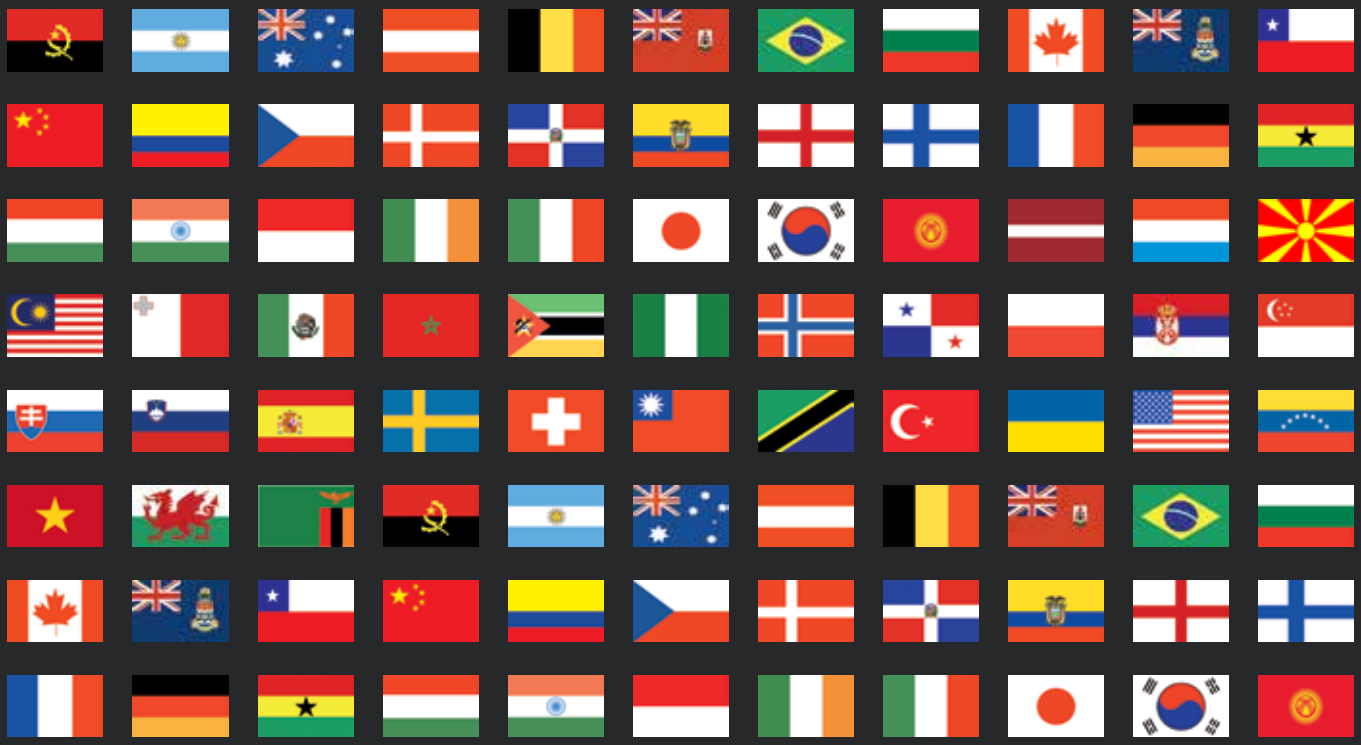
Mergers & Acquisitions

Contributing editor
Alan M Klein



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GETTING THE DEAL THROUGH

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Mergers & Acquisitions 2016

Contributing editor
Alan M Klein
Simpson Thacher & Bartlett LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Denmark

Thomas Weisbjerg and Brian Jørgensen
Nielsen Nørager Law Firm LLP

1 Types of transaction

How may businesses combine?

Under Danish law the basic forms of business combinations are:

- acquisition of either assets (with or without liabilities) or shares in the target company;
- mergers of public or private limited companies, including merger by absorption and merger by incorporation of a new entity; and
- public tender offers, including exchange offers, with regard to acquisition of all or part of the shares in a listed company.

