threshold for notifying certain acquisitions is lowered to 10 %, and the target company in addition to the acquirer are obliged to notify the relevant Ministry of the acquisition. A prohibition on sharing information that can be used for security-threatening activities without consent from the relevant Ministry will be introduced, as well as a ban on closing the acquisition before the authorities have made a decision in the case. If the notification regulations are not complied with, the authorities can sanction by imposing an infringement fee, and in the case the investor, or the target company, intentionally or negligently violates a decision on the suspension of the acquisition of the company, the authorities can impose a fine or imprisonment up to a year, or both.¹¹

Moreover, in October 2023 the government appointed a committee to examine whether there is a need for further increased control of investments and other economic activities for reasons of national security outside the scope of the Security Act. The committee will present its report by 1 December 2023.¹²

Norway has not established a fixed point of contact for notifications and assessment of screening-cases, due to the sector principle of the Security Act. The foreign investor must therefore contact the ministry responsible for the business sector in which the target company is located. If no ministry is responsible for the target company in question, the investor must contact and notify the National Security Authority (NSM). NSM is one of Norway's three secret services. If the responsible Ministry assess that an investment constitutes a threat to national security interests, and that the threat cannot be mitigated by agreed terms, the King in Council will decide whether the investment will be authorized or not. The decision will be made following consultations with relevant Ministries and agencies.

¹¹ Proposition to the Storting (Prop. 95L (2022-2023): <https://www.regjeringen.no/no/dokumenter/prop.-95-l-20222023/id2969542/>.

¹² The Norwegian Government: <https://www.regjeringen.no/no/aktuelt/regjeringen-vil-utrede-behovet-for-narmere-sikkerhetsvurderinger-av-utenlandske-investeringer/id2942007/>.

2. Domestic Framework

2.1. Overview of the Domestic Screening Mechanism

The Norwegian Security Act entered into force in January 2019. Chapter 10 of the Act, named “ownership control regulations” applies to certain investments in Norwegian target companies which are subject to the Security Act. As mentioned, it is not publicly known which companies these are, though according to § 3-1 of the Security Act, the companies must fulfil at least one of the following criteria:

- (a) process security-graded information,
- (b) possess information, information systems, objects or infrastructure that are of decisive importance for fundamental national functions, or which is of decisive importance for national security interests, without being directly linked to a fundamental national function.
- (c) conduct activities that are decisive for fundamental national functions, or that are of decisive importance for national security interests, without being directly linked to a fundamental national function.¹³

The ministries are therefore in charge of identifying companies within their area of responsibility, which conduct activities that are decisive for fundamental national functions, or which are of decisive importance for national security interests, without being directly linked to a fundamental national function.

According to the Ministry of Justice, the screening based on the regulations of Chapter 10 only constitute one of several FDI screening mechanisms.¹⁴ As of today, it is somewhat uncertain which other screening mechanisms the Ministry is referring to.

However, § 2-5 of the Security Act has also been used in order to stop or restrict foreign investments in Norwegian companies that are not subject to the act.¹⁵ This provision is an

¹³ Proposition to the Storting (153L – 2016/2017), page 111: https://www.regjeringen.no/contentassets/0fcee45affd24280896b88b5413a00aa/no/pdfs/prp20162017_0153000dddpdfs.pdf

¹⁴ The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc)*, page 8: <https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-endringer-i-sikkerhetsloven-eierskapskontroll-mv..pdf>.

¹⁵ The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*, page 15: <https://nsm.no/getfile.php/136480->

exception provision, which only applies when there is no other legal basis for stopping an activity that entails a risk to national security interests being threatened. According to the provision, the King in Council can make necessary decisions to prevent activities that present a threat to security or other planned or ongoing activities that may present a not insignificant risk of a threat to national security interests. The scope of the provision is wide and covers a broad spectrum of activities and situations, and the regulation does not stipulate which sectors or transactions are covered. Furthermore, the provision is a regulation and not a stand-alone screening mechanism because the provision does not have an accompanying notification obligation for investors, which means that such transactions are not necessarily systematically reported to and screened by Norwegian authorities.

Norwegian authorities have, prior to the recent amendments, emphasized the use of the Security Act § 9-4 in relation to FDI screening. For example, in cases where ownership changes occur in a company's supply chain that comprises a risk to national security. Regardless of whether the procurement is classified or not (the former is a procurement where the supplier of the good or service may gain access to or produces classified information or may gain access to a critical national object or infrastructure), the provision in the Security Act § 9-4 can be applied. The provision obliges the company to notify the responsible Ministry and gives the government the opportunity to stop or set conditions for the procurement. If a procurement is security graded and the supplier has a supplier clearance according to the Security Act, the supplier shall also inform the authorities about changes in the ownership structure, cf. Security Act § 9-3, fourth paragraph. Hence, the regulation is primarily a procurement regulation as it does not establish any notification obligations for foreign investors, nor is it a screening mechanism as such. When the recent amendments of the Security act enter into force, such suppliers are also included under the notification obligation of Chapter 10.

