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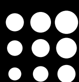

LEXOLOGY
Getting the Deal Through

NORDIC M&A

Practice Guide

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1

Acquisition Financing in Denmark

Lars Lüneborg[1]

Market overview and developments

Previously the Danish market was primarily serviced by banks, but in recent years the Danish market has seen a vast increase in alternative credit providers in the form of debt funds and direct lenders. Historically, debt funds typically only played a role in the secondary market, in particular if the debt was distressed. However, now they are also taking up roles as arrangers or originators of both medium-sized and large cap deals that they will also underwrite in full. As commercial lending is not subject to a banking licence in Denmark, debt funds are not subject to restrictions on, inter alia, capital adequacy and lending limits, which makes them more flexible in leveraged acquisition financing than banks. As a result of this flexibility, the debt funds continue to gain significant market share, despite the fact that pricing is often higher. To some extent, the same is true for direct lenders, especially insurers and pension funds. The direct lenders do, however, tend to do leveraged real estate and infrastructure deals and not acquisition financing.

Although, as mentioned, there has been an influx of debt funds in the Danish market, large cap leveraged deals are still dominated by the major international investment banks. Mid-market leveraged deals and below are dominated by the largest domestic or Nordic banks, with the debt funds finding their way into all types of leveraged deals.

As indicated above, the market is highly developed and competitive on the lender side, providing borrowers and sponsors alike with numerous high-quality lending options. Over the past years, the deals seen in the Nordic market have, generally, been smaller than in the larger markets in continental Europe such as Germany and France. The Nordic market has a history of a well-serviced loan market, which has offered both a competitive bank market and various other alternative sources of funding, such as direct lending from pension funds. However, this may begin to change as, recently, the first unitranche facilities have appeared, which have otherwise been kept out as a result of the well-serviced loan market.

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1 Lars Lüneborg is a partner at Horten.

High-yield borrowing is not a real alternative to credit lending in Denmark unlike in other northern European jurisdictions, where there is an active and developed high-yield market. As a consequence, high-yield issues for the purpose of financing acquisitions of Danish targets are primarily done by way of bond issues in Sweden, Norway, England and the United States.

Legal framework

Acquisition financing is largely unregulated in Denmark save for the restrictions on the target company stipulated in the Danish Companies Act.

In practice, the most notable regulation on acquisition financing in Danish law is the prohibitions against financial assistance found in the Danish Companies Act, sections 206 to 212. The prohibitions against financial assistance are two-headed:

(i) a provision against financing a company's (or its direct or indirect parent company's) takeover; and
(ii) a provision prohibiting the granting of loans to shareholders, directors or companies with a 'deciding influence' over the company.

In relation to (i), a Danish limited liability company may not, directly or indirectly, advance funds, grant loans, guarantees or security for a third party's acquisition of shares in the company itself, or in its direct or indirect parent company. This does also include (and thus prohibit) debt push-down transactions under certain circumstances. Thus some acquisition financing structures involving the target company may not be viable where the target company is a Danish company. The same is the case if a Danish subsidiary (financially) aids in the takeover of its direct or indirect parent company. In practice the guarantee provided by a Danish company in an acquisition financing structure will include a provision that the guarantee will be limited as to not include financial assistance in violation of the above-mentioned sections.

In relation to (ii), for these purposes 'deciding influence' means the power to control the financial and operational decisions of the company. Deciding influence typically exists where the beneficiary:

- controls, directly or indirectly, more than half of the voting rights in the company;
- has the power to control the financial and operational decisions of the company pursuant to the articles of association or any agreement; and/or
- has the power to appoint the majority of the board of directors.

Although the main rule is that this form of financial assistance is prohibited, there is a notable exception to this rule: if the parent entity of the Danish company is domiciled in Denmark or, if domiciled outside Denmark, within the EU or, to some extent, within the OECD, and that parent entity in respect of incorporation, limitation of liability, management and other central parameters is similar or substantially similar to a Danish limited liability company, it is exempt from the prohibition against loans to shareholders. Any foreign subsidiary of a controlling Danish parent is also outside the general financial assistance prohibition. Thus Danish limited liability companies are often allowed to provide shareholder loans despite the prohibition against it.