The consideration in any of the above forms of combinations may be either cash or shares or other contribution in kind, or a combination thereof.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The legal basis for business combinations in Denmark is essentially formed by the Danish Sales of Goods Act and the Danish Contracts Act together with the Danish Companies Act. The Companies Act regulates both private and public limited companies.

In addition, inter alia, the following legislation may apply:

- the Danish Securities Trading Act and the Takeover Order (implementing the Takeover Directive (2004/25/EC)), applicable to companies listed on Nasdaq Copenhagen and First North or other Danish regulated or alternative markets;
- Stock exchange regulations issued by Nasdaq Copenhagen;
- the Danish Competition Act (including Danish merger control regulation);
- the Danish Bankruptcy Act;
- the Danish Act on Employees' Rights in the Event of Business Transfers; and
- various pieces of tax legislation, including the Danish Corporate Tax Act, the Danish Value Added Tax Act, and the Danish Act on Taxation of Capital Gains on Shares.

Legislation from the European Union must be considered in certain larger transactions, particularly in regard to merger control. Further, sector-specific requirements must be considered within certain industries such as the financial sector. Transactions within this sector will, in the main, require prior approval by public authorities.

3 Governing law

What law typically governs the transaction agreements?

Generally, transaction agreements fall within the scope of party autonomy under Danish private international law and are therefore, subject to Danish public policy, as the main rule governed by the law chosen by the parties.

Where the parties have not agreed on the governing law, asset transfer agreements will normally be governed by the laws of the country in which the target company is domiciled, whereas share transfer agreements may be governed by foreign law, for example, in the event that the seller is domiciled outside of Denmark. To avoid uncertainty, it is advisable to specify the governing law in the transfer agreement.

Certain Danish mandatory regulation with respect to form and procedure for different types of business combinations may, however, apply irrespective of the parties' choice of law. The Danish Companies Act, for example, sets out procedures with regard to mergers, including cross-border mergers, and the Danish Securities Trading Act and the Takeover Order set out procedures with regard to public tender offers.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Generally, no government filings are necessary in connection with a business combination. However, filings may be necessary in the following situations.

Share transfers

Pursuant to the Danish Companies Act, shareholders of both listed and unlisted companies shall notify the company of substantial shareholdings (ie, upon attaining 5 per cent of the share capital's voting rights or nominal value and upon subsequently exceeding or falling below the threshold of 5, 10, 15, 20, 25, 33.33, 50, 66.66, 90 or 100 per cent of the voting rights or nominal value of the share capital, respectively). Such information shall be registered by the company and the register is available for inspection by public authorities, shareholders and board members.

Further, a company must register such notifications of substantial shareholdings in the Danish Business Authority's (DBA) IT-system (the Public Shareholders' Register) in which this information is made publicly available.

With regard to listed companies, the above information shall also be notified immediately (on the date of the transaction) by the purchaser to the Danish Financial Supervisory Authority and the company shall make the information available to the market without delay.

Violation of the notification obligations is punishable by a fine.

Holders of bearer shares in public limited companies attached with less than 5 per cent of the share capital's voting rights or nominal value are obligated to register their shareholding with the DBA. This requirement does not apply to shareholders in listed companies. The registered information is not made publicly available and is only accessible by public authorities for inspection purposes.

Asset transfers

Depending on the nature of the acquired assets, notifications to public authorities may be required or be advisable.

All rights over real estate, including ownership rights, rights of use of another person's real estate, mortgages and other rights must be perfected by registration with the Danish Land Registry in order to obtain protection against legal proceedings against the property and in relation to subsequent bona fide beneficiaries of rights to the real estate. The registration fee varies depending on the type of right to be registered, the most expensive being ownership rights and mortgage where the fee amounts to a percentage of the purchase price and of the secured amount, respectively.

Ownership rights to industrial property under Danish law, including registered trademarks, industrial designs, patents and utility models, are

registered with the Danish Patent and Trademark Office and a business transfer will often necessitate amendments to the registered information.

Mergers

In general, all amendments to the articles of association of limited companies shall be registered with the DBA, for example, change of company name, increases or reductions of the share capital, and so on.