Foreign investments in Norwegian real estate does not trigger an obligation to notify Norwegian authorities, unless the transaction also includes a company subjected to the Security Act in accordance with § 3-1.¹⁶ When the new amendments of the Security Act enter into force,

[1623136396/NSM/Files/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20a%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjop%200621.pdf](https://www.regjeringen.no/no/dokumenter/veileder-veiledere-20i-20bruk-20av-20sikkerhetsloven-20for-20a-20motvirke-20sikkerhetstruende-20investeringer-20og-20oppkjop-200621.pdf).

¹⁶ The Norwegian Justice Ministry, *Consultation paper on changes in the Security Act (screening etc)*, page 33:

properties which, based on their location, can facilitate security threatening activities against an object or infrastructure¹⁷ are considered properties of security importance. Companies in Norway are responsible for identifying such properties and notify the NSM if such a property poses a risk to a company's object or infrastructure, and it is not possible to maintain a reasonable level of security, cf. Security Act § 7-6, second paragraph. In this risk assessment, the surrounding properties shall be assessed, the actual use of the property, geographical proximity, ownership, and tenancy. However, foreign investors are not obliged to notify Norwegian authorities if a transaction involves an ordinary acquisition or rent of real estate.

Greenfield investments are not covered by Chapter 10 of the Security Act but might be covered by the exception provision in § 2-5 if the investment constitutes a not insignificant risk of a threat to national security interests.

2.2. Screening according to Chapter 10 of the Security Act

It is mandatory for investors to notify the responsible Ministry if the investor intends to acquire directly or indirectly a qualified ownership interest in a company which is subject to the act according to § 1-3.¹⁸

Section 10-1 (2) states that a qualified ownership interest exists if the acquirer will, overall, give the acquirer either directly or indirectly;

- At least one-third of the share capital, participating interests or votes in the undertaking,
- the right to own at least one-third of the share capital or participating interests, or
- significant influence over the management of the company otherwise.

<https://www.regjeringen.no/contentassets/f521121e63a642f797f5c577742ed605/horingsnotat-om-enderinger-i-sikkerhetsloven-eierskapskontroll-mv..pdf>.

¹⁷ According to the Security Act § 7-1 first paragraph, objects and infrastructure are nationally critical if fundamental national functions may be harmed if their functionality is reduced or they are subjected to vandalism, damage or unlawful seizure, or can damage national security interests in some other way.

¹⁸ Article 10-1 (1) of the Security Act.

This does not include the obligation to notify in the case of sale of assets or the transfer of rights and obligations. If the Ministry is made aware of such cases, they may be restricted or stopped due to national security interests if the conditions of § 2-5 in the Security Act are met.¹⁹

According to Chapter 10 the notification obligations covers foreign investors, EU-investors as well as Norwegian investors. The broad scope was justified by the fact that ownership structures can be complicated, and by imposing a notification obligation on all acquirers, you also cover cases where a foreign investor seek to circumvent the national screening provisions.²⁰

In cases where the company does not fall within the area of responsibility of any ministry, such notice shall be given to the NSM. The regulations do not mention sectors or business activities which are covered, as the defining criteria is whether the target company is subject to the Security act. As of today, there are no available guidelines which specify which companies are covered, or which industries or sectors are covered.

The authorities' processing of notices of acquisition is regulated in the Security Act § 10-2. The Ministry which receives the notification, alternatively the NSM, will seek advisory opinions from relevant Ministries and Norwegian intelligence and secret services on the acquisition's and the investor's risk potential. If the conclusion is that the acquisition poses a not inconsiderable risk based on the target company's importance for safeguarding national security interests, a decision to stop or impose conditions on the acquisition can be made by the King in Council.²¹

According to § 10-2 (3) the Ministry or NSM has a deadline of 60 days to inform the notifier whether the acquisition has been approved, or whether the matter is to be dealt with by the King in Council. If the acquisition is considered to entail a not inconsiderable risk of national security interests being threatened, the King in Council can decide that the acquisition cannot

¹⁹ The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*, page 11: <https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20a%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjop%200621.pdf>.

²⁰ Proposition to the Storting (153L – 2016/2017), page 150: https://www.regjeringen.no/contentassets/0fcee45affd24280896b88b5413a00aa/no/pdfs/prp20162017_0153000dddpdfs.pdf.