In all cases, financial assistance by a Danish group company is subject to the general restriction in the Danish Companies Act, being that a company may only undertake transactions from which the directors believe (on a reasonable basis) that the company derives real

and adequate corporate or commercial benefit. Most notably, this provision has been applied by Danish courts in the case of security being provided crossstream.

In the case of loans or advances, if financial assistance is provided in breach of the above-mentioned prohibitions, the action will be considered invalid and the advance or loan must be repaid immediately, including a statutory interest rate, irrespective of whether the recipient acted in good faith. In the case of security or guarantee, financial assistance provided in breach of the above-mentioned prohibitions will still be valid if the beneficiary of the security or guarantee acted in good faith at the time the security or guarantee was granted.

Documentation

Loan documentation

The vast majority of the larger syndicated deals in the Danish market are governed by English law and based on standard agreements, such as Loan Market Association (LMA) standards.

Smaller and more local leveraged finance transactions are primarily governed by Danish law, although occasionally such deals are governed by Swedish or German law. Such loan agreements tend to be shorter than those used in common-law jurisdictions and based on standard terms and conditions from the lender, with some room, however, for negotiating the respective covenants.

Intercreditor agreements

Intercreditor agreements are quite common in large and upper mid-market Danish transactions and often include clauses regulating:

- ranking and subordination of debt and security, typically achieved through contractual subordination;
- appointment of security agents;
- the creditor's right to agree to amendments or to grant waivers to the borrower without the consent of the remaining creditors and parties;
- indemnities and remedies available in the event of breach;
- creditors' disclosure obligations; and
- the parties' right to assign or transfer its rights and obligations.

Bank or bond transactions are commonly used in the larger leveraged finance deals, primarily in the form of senior secured high-yield bonds in combination with a super-senior revolving credit facility (RCF). Domestic and international lenders alike are comfortable with dealing with such financing structures. However, as mentioned above, there is an absence of a liquid bond market in Denmark. Thus any high-yield bond issues for the purpose of financing acquisitions of Danish targets are primarily done by way of bond issues in Sweden, Norway, England and the US.

In addition to the lenders, who are the main parties to the intercreditor agreement, in Danish large cap leveraged finance transactions, the intercreditor agreement typically also includes hedging counterparties. Hedging counterparties often appear in the intercreditor agreements as it is customary in Danish large cap leveraged finance transactions to require the borrower to enter into a hedging agreement in respect of a minimum proportion of its term facilities in order to mitigate against upward interest rate fluctuations, adverse exchange rate movements or both. As hedging counterparties will often be able to benefit from the transaction guarantees and security granted by the borrower for amounts that may be owing to them, the lenders will

require them to be a party to the intercreditor agreement in its capacity as hedge counterparty, even if it is already party in another capacity.

In most transactions, the position of the hedging liabilities reflects the position adopted by the LMA precedent intercreditor agreement for leveraged acquisition financing where the hedging liabilities rank pari passu with the senior facility liabilities. The reason for this is that in the Danish market, hedging continues to be provided primarily by the senior lenders who expect their hedging liabilities to rank alongside the senior debt.

In cases where the bank role is limited to providing a super-senior RCF, the hedging counterparty will typically continue to benefit from the transaction guarantees and security, but the ranking of the hedging liabilities will be a matter of negotiation between any non-bank lenders and the bank RCF provider and not all rank pari passu with the senior facility liabilities; typically, a portion of the hedging liabilities will rank pari passu with the super-senior RCF, while the remainder of the hedging liabilities will rank pari passu with the term debt provided by the non-bank lenders.

Structures

The most prevalent form of acquisition financing used in acquisition finance in Denmark is senior loans, most of which are issued by commercial banks. The typical structure for larger acquisitions is several banks and other financial institutions issuing a loan collectively in the form of a club deal. Syndicated loans with commercial banks from several jurisdictions are only seen in very large acquisition financing deals.

While the most common form of leveraged finance in Denmark is senior loans, the growth of alternative debt providers has created more diversity in the acquisition financing landscape. The alternative debt providers will typically provide mezzanine loans to the acquisition financing.

Bridge loans are commonly used in the acquisition financing by private equity funds by way of short-term facilities used to bridge a financing gap until long-term financing can be obtained, which typically occurs a short time after closing of the acquisition, for example, until a capital increase can be executed.