With regard to mergers, the DBA shall be notified of both the participating companies' merger plans (as the main rule) and the actual execution of such plans. Accordingly, the DBA shall receive copies of merger plans after the signing hereof and any subsequent resolutions to carry out the mergers shall be notified to the DBA within two weeks from the resolution date.

In mergers where all participating companies are private limited companies (ApS), it may, subject to satisfaction of certain requirements, be resolved that the merger shall be implemented as an immediate merger, which implies that the merger may be resolved, executed and registered with the DBA without any prior notification to the DBA of a merger plan or any other publication of information on the merger.

Merger control

Mergers and acquisitions shall be notified to the Danish Competition and Consumer Authority in the event that one of the following thresholds is exceeded:

- the aggregate annual turnover in Denmark of all of the undertakings involved is at least 900 million Danish kroner and the aggregate annual turnover in Denmark of each of at least two of the undertakings concerned is at least 100 million Danish kroner; or
- the aggregate annual turnover in Denmark of at least one of the undertakings involved is at least 3.8 billion Danish kroner and the aggregate annual worldwide turnover of at least one of the other undertakings concerned is at least 3.8 billion Danish kroner.

If a merger or acquisition has an EU dimension as defined in the EC Merger Regulation (2004/139/EC) (for example, if the aggregate worldwide annual turnover of all the undertakings concerned exceeds €5 billion and the aggregate turnover within the EU of each of at least two of the undertakings concerned exceeds €250 million), the merger or acquisition shall be notified to the European Commission instead of the Danish Competition and Consumer Authority.

Fees

Registration with the DBA of incorporation of and subsequent changes made to limited liability companies are subject to fees. The registration fee varies depending on whether the registration is made using a paper registration form or online via the DBA's IT system. Further, a fee must be paid when filing a merger notification with the Danish Competition and Consumer Authority. The fee for a simplified notification is 50,000 Danish kroner, while the fee for a full notification amounts to 0.015 per cent of the combined annual turnover in Denmark of the undertakings concerned, subject to a maximum of 1.5 million Danish kroner. Otherwise no fees are charged with regard to the above notifications.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Rules regarding disclosure of information apply in different situations. General disclosure obligations for companies listed on a regulated market in Denmark or another country within the European Union are set forth in the Danish Securities Trading Act. Such companies shall disclose inside information if this information pertains directly to their activities; inside information in this context means information that has not been made public and is likely to have a notable effect on the price formation of the company's shares if made public, for example, business combination agreements.

Public tender offers, both mandatory and voluntary, shall be made in accordance with the requirements set out in the Danish Securities Trading Act and the Takeover Order. When a mandatory offer is required or a decision to make a voluntary offer has been made, this shall be communicated to the public by the bidder by means of an announcement to this effect to be disseminated through electronic media which, as a minimum, covers the public in the countries where shares of the target company are being traded on a regulated or alternative market. Further, the bidder shall make public an offer document containing information on the financial and other terms of the offer, including the deadline for acceptance of the offer and any other information considered necessary for the shareholders to reach an informed decision on the offer. A statement in which the offer is reviewed by the board of directors of the target company shall be disclosed to the public together with the board's opinion on any advantages and disadvantages within the first half of the offer period.

As regards business combinations by merger, the Danish Companies Act provides that the board of directors of each of the merging companies shall furnish a written statement to the shareholders explaining the merger plan in more detail, including information on the pricing of the shares. The statement may be omitted if all of the shareholders unanimously decide so. Further, an impartial appraiser shall in each of the merging companies prepare a written opinion on the merger plan, including statements regarding the position of the companies' creditors. These opinions shall also be submitted to the DBA. Both the opinion on the merger plan and the statement regarding the position of the creditors may, however, be omitted if so decided unanimously by all shareholders.

