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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the second edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Egypt and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Alan M Klein of Simpson Thacher & Bartlett LLP, the contributing editor, for his assistance in devising and editing this volume

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Getting The Deal Through

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Denmark

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STRUCTURES AND APPLICABLE LAW

Types of transaction

1 | How may publicly listed 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.

Statutes and regulations

2 | What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The legal basis for business combinations in Denmark is generally formed by the Danish Sales of Goods Act, the Danish Contracts Act and the Danish Companies Act, and, specifically with regards to acquisitions of publicly listed companies, the Capital Markets Act. The Companies Act regulates both private and public limited companies.

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

- the Takeover Order (implementing the Takeover Directive (2004/25/EC)) and Regulation (EU) No. 596/2014 on Market Abuse (MAR), applicable to companies listed on Nasdaq Copenhagen and First North or other Danish regulated markets or multilateral trading facilities;
- the guidelines to the Takeover Order by the Danish Financial Supervisory Authority (the Danish Financial Services Authority (FSA));
- Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (however, not fully in force until 21 July 2019);
- Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (however, not in force until implemented in Danish law on 10 June 2019 at the latest);
- Stock exchange regulations issued by Nasdaq Copenhagen, including the recommendations on corporate governance;
- 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;
- the Danish Act on the Processing of Personal Data (as per 25 May 2018: the General Data Protection Regulation (Regulation (EU) 2016/679); 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.

Transaction agreements

3 | Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

The acquisition of a Danish listed company may be in the form of a voluntary takeover bid to the target company's shareholders for all of the shares in the target company. If the acquisition is made through a voluntary bid, the bidder may seek to enter into agreements (irrevocable undertakings) with existing major shareholders regarding these shareholders' acceptance of a contemplated bid. Further, the bidder may seek to enter into an agreement with the target company for the purpose of obtaining its board of directors' recommendation of the bidder's contemplated voluntary bid and with respect to certain process matters and insider issues, confidentiality and due diligence.

Of course, a party may also simply wish to acquire a certain shareholding in a Danish listed company without necessarily taking over the entire share capital, and a standard share purchase agreement may in such cases be entered into if not simply traded on the stock exchange trading platform. In this respect, however, the Capital Markets Act and the Takeover Order contain provisions triggering a mandatory bid obligation on any shareholder that obtains a 'controlling influence' in a Danish listed company through a purchase of shares.

In assessing whether a transaction may trigger a mandatory bid obligation, under the Takeover Order, a controlling influence will be established if the acquirer owns more than one-third of the voting rights in the listed target company, unless it can be clearly demonstrated that such ownership, in special cases, does not constitute a controlling influence. A shareholding of less than one-third may, however, also result in a controlling influence, if an acquirer holding less than one-third of the voting rights has:

- the right to exercise more than one-third of the voting rights by virtue of an agreement with other investors;

- the right to control the financial and operating decisions of the target company under the articles of association or an agreement;
- the authority to appoint or remove a majority of the members of the board of directors and the board has a controlling influence; or
- the de facto majority of votes at general meetings and thus the actual controlling influence in the company.

When assessing whether a bidder has a controlling influence, the existence and effect of potential voting rights, subscription rights and options to purchase shares, which may be exercised or converted at the time, must be taken into account. Exemptions from the mandatory bid requirement may be granted under certain circumstances by the Danish FSA. In recent years, exemptions have been granted when the only alternative has been the bankruptcy of the listed target company.

FILINGS AND DISCLOSURE

Filings and fees

4 Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

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

Tender offers and delistings

Voluntary and mandatory takeover bids as described above in section 3 must be filed with the Danish FSA. If more than 90 per cent of the shares in a publicly traded company is successfully taken over by a single shareholder, the company typically submits a request for delisting of its shares to the regulated market in question.

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). This 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 receive a copy of the joint merger plan executed by the boards of directors of both companies. Any subsequent resolutions to carry out the merger shall be notified to the DBA within two weeks of the resolution date.

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.

Information to be disclosed

5 What information needs to be made public in a business combination or an acquisition of a public company? 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 Market Abuse Regulation and the Danish Capital Markets 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 Capital Markets 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 so decide. 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. Finally, a merger may require publication of a prospectus or an extended company notice approved by the Danish FSA.

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.

Disclosure of substantial shareholdings

6 What are the disclosure requirements for owners of large shareholdings in a public 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, limited partnerships and certain other legal entities 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.