²¹ The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*, page 14: <https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20a%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjop%200621.pdf>.

be carried out, or that restrictive conditions must be applied for the transaction to be executed.²²

3. Developments to follow

The Security Act has been in force since January 2019, but there is little known practice related to the screening-provisions of the act. The NSM published a short guide in 2021, referred to as “*Guide in the use of the Security Act to counter security-threatening investments and acquisitions*”.²³ However, the guide is not updated according to the recent amendments of the act.²⁴ When the amendments of Chapter 10 in the Security Act enters into force, it is expected that the authorities will draft more detailed regulations that specifically regulate the content of the provisions in the Security Act.

Further changes to the FDI regulations and screening mechanism might follow when the governmental appointed committee tasked to examine whether there is a need for increased control of investments and other economic activities outside the scope of the Security act, present their report on 1 December 2023.²⁵

²² Article 10-3 (1) of the Security Act.

²³ The National Security Authority: *Guide in the use of the Security Act to counter security-threatening investments and acquisitions*: <https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20a%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjop%200621.pdf>.

²⁴ The act on Amendments to the Security act: <https://lovdata.no/dokument/NL/lov/2023-06-20-77>.

²⁵ The Norwegian government: <https://www.regjeringen.no/no/aktuelt/regjeringen-vil-utrede-behovet-for-narmere-sikkerhetsvurderinger-av-utenlandske-investeringer/id2942007/>.

Annex 1: Relevant laws, ordinances, regulatory guidelines

The Security Act

Act relating to national security (Security act) of 1. June 2018 No. 24.

- <https://lovdata.no/dokument/NL/lov/2018-06-01-24>
- Unofficial English translation (not updated according to recent amendments): <https://lovdata.no/dokument/NLE/lov/2018-06-01-24>

Act on amendments to the Security act (ownership control and the scope of the law) of 20. June 2023 No. 77:

- <https://lovdata.no/dokument/NL/lov/2023-06-20-77>

Regulations relating to the protective security work of undertakings (the Security of Undertakings Regulations) of 20. December 2018 No. 2053.

- <https://lovdata.no/dokument/SF/forskrift/2018-12-20-2053>
- Unofficial English translation: <https://lovdata.no/dokument/SFE/forskrift/2018-12-20-2053>

Guide in the use of the Security Act to counter security-threatening investments and acquisitions, by the National Security Authority:

- <https://nsm.no/getfile.php/136480-1623136396/NSM/Filer/Dokumenter/Veiledere/Veileder%20i%20bruk%20av%20sikkerhetsloven%20for%20a%20motvirke%20sikkerhetstruende%20investeringer%20og%20oppkjop%200621.pdf>

Other legislation

Act on Securities Trading (Securities Trading Act) of 29. June 2007 No. 75.

Annex 2: Relevant administrative and court cases

There is only one publicly known case related to a FDI of a Norwegian company, which by the authorities was considered to pose a threat to national security, namely the Bergen Engines-case in 2021. The Russian TMH International Group attempted to buy the company, which amongst other produce engines to the Norwegian Navy. The acquisition was considered a threat to national security and was stopped by Norwegian authorities based on § 2-5 of the

Security Act. The screening regulations in Chapter 10 did not apply to the case, as Bergen Engines was not subject to the Security Act.²⁶

Annex 3: Relevant literature

- Andersen, Morten Skumsrud, Mathilde Giske, and Ulf Sverdrup. "Mekanismer for screening av utenlandske investeringer. Oversikt over et utvalg land." *NUPI Report* (2021).
- Gåsemyr, Hans Jørgen, and Hege Medin. "Utenlandsk eierskap i eiendom i Norge: informasjonskilder og mulige oversikter." *NUPI Report* (2021).
- Gåsemyr, Hans Jørgen, and Hege Medin. "Veier til informasjon om utenlandsk eierskap i Norge: kilder og metoder." *NUPI Report* (2021).
- Hafstad, Charlotte. "«Weaponization» av eierskap og norske eierskapskontrollregler." *Lov og Rett* 5 (2023): 303-324.
- Sverdrup-Thygeson, Bjørnar, and Espen Mathy. "Norges debatt om kinesiske investeringer: Fra velvillig til varsom." (2020).
- Sverdrup-Thygeson, Bjørnar, and Ulf Sverdrup. "Når geøkonomi møter den nordiske modellen." (2020).
- Waage, Kristin, et al. "Økonomiske virkemidler for å oppnå strategiske mål—en oversikt." (2021).

²⁶ Royal decree of 26 March 2021, "Prohibition of the sale of Bergen Engines AS": <https://www.regjeringen.no/contentassets/e775dc91a33e4713a090da7398e6f3f5/endelig-godkjent-kgl.res.-stans-av-salget-av-bergen-engines-as.pdf>.

About the CELIS Institute

The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. More about the Institute's activities under www.celis.institute.

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CELIS Country Reports (hereafter "Report") are produced by leading experts for any European and select non-European jurisdiction following an elaborate model, allowing for comparison and evaluation across jurisdictions. The project's aim is to identify and suggest best practice and to propose a common European (model) law on investment screening.

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