With regard to employees, the Danish Act on Rights of Employees in the Event of Business Transfers (implementing Directive No. 2001/23/EC) provides that the employees shall be informed of the business transfer, to the extent possible, within a reasonable time. The employees shall be informed of the date of the business transfer, the reasons behind the transfer, financial and social consequences for the employees, and so on. In the event of mass redundancies, the employer is required to give notice to certain public employment boards prior to terminating any employment contracts.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Owners of substantial shareholdings in both listed and unlisted companies shall disclose information to the company if certain changes are made to the size of their shareholdings and, in addition, this information shall be registered in the DBA's IT-system in which this information is made public available; see question 4 for further details. With regard to listed companies, the above information shall also be notified to the Danish Financial Supervisory Authority and the Company shall make the information available to the market without delay.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Members of the board of directors and the management in Danish companies are, by virtue of their position with the company, subject to a fiduciary duty to act in the best interest of the company. In this context, the interests of the company are not necessarily equated solely with the interests of the shareholders, but must be considered from a broader point of view, comprising other stakeholders such as employees, the company's creditors, and so on.

This fiduciary duty, which is not subject to any general regulation, comprises in addition to a general duty of care and loyalty – several more specific duties, some of which are manifested in special provisions under Danish law. The Danish Companies Act thus provides that directors and the management are prohibited from taking part in the discussion and decision-making of issues if the person in question has a major interest therein, which may be contrary to the interests of the company. Further, the members of the company's board of directors and management are prohibited from entering into transactions on behalf of the company that may cause an unjust advantage to certain shareholders or a third person over the company or other shareholders.

In addition, the employment agreements of the management often comprise a duty for the management to be of assistance and therefore play an active role in connection with a business combination.

Shareholders are entitled to act in their own interest and are only in extraordinary circumstances obliged to take the interests of other stakeholders into consideration, for example, in companies with a majority or

sole shareholder, if such shareholder acts in his or her own private interests through a position in the management.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

It has not been finally established in Denmark whether the board of directors is competent to resolve on the disposal of all (or substantially all) of the company's assets and liabilities or if such disposal must be resolved by the shareholders. In the DBA's opinion the board of directors is competent. However, in practice the approval of the shareholders is often obtained to avoid uncertainty as to the validity of such a disposal.

Shareholders' approval rights may be (and often are) prescribed in the company's articles of association or in a shareholders' agreement, or both.

Mergers shall in most cases be resolved by the shareholders of the discontinuing company, whereas the central governing body is the competent body in the continuing company, provided that the merger does not require a capital increase or other amendments to the articles of association of the continuing company, in which case the merger must be approved by the shareholders.

Voluntary public tender offers are usually conditional upon the acceptance from shareholders representing a specified percentage of the nominal share capital or voting rights (or both) of the target company. The relevant percentage depends on the aim the bidder is seeking to achieve. Ordinary amendments of the articles of association require two-thirds of both votes and capital, while squeeze-out and delisting requires more than nine-tenths of both votes and capital.

The Danish Companies Act provides that a minority shareholder may demand that a single majority shareholder holding more than nine-tenths of both the shares and capital buys all of the shares of that minority shareholder.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Danish law on public tender offers applies equally to voluntary tender offers irrespective of whether these are recommended or contested by the board of directors in the target company.

Several Danish companies have implemented measures against hostile takeovers in the articles of association, including limitations on voting rights, voting ceiling and division of the company's shares into classes, typically into a class of unlisted shares with the majority of the voting rights and a listed class of shares with minimum voting rights. Given this fact, hostile takeovers are not frequently experienced in Denmark. However, the Danish Companies Act provides that shareholders representing at least two-thirds of both votes and capital may at a general meeting adopt a resolution suspending all special rights or restrictions associated with a shareholding or specific shares if a public tender offer is submitted to the company. This 'break-through' rule, which is based on the Takeover Directive (2004/25/EC), only applies to special rights or restrictions established after 31 March 2004. Furthermore, such suspension may be restricted only to a public tender offer submitted by a company within the European Union or European Economic Area.