Historically, corporate bond issues have only been used to a limited degree in Denmark, in part owing to the time constraints involved and market conditions. Furthermore, a long-term practice of the Danish FSA entailed a risk that a company wanting to issue bonds would require a banking licence to do so, which is likely to have deterred companies from the financing form. Thus, historically, only larger Danish companies and certain larger banks have issued corporate bonds, and this continues to be the trend in the Danish market.

Whereas corporate bond issues involve a time constraint owing to the obligation to publish a prospectus, private placements, where securities are offered to a limited number of institutional investors, do not have the same limitations. Thus they may be a time-efficient source of financing compared with a corporate bond issue. Private placements are, however, often in direct competition with direct lending on larger transactions and with banks on small transactions, which has limited their incidence in Danish transactions.

Asset-backed lending as opposed to cash flow-based lending is not commonly used in Denmark as a means of acquisition financing. Having said that, this financing structure does appear in respect of asset-heavy businesses (eg, real estate funds) applying a structure that would normally be based on LMA precedents.

Security and guarantees

Typically, the lenders will require that the purchasing company (as obligor under the acquisition financing facility) provide security in the target's shares and over some of its assets. In Denmark, the most commonly used forms of security include:

- share pledges;
- (intra-group) receivables assignments;
- bank account pledges;
- insurance receivables assignments;
- if relevant, fixed charge over real estate or land;
- to some extent, floating business charge over the business-related assets of the company;
- occasionally but seldom, fixed charges over inventory, machinery or equipment, including movable assets; and
- occasionally but seldom, fixed charges over stock in trade or work in progress.

Most of the above forms of security are perfected by notice, whereas the floating business charge, fixed charges over real estate or land and fixed charges over assets require registration with the Danish Registration Court in order to be effective and thus attract a substantial variable stamp duty of 1.5 per cent calculated on the secured amount. Bank account pledges will typically not be perfected in Danish transactions, as perfection of bank account pledges effectively requires that the account is blocked, with any movement requiring consent by the pledgee, which requires extensive administration.

A company may in principle provide upstream, crossstream and downstream guarantees for the financial obligations of group companies; however, this is subject to the above-mentioned rules on financial assistance and the concept of corporate benefit (see below). The same is the case for providing security, especially in the case of upstream security (eg, a Danish target company and its subsidiaries in favour of a parent company).

In relation to corporate benefit, a subsidiary may, for example, receive a corporate benefit when providing a guarantee or security for the obligations of its parent company when the parent company's facility is used to make intergroup loans to the subsidiary or is otherwise commercially beneficial to the subsidiary. However, in some cases it can be difficult to conclude whether a (sufficient) corporate benefit exists as the assessment is subjective in nature. Therefore, the assessment must be based on the facts of the matter and after due and careful consideration by the board on a case-by-case basis. If the board of directors does not believe that the company will derive a corporate benefit from providing security to, for example, the lender, the granting of that security may be regarded as an unlawful transfer of value without consideration and thus as a transaction that is not to the benefit of the company. If, based on this unlawfully provided security, the company suffers a loss, which they are not fully compensated for by the beneficiary, the relevant individuals (including corporate officers) responsible for taking or implementing the decision to provide security may become personally liable to cover the company's loss.

Enforcement

Certain provision in the Danish Administration of Justice Act set out procedures for enforcing and realising a security. However, in many cases, the contractual provisions of the relevant security document will override these (except for provisions under the Danish Bankruptcy Act – see below).

Usually, the relevant security document will include an enforcement clause that gives the secured party the right to sell, by private or public sale, the assets or in any other way as the secured party in its sole discretion deems fit (including on what terms). This enforcement clause will typically also make it possible for the secured party to purchase the assets for itself. However, whenever a secured party elects to enforce its right to sell or dispose of the assets, it must be aware that it owes a duty of care to the party granting the security and may thus not realise the security in a way unduly adverse to that party.

If the party providing the security objects to the enforcement by a secured party of the security and its rights under a security document, the enforcement by the secured party must involve the bailiff's court. The bailiff's court may refuse the secured party's request for enforcement if the secured party's claim is not sufficiently substantiated by the evidence. Moreover, the bailiff's court may from time to time refer the decision to the ordinary courts. Any such referral is at the sole discretion of the bailiff's court. Generally, the bailiff's court will refer the case if, based on the evidence put forward by the secured party, the decision of the case will require extensive preparation or examination by the bailiff's court, or the claim is not clearly substantiated by the evidence. This may substantially delay the enforcement process as the processing time with the bailiff's court is shorter than with the ordinary courts.