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

7 What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? 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. This duty to act in the best interest of the company is crucial in takeover procedures (eg, in connection with the board of directors' recommendation or disapproval of a voluntary bid).

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.

Approval and appraisal rights

8 What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

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.

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.

Reference is further made to question 9.

COMPLETING THE TRANSACTION

Hostile transactions

9 What are the special considerations for unsolicited transactions for public companies?

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 Recommendations) to involve the shareholders in these 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.

Break-up fees – frustration of additional bidders

10 Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public 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.

Government influence

11 Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, 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.

Conditional offers

12 What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

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 Capital Markets 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, non-occurrence of material adverse changes, and so on.

Financing

13 If a buyer needs to obtain financing for a transaction involving a public company, 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. However, a voluntary takeover offer cannot be made conditional upon the bidder's control or depend on the bidder's own discretion and may not be conditional upon financing. A mandatory takeover offer may not be conditional at all. In tender offers, the consideration for the shares shall be paid in cash upon expiry of the applicable tender offer process, and the selling shareholders do not assist in the bidder's financing.

Minority squeeze-out

14 May minority stockholders of a public company 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 a squeeze-out procedure is initiated within three months from the expiry of an offer period of a takeover bid, the majority shareholder may redeem the remaining minority shareholders applying the same price per share as offered in connection with the takeover bid. If a squeeze-out process is initiated later than three months from the expiry of an offer period and the redemption price cannot be agreed upon, the price 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.

Cross-border transactions

15 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.

Waiting or notification periods

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

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

The Danish Capital Markets 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 competing offer is submitted before the expiry of the offer period of the initial takeover offer, the offer period of the initial takeover offer will automatically be extended until the expiry of the offer period of the competing offer. 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 (TUPE regulation). 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.

OTHER CONSIDERATIONS

Sector-specific rules

17 | 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.

Tax issues

18 | What are the basic tax issues involved in business combinations or acquisitions involving public companies?

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, 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.

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, taxes, depreciation and amortisation (EBITDA) 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 EBITDA limitation rule, net financing expenses in excess of 30 per cent of the EBITDA 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 EBITDA rule only applies to interest in excess of 22,313,400 Danish kroner, and the asset limitation rule only applies to interest in excess of 22.3 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.

Labour and employee benefits

19 | What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

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.

The listed target company and the bidder (and persons acting in concert with a bidder) are prohibited from entering into agreements regarding bonuses and similar benefits for the executive management or the board of directors in the target company. This restriction applies from the initiation of discussions with the listed target company until such have ended or a takeover offer has been successfully completed.

Generally, a listed company may not enter into a specific agreement on incentive-based remuneration with a member of its management until the board of directors has laid down general guidelines for incentive-based remuneration for the company's management, the guidelines for which must have been considered and approved by the company's general meeting and be adopted in the company's articles of association.

Restructuring, bankruptcy or receivership

20 | What are the special considerations for business combinations or acquisitions 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.

Anti-corruption and sanctions

21 What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

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.

UPDATE AND TRENDS

Current trends and proposals for reform

22 What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

On 6 February 2019, a legislative proposal was submitted implementing the Shareholder Rights Directive II (SRD II), and a final version of the legislation is expected to be implemented prior to the implementation deadline 10 June 2019. The new legislation includes the following main points:

- Listed companies are able to better identify shareholders.
- Listed companies must prepare and publish a remuneration policy for management members, which sets the framework for fixed and variable remuneration of the management members and publish a remuneration report.
- In listed companies, significant transactions between a public limited company and its related parties must be approved by governing body of the public limited company before the transaction is completed. The public limited company must publish a statement of certain significant transactions with related parties.
- Institutional investors and investment managers must publish an active ownership policy or explain why they have decided not to publish this policy.

On 28 February 2019, the Ministry of Trade and Industry submitted a legislative proposal to abolish the opportunity to establish an entrepreneur company (also called 'IVS').

The entrepreneur company structure was created with the purpose of strengthening entrepreneurship, but the company structure has, according to an analysis conducted by the government, not had the desired effect in the Danish business sector.

The government will at the same time lower the share capital requirement for private limited companies from 50,000 kroner to 40,000 kroner.

If the proposal is adopted, existing entrepreneur companies must within two years reregister as a private limited company with a share capital of at least 40,000 kroner.

The proposal was submitted to first reading by Parliament on 19 March 2019.

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