When a voluntary tender offer is made, the board of directors must weigh the interests of the shareholders against other relevant interests, including the interests of the company itself (if contrary to the shareholders), the company's creditors and the employees. However, the shareholders' interests will be prominent in most situations. Measures available for the board of directors include: refusal to have due diligence carried out by the bidder, a recommendation to the shareholders to refuse the submitted tender offer, determining the possibility of a more favourable competing bid, and so on. Alternatively, the board of directors may decide to act actively against the takeover by the use of a capital increase directed at friendly third parties, 'poison pills', conducting merger negotiations with third parties, and so on. However, these measures should be carefully considered as the directors risk incurring liability if not acting in the best interest of the company. It is generally advisable (and in accordance with the Danish Corporate Governance Code) to involve the shareholders in such actions. Further, under the Danish Companies Act shareholders representing at least two-thirds of both votes and capital may at a general meeting resolve to introduce a procedure whereby the board of directors must obtain the approval of the general meeting before taking any actions that may hinder or frustrate a takeover bid, other than resolving to seek alternative bids.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees and other fees of this type are not governed by any specific regulation. Such fees may, however, be modified or set aside, in whole or in part, pursuant to the general clause of the Danish Contracts Act if it is considered manifestly unfair or contrary to the principles of good faith to enforce them.

Furthermore, under Danish law a company is as a general rule prohibited from providing financial assistance to a third party for the purpose of acquiring shares in the company or shares issued by its parent company, if any. However, financial assistance is allowed provided that:

- a credit assessment has been obtained;
- the company's board of directors has submitted a written report to the shareholders indicating the reasons for the financial assistance, the interest of the company in providing such assistance, the conditions on which the assistance is provided, the risks involved in respect of liquidity and solvency of the company, and the price at which the third party is to acquire the shares in the company;
- the report from the board of directors is made public via the DBA's information system;
- the shareholders approve such assistance in advance;
- the assistance is sound in the context of the company's financial status;
- the financial assistance is granted on market terms; and
- the financial assistance does not exceed an amount that could otherwise have been distributed as dividends to the shareholders.

A company shall therefore refrain from granting loans, providing assets as security or otherwise making assets available in connection with such acquisitions unless the above requirements are met. Consequently, potential financial assistance aspects of a business combination should be considered carefully, including with respect to break-up fee arrangements. The board of directors may otherwise risk personal liability where the company has defrayed such fees.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Except for the Danish Competition and Consumer Authority and rules regulating the sector-specific industries including the financial sector, governmental agencies cannot in general influence or restrict the completion of a business combination.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Business combinations with regard to unlisted companies may in general be subject to any condition agreed by the parties involved, the only restriction being the general clause in the Danish Contracts Act according to which agreements may be modified or set aside, in whole or in part, if it would be manifestly unfair or contrary to the principles of good faith to enforce it.

Business combinations involving listed companies must meet certain legal requirements. The Danish Securities Trading Act and the Takeover Order provides that mandatory public tender offers may not be conditional at all. The Danish Financial Supervisory Authority has power to grant an exemption from this rule.

Further, voluntary public tender offers must not be conditional upon financing; thus, the bidder's financing must be in place prior to submitting an offer. Further, according to the practice of the Danish Financial Supervisory Authority, an offer may not include conditions the fulfilment

of which the bidder has influence on. Otherwise, the bidder would in practice be able to determine whether or not an offer should be kept open. Apart from the aforesaid conditions, no restrictions apply. Voluntary public tender offers are usually conditional, for example, upon a certain level of acceptance from the shareholders, approval from the Danish Competition and Consumer Authority, material adverse changes, and so on.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

From a buyer's perspective it is often desirable to make a transfer agreement conditional upon the buyer being able to obtain the financing necessary for its acquisition of the target business. Due to the recent credit crisis it has become more difficult to obtain such financing from banks (and other external financiers) and sellers have thus become very reluctant to accept such a condition precedent in the agreement.

In connection with structured auctions processes, sellers often require that a bidder has either entered into final financing agreements with its bank (or other external financier) or has obtained a firm commitment from the bank to provide the necessary financing.

A pre-arranged financing package may also be offered by the selling party to a bidder in an acquisition (stapled financing).

A buyer will often need to finance both the acquisition and to refinance the existing interest-bearing debt of the target company. The completion of such refinancing may be a closing obligation in the transaction documents.