Denmark does not operate with the concept of receivership and the courts will not acknowledge the claim of a party claiming to be appointed as such. Thus there is no right for a secured creditor to appoint a person who will operate or realise the secured assets with a view to repaying the secured debt.

Moving from contractual enforcement to statutory enforcement, provisions in the Danish Bankruptcy Act may override any contractual provision on enforcement agreed between the parties. Under the Danish Bankruptcy Act, a secured party may, in the event of bankruptcy by the creditor, dispose of a charged asset by way of public auction, or, if the asset is a financial instrument (as defined in the Danish Capital Markets Act (as defined in MiFID II)) listed on a Danish or foreign stock exchange or other regulated market, through a securities institute. The process of disposing of the assets must be conducted in the form described in the Danish Bankruptcy Act. In the case of bankruptcy an administrator of the estate is appointed by the court. When the assets are disposed of by way of public auction, the administrator or any creditor may – in most circumstances – ask for a postponement of the auction and also for a second auction to be held in order to achieve the best possible sales result for the bankruptcy estate. A secured creditor may also be redeemed by the administrator, if the administrator deems this to be in the interest of the bankruptcy estate.

In addition to the rules governing bankruptcy, there is also a set of regulations concerning financial restructuring and standstill periods, which may give a company time to try and solve its financial difficulties without going into bankruptcy. This may be in the form of a voluntary or a compulsory restructuring. The compulsory restructuring arrangement with creditors is subject to a prior court decision that prevents most seizure and other executive measures. It also restricts the possibility of filing a petition for bankruptcy. It does not, however, prevent enforcement against secured assets that are chattels or receivables.

Compulsory restructuring proposals may be set forth by the court-appointed restructuring administrator and will be based on input from the major creditors. They must be presented to all creditors and put up for voting within six months from when a first meeting with all creditors is held. That first meeting must be held shortly after the company has entered into restructuring.

Under compulsory restructuring, claims cannot normally be reduced to less than 10 per cent of their pre-restructuring value. The execution of a compulsory restructuring arrangement requires a 60 per cent majority of the voting creditors (subject to certain de minimis thresholds). Any out-of-court arrangement that may be made with a company's creditors will only be effective if the creditors voluntarily agree to be involved. No creditor can be forced into an out-of-court restructuring arrangement; this is reserved for the in-court restructuring.

In a bankruptcy, claims against the debtor raised by the creditor may be used by that creditor to set-off against a claim that the debtor had against the creditor at the time of the bankruptcy. However, this is only possible if the set-off could have been made under the general rules on set-off rights found in Danish law. Accordingly, the set-off rights can be exercised if the counterclaim is between the same parties, also due for payment and if the claims are of the same nature.

Lender liability

The Danish Bankruptcy Act governs the ranking order of claims in the event of bankruptcy. The different classes of claims are paid out by the proceeds obtained from the realisation of assets following the bankruptcy according to their level of priority. The realisation of a security is kept entirely separate from this.

Payment obligations that a debtor must make under an unsecured loan rank pari passu with the claims of all other unsecured creditors, except for certain mandatory obligations made senior by law (eg, employees' salary claims). Under the Danish Bankruptcy Act, the priority of the different classes of claims can be placed into the following simplified order:

- (i) costs incidental to the commencement of the bankruptcy proceedings and to the administration of the state as well as debt incurred by the estate in the course of its administration;
- (ii) costs incidental to the creditors' attempt to reach a solution in respect of the debtor's financial affairs by means of restructuring, composition or other similar arrangement and other related costs;
- (iii) all types of claims for wages and other remuneration for work performed in the debtor's service, including but not limited to, claims for damages for interruption of the employment and claims for holiday allowance, but excluding management compensation and severance payments, etc;
- (iv) suppliers' claims for tax and duties paid for products that are liable to duty and that are delivered to the debtor for the purpose of resale;
- (v) simple claims, namely any other pari passu claims except for subordinated claims;
- (vi) subordinated claims, where claims for interest accrued after the date of bankruptcy and claims under lease agreements, claims on regular payments are given first priority among the subordinated claims. Second, claims for fines, default fines, tax claims for incorrect tax returns and other penal instruments and liquidated damages must be paid. Claims according to gratuitous promises and presents are given third priority.