The seller may assist in the buyer's financing in a number of ways, typically by issuing a vendor note regarding part of the purchase sum (often subordinated in relation to bank loans obtained for the financing of the acquisition), by accepting a deferred payment of the purchase price or by distribution of dividends or other reduction of excess cash of the company prior to completion of the acquisition.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A single majority shareholder holding more than nine-tenths of the shares in a company and a corresponding proportion of the voting rights, may demand that the remaining shareholders have their shares redeemed by the majority shareholder. Each minority shareholder of the company has a corresponding right to demand redemption by such a single majority shareholder.

The minority shareholders shall be invited to transfer their shareholdings within four weeks. Such invitation shall set forth the terms of redemption and the basis on which the redemption price has been determined. If the redemption price cannot be agreed upon, it must be determined by an appraiser appointed by the courts. The invitation must include a statement by the board of directors on the general terms of the redemption. Any minority shareholders who have not transferred their shares to the majority shareholder before the expiry of the four-week period shall be invited, through a notification published with the DBA, to transfer their shares within a period of not less than three months. Such notification shall repeat the above-mentioned information. Any shareholdings not transferred to the majority shareholder upon expiry of the three-month period will be considered cancelled upon the majority shareholder's deposit of the redemption sum in favour of the relevant shareholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Danish law does not set out any specific rules in regard to cross-border transactions other than the EU-based legislation on cross-border mergers (Directive No. 2005/56/EC implemented in the Danish Companies Act) and European Companies (Regulation No. 2001/2157/EC and the Danish Act on the European Company). In addition, the Danish Companies Act also includes specific rules regarding cross-border demergers and rules governing the cross-border transfer of a company's registered office.

The structuring of cross-border transactions is often tax-driven and it is common practice to acquire the whole or parts of a company through one or more holding companies established in jurisdictions with beneficial tax legislation.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Apart from waiting periods under Danish and EU competition law, business combinations are not in general subject to waiting periods as such.

The Danish Securities Trading Act and the Takeover Order provide that business combinations structured as public tender offers include a minimum offer period of at least four and not more than 10 weeks. As a special exception to this rule, the offer period may be extended to a total of nine months pending required public authority clearances. If a shareholder as a result of a voluntary public tender offer obtains control of the target company, any subsequent tender offers or squeeze-out of remaining shareholders will entail further waiting periods.

The rights of the employees in the event of business combinations structured as an asset purchase are regulated by the Danish Act on Rights of Employees in the Event of Business Transfers. The act provides that the purchaser assumes the rights and obligations pursuant to any collective or individual agreement that existed at the time of the transfer. Accordingly, the purchaser may be subject to certain notification obligations. As a minimum requirement, the purchaser must inform the employees about the transaction in advance.

The merger and demerger procedures pursuant to the Danish Companies Act include some notification and waiting periods. Merger and demerger resolutions must in most cases be approved by the shareholders of the discontinuing company, and often also by the shareholders of the continuing company. Such general meetings must be convened with a minimum of two and a maximum of four weeks' notice, however requirements as to form and notice under the Danish Companies Act and the articles of association may be waived by unanimous consent of the shareholders. The merger and demerger resolution may not be adopted until four weeks after the DBA's publication of the merger or demerger plan submitted by the participating companies, except in the case of immediate mergers; see question 4 for further details.

Waiting periods may also arise in connection with tax exempt transactions should an approval from the Danish taxation authorities be required. This may be necessary with regard to tax exempted contributions of assets or share conversions under the Danish Merger Tax Act and the Danish Capital Gains on Shares Act, respectively. In connection with tax-exempt mergers, the Danish Merger Tax Act provides that the date of the merger shall coincide with the commencement of the financial year of the acquiring company, which may in practice also imply a waiting period.

Transactions within specific business sectors such as banking and other financial services will, as a main rule, require the prior approval by public authorities.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Sector-specific requirements must be considered within certain industries such as the financial sector. Transactions within this sector will as main rule require the prior approval by public authorities.

18 Tax issues

What are the basic tax issues involved in business combinations?