The Danish Bankruptcy Act does also allow for some clawback, if charges and other security are granted within a certain time frame prior to the commencement of the insolvency proceedings. The general clawback period is three months. Thus, if the act of perfection of a security was effected later than three months prior to the reference date (which may be before the date of the actual bankruptcy decree), they may be subject to an objective clawback. The clawback period

may be extended to two years or without limitation, if the charge or transaction was granted in favour of a person who is closely connected to the debtor, provided that the company was insolvent at the time of the execution of the transaction in question, and the participating party was or ought to have been aware of that fact.

An extended clawback period may also apply to payments of debt, if such payments have been effected by unusual means of payment, before the due date of the payment or if the payment was effected in amounts that substantially impaired the solvency of the debtor. Payments of debt that occur after the reference date may also be avoided, unless the rules on the order on equitable subordination apply.

Another example of the clawback period being without limitation is found with certain transactions where the transaction constitutes an undue preference of a creditor over other creditors, the debtor's property is withheld from serving to satisfy other creditors or the debtor's debts are increased to the detriment of the other creditors. Those transactions may be voided if the debtor was or became insolvent as a consequence of the transaction and the preferred party knew or ought to have known of the debtor's insolvency.

Tax

Stamp duty

Generally, the provision of loans or the granting of security is not subject to stamp duty in Denmark. However, transfers of assets and granting of security that need to be registered with the Danish Court (eg, transfer of real property and granting of floating business charges) are subject to a variable stamp duty as well as a fixed fee. A deed of transfer of real estate is subject to a stamp duty of 0.6 per cent of the transfer sum plus a fixed sum of 1,660 kroner, whereas real estate charges are subject to a stamp duty of 1.45 per cent of the secured amount plus a fixed sum of 1,640 kroner. The stamp duty applicable to the registration of other security is 1.5 per cent of the secured amount plus a fixed sum of 1,660 kroner.

Withholding tax

Generally, there is no withholding tax on interest payments and capital gains received by foreign corporate lenders. However, a foreign corporate lender may be subject to Danish withholding tax on interest and capital gains accrued on 'controlled debt' owed by a Danish company.

Debt is 'controlled debt' if it is owed by a Danish debtor company to a foreign corporation that directly or indirectly controls the Danish debtor, is controlled by the Danish debtor or is under common control with the Danish debtor. In this context, 'control' means the direct or indirect possession of more than 50 per cent of the share capital or votes.

Controlled debt is subject to withholding tax on interest and capital gains accrued in Denmark; however, an exemption to this main rule is possible if the foreign lender meets the following requirements:

- the foreign lender is covered by the EU interest and royalty directive or a tax treaty concluded by Denmark and the state of residence;
- the foreign lender qualifies as the beneficial owner of the accrued interest or capital gains within the meaning of the EU interest and royalty directive or the applicable tax treaty; and
- the debt arrangement with the Danish debtor company must not fall within the scope of the Danish regime on abusive tax arrangements.

The above-mentioned requirements for exemption of withholding tax are strictly applied by the Danish tax authorities. Thus, in cases with a cross-border loan arrangement involving controlled debt and a Danish company as borrower, the issue of withholding tax should always be considered carefully.

Thin capitalisation

From a corporate law standpoint, there are no thin capitalisation rules other than a general risk of liability for trading in an unwarrantable fashion, which may entail personal liability for the management of the company. However, in tax law the special provisions on thin capitalisation (ie, debt-to-equity ratio based on market value exceeds 4:1 and the total debt is in excess of 10 million kroner) will restrict the right to deduct interest from taxable income if the company is subject to the thin capitalisation rules. Additional limitations on the deductibility of interest payments may apply.

Financing of certain takeovers

Certain financial undertakings

Any natural or legal person wanting or planning to acquire a qualified interest (greater than 10 per cent), directly or indirectly, of the voting rights or share capital in a financial undertaking is subject to prior approval by the Danish FSA. For these purposes, a 'financial undertaking' means, inter alia, banks (credit institutions) and other financial undertakings such as mortgage-credit institutions, investment firms, investment management companies, payment service companies and insurance companies. Approval must also be sought prior to the increase in the holding of a qualified interest that will result in the interest held by the owner exceeding 20, 33 or 50 per cent of the voting rights or the share capital of the financial undertaking.

The assessment by the Danish FSA takes into account the likely influence of the intended acquirer of the financial undertaking, in particular with regard to the sound and prudent management of the financial undertaking but also with regard to the expected or projected financial soundness of the intended acquisition in addition to a number of criteria. As an example, a takeover of a bank in distress was once denied by the Danish FSA on the grounds that the intended business model was not considered to be sustainable. Nonetheless, in many cases, the most work-intensive requirement of the assessment is the gathering of a certificate of no judgments from the executive officers in the intended acquirer.

If a natural or legal person acquires a qualified interest in a financial undertaking without obtaining prior approval from the Danish FSA, the voting rights associated with the equity investments of the relevant owners may be suspended by the Danish FSA until such approval is obtained.

Targets listed on a stock exchange

If the target company is a company listed on a Danish stock exchange, the acquisition has to take into account the special provisions in the Danish Capital Markets Act and the Executive Order on Takeover Bids. For listed targets, two kinds of bids apply, voluntary and mandatory. In both cases, the bidder is subject to a requirement to publish an announcement of the offer. Additionally, the bidder must draw up and publish an offer document within four weeks, which must be filed with the Danish FSA. The requirements pertaining to the contents of the offer document are set out in the Executive Order on Takeover Bids.

A bidder may become subject to a mandatory bid obligation if the transaction leads to the establishment of a controlling influence. 'Controlling influence' in the case of mandatory bids is defined differently from elsewhere, with controlling influence being deemed to exist when the acquirer holds more than one-third of the voting rights in the listed company unless it can be unequivocally demonstrated that such ownership does not constitute a controlling influence. Additionally, under certain circumstances, an acquirer may also obtain controlling influence by having less than one-third of the voting rights in the listed company, for example, if an acquirer by virtue of an agreement with other shareholders has the right to exercise at least one-third of the voting rights.

Whereas the completion of a mandatory takeover offer is prohibited from being subject to conditions, a voluntary takeover offer can be, and is most often, subject to certain conditions, such as conditions regarding the minimal interest to be acquired and antitrust and other regulatory approval. A bidder may not, however, condition the completion of the offer upon events that are under the control of the offeror itself.

In the case of a mandatory takeover offer, the consideration may be in the form of shares, cash or a combination thereof, unless the shares offered are not liquid shares admitted to trading on a regulated market. In such cases, a cash consideration must be offered as an alternative. For voluntary takeover offers the consideration offered may be in cash, shares or other contribution in kind, or a combination thereof. Certain information requirements are applicable, however, to considerations that are not made in cash.

2

Merger Control in Sweden

Emma Johansson and Johan Wahlbom[1]

Introduction

The Swedish merger control rules require certain transactions to be notified and approved by the Swedish Competition Authority (SCA) before they are implemented. This process can be time-consuming, absorb a large amount of resources of the parties and can potentially affect the structure of the transaction – or even its feasibility – if there are competition issues. Hence it is important that the specifics of the Swedish merger control rules are considered at the outset and throughout the transaction planning and implementation. The Swedish merger control rules apply to concentrations exceeding certain thresholds, unless any of the thresholds in article 1 of the EU Merger Regulation are met. If a concentration has a Community dimension, the concentration should be notified to the European Commission. Importantly, it should also be noted that the SCA retains, in certain circumstances, the right to review transactions falling below the Swedish merger control thresholds.

This chapter sets out the relevant legal framework and key elements of the Swedish merger control regime, focusing on practical issues arising in transactions as well as the recent developments pertaining to Swedish merger control practice.

Legislative framework and regulators

Legislative framework

Swedish merger control is governed by the current Swedish Competition Act (the Act), which entered into force in November 2008, and the Competition Regulation, which entered into force in February 2021. The Act contains two main prohibitions: the prohibition against anticompetitive cooperation between undertakings (similar to article 101 of the Treaty on the Functioning of the European Union (TFEU)); and the prohibition against the abuse of market power by undertakings in a dominant position (similar to article 102 TFEU). In addition, the Act contains rules on the acquisition of undertakings and on anticompetitive public sales activities.