Danish companies are subject to corporate income tax of 22 per cent. A shareholding of 10 per cent or more in a company is considered a subsidiary investment (provided that the shareholding qualifies for a tax reduction under the Parent Subsidiary Directive (2011/96/EC) or an applicable tax treaty). Dividends received from subsidiary investments (including as a general rule outbound cross-border dividends) and capital gains realised on the transfer of shares in subsidiary investments are tax-exempt and not subject to Danish withholding tax. Also, as from 2013 capital gains realised on the transfer of shares by a company holding less than 10 per cent of the share capital (and having no controlling influence) in an unlisted company are tax-exempt and not subject to Danish withholding tax.

Update and trends

Ban on issuance of new bearer shares
As of 1 July 2015 it is no longer possible for Danish companies to issue bearer shares. Existing bearer shares continue to remain effective. However, exercise of rights attached to bearer shares requires satisfaction of certain conditions by the bearer.

Public Shareholders' Register
Limited partnerships (K/S) are currently not included in the requirements under the Danish Companies Act to register certain information on shareholders holding 5 per cent or more of the share capital or voting rights in the company in the Public Shareholders' Register. However, in order to ensure greater transparency of ownership interests in Danish companies and counter money-laundering activities the Danish Act on Certain Commercial Undertakings was amended on 6 January 2015 with the objective of authorising the Minister of Business and Growth to issue an execute order subjecting, inter alia, limited partnerships to the registration requirements, which public and private limited companies are subject to. The Minister of Business and Growth has not yet exercised the authorisation.

Amendment to Danish Securities Trading Act
On 3 July 2015 EU Directive 2013/50/EU was partly implemented into the Danish Act on Securities Trading with the objective of simplifying the information requirements applicable to issuers of securities with a view to making regulated markets more attractive to small and medium-sized issuers raising capital in Denmark. Further the provisions in the Act on Securities Trading regarding transparency and notification of major holdings have been amended and now cover additional types of financial instruments.

New Capital Markets Act
Directive 2014/65/EC of the European Parliament and the Council (MiFID II) is expected to be implemented in Danish law by way of a new a Capital Market Act (replacing the Danish Securities Trading Act), which is expected to become effective on 1 January 2017. The new act will also introduce certain amendments due to Regulation (EU) 600/2014 of the European Parliament and the Council (MIFiR).

New Ministerial Order on Major Shareholders
Pursuant to a new Ministerial Order on Major Shareholders that came into effect on 26 November 2015, the notification requirement with respect to a listed company's portfolio of treasury shares of 5 per cent or more will no longer be based on the Securities Trading Act but the rules for notification of substantial shareholdings. The new order does not amend the existing thresholds for notification but introduces a new model with three 'baskets' for calculating whether a threshold is passed. Under the new order a major shareholder is obliged to notify the company of its holding when: (i) the shareholder's votes and share capital pass a threshold; (ii) the shareholder's share-based derivatives pass a threshold; and (iii) the shareholder's total holding under item (i) and (ii) pass a threshold. Further, the order extends the notification requirement to also cover securities in the form of cash settled derivatives.

Interest is generally deductible for Danish corporate income tax purposes. The deductibility of interest payments may, however, be reduced under applicable Danish thin capitalisation rules as well as asset and earnings before interest and taxes (EBIT) limitation rules. The thin capitalisation rules prescribe a debt-to-equity ratio of four to one. Any interest on debt to related parties in excess of this ratio will be subject to deductibility limitations. This rule applies, however, only if the debt to related parties exceeds 10 million Danish kroner and the financing is not made on market terms. Under the EBIT limitation rule, net financing expenses in excess of 80 per cent of the EBIT are subject to deductibility limitations. Under the asset limitation rule, deduction of net financing expenses is only allowed if they do not exceed a cap computed by applying a standard rate of return on the tax base of the company's qualifying assets. The EBIT and asset limitation rules only apply to interest in excess of 21.3 million Danish kroner, but the rules are not limited to interest on debt to related parties.

Asset transfers
Asset transactions usually give rise to capital gains taxation on the seller's side. In asset transactions the purchase price shall be allocated among the groups of assets comprised by the transaction, including goodwill, and the different groups of assets are assessed individually. Initial purchase prices (where applicable) and sales prices are compared in order to identify capital gains and losses. Further, depreciation recovery may occur and any depreciation recovered will in general be taxable.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The legal basis for protection of employees in connection with asset transfers (as opposed to share transfers) is essentially formed by the Danish Act on Rights of Employees in the Event of Business Transfers (implementing Directive No. 2001/23/EC). Pursuant to this act, the transferor's rights and obligations in respect of its employees as per the date of the business transfer shall, by reason of such transfer, be transferred to the transferee. All individual employee rights will thus be maintained following the business transfer (while collective bargaining agreements may be terminated pursuant to a separate procedure laid down in the act). The business transfer will not in itself constitute a reasonable cause for termination. Furthermore, the employees shall be informed of the business transfer in advance, to the extent possible, within a reasonable time.

The employees of the target company shall also be informed of a transfer of shares in the company if such share transfer has a material impact on the employees' employment; see the Danish Act on information and consultation of employees, which implements Directive No. 2002/14/EC.

The Danish Act on Employment Clauses, which came into effect on 1 January 2016, contains mandatory regulation of job clauses, non-competition and non-solicitation clauses, including provisions regarding compensation. Further, pursuant to the Danish Act on Salaried Employees, salaried employees who are remunerated by commission or other performance bonuses are entitled to receive a pro rata share of such bonuses in the year where their employment is terminated. Similar, but less strict, protective regulation applies to stock option programmes and the like.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

When a target company has been or risks being declared bankrupt, special precautions must be taken to avoid subsequent disputes with the creditors of the target company. Warranties and guarantees from an insolvent target company are rarely of any value to the buyer and it is customary that the target company is acquired 'as is' and without any liabilities for the seller. This increased risk on the buyer side is often reflected in the purchase price.

The purchase of assets from an insolvent target company may be voidable if the purchase price does not reflect the fair market value for such assets. Likewise, business combinations in which some creditors of an insolvent target company are given preferential treatment over others may be voidable.

The purpose of the Danish reconstruction rules is, inter alia, to keep viable businesses in operation while considering the interests of the creditors. A reconstruction must, as a minimum, contain elements of compulsory composition of the distressed company's debts or a transfer of its business (in whole or in part).

Reconstruction may be commenced when a debtor is insolvent and upon request from the debtor or a creditor. The bankruptcy court will then appoint one or more reconstructors and an accounting expert representative. Further, a date is fixed for a meeting to be held no later than four weeks after the commencement of the reconstruction process with the creditors, at which the creditors shall vote on the reconstruction plan prepared by the reconstructors and the accounting expert representative. Provided that the creditors vote in favour of the reconstruction plan, the initial meeting shall, no later than six months later, be followed up by another meeting, at which the creditors vote on the reconstruction proposal. The bankruptcy court may extend the time limit for voting on the reconstruction proposal twice by two months each time, meaning that the reconstruction process cannot extend beyond 11 months.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Anti-corruption and anti-bribery are not subject to any general regulation. However, the offering, giving, receiving or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty, namely bribery, is prohibited by the Danish Penal Code. Violation of this prohibition is punishable by fine or imprisonment for up to six years. Also illegal kickbacks (secret commission) in private deals are prohibited and penalised by prison under the Danish Penal Code.

In addition, anti-corruption initiatives have been made by several organisations in Denmark, the key public and private business-relevant organisations being the Danish Export Credit Agency, the Trade Council of Denmark and the Confederation of Danish Industries. These initiatives are, however, focused on providing Danish companies operating in foreign markets with anti-corruption tools.

NIELSEN NØRAGER

Thomas Weisbjerg **twe@nnlaw.dk**
Brian Jørgensen **bj@nnlaw.dk**

Frederiksberggade 16
1459 Copenhagen K
Denmark

Tel: +45 33 11 45 45
Fax: +45 33 11 80 81
www.nnlaw.dk

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