1 Emma Johansson is a competition law expert and Johan Wahlbom is an associate at Vinge.

The Swedish merger control rules are in many respects similar to, and largely based on, the EU Merger Regulation. Therefore the SCA tends to follow the guidelines and decisional practice of the European Commission when applying the Swedish merger control rules.

Regulators

The SCA has the primary responsibility for enforcing the Act. Previously, the SCA was forced to submit an application to the court in order to block a concentration or impose conditions. However, since January 2018, the SCA has had the power to prohibit and impose conditions on concentrations on its own motion (similar to the European Commission). Decisions from the SCA can be appealed to the Swedish Patent and Market Court, and further appealed to the Swedish Patent and Market Court of Appeal.

Scope of merger control

Concentrations

The Act provides that a concentration shall be deemed to arise where control of an undertaking has changed on a lasting basis as a result of:

- the merger of two or more previously independent undertakings; or
- one or more persons, already controlling at least one undertaking, or one or more undertakings, acquiring, whether by means of the purchase of shares or assets, by agreement, or by any other means, direct or indirect control of one or more undertakings or parts thereof.

The creation of a joint venture that permanently fulfils all the functions of an autonomous economic entity (ie, a full-function joint venture) constitutes a concentration within the meaning of the Act.

To the extent the creation of a full-function joint venture, which constitutes a concentration in accordance with the above, has as its objective or effect the coordination of competitive behaviour of undertakings that remain independent, the assessment of this coordination will be made in accordance with the Act's provisions governing anticompetitive cooperation between undertakings. Similarly, other types of joint ventures, such as non-structural cooperative joint ventures, are governed by the same provisions relating to anticompetitive cooperation.

In its merger control guidelines (available on its website)[2], the SCA refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on the concept of a concentration under the EU Merger Regulation. This includes, inter alia, the Swedish control test, which is based on the EU concept of decisive influence. Consequently, a minority acquisition that does not confer de jure or de facto control over an undertaking is not caught by the Act.

Applicable notification thresholds

An obligation to notify a transaction exists under the Swedish merger control rules if the undertakings concerned exceed the relevant thresholds. If a concentration has a Community dimension (ie, meets any of the turnover thresholds in article 1 of the EU Merger Regulation), the concentration should be notified to the European Commission. Additionally, the SCA may request

2 www.konkurrensverket.se/.

that the European Commission examines any concentration, either wholly or in part, that does not have a Community dimension and affects trade between member states.

The Act provides for mandatory notification to the SCA where:

- the undertakings concerned generated an aggregated turnover in Sweden during the latest financial year exceeding 1 billion kroner; and
- each of at least two of the undertakings concerned generated a turnover in Sweden during the latest financial year exceeding 200 million kroner.

In the event the first criterion is fulfilled, but not the second:

- the SCA may order a party to the concentration to notify the concentration provided there are particular grounds for doing so; or
- a party or other participant in the concentration may notify voluntarily.

The term 'particular grounds' is not defined in the Act. However, the preparatory works clarify that there must be 'indications of some strength' of harm to competition for such an order to be made. The preparatory works further explain that particular grounds may be at hand when a strong company in a concentrated market acquires smaller competitors through successive acquisitions or a newly established company that could possibly challenge the position of the acquirer. Further, the SCA's guidelines state that well-founded complaints from customers or competitors may also constitute particular grounds.

This discretionary power was exercised quite recently (at the end of 2019) when the SCA ordered Easypark AB to notify its acquisition of Inteleon Holding AB, which operated the rival SMS-Park, an acquisition that did not meet the thresholds for mandatory notification. Both parties offered digital payment solutions for parking and the SCA found that the parties had exerted significant competitive pressure on each other and that many parking space operators considered the parties as each other's main alternative. The concentration was cleared only after the SCA had conducted an in-depth investigation (Phase II) where several mitigating factors were also found to exist. Another illustrative matter is *Swedbank/Svensk Fastighetsförmedling*, where despite prior consultation with the SCA, the acquirer felt comfortable not to voluntarily file the transaction before closing. Following an order to file, the SCA eventually successfully sued to block the transaction, meaning that the target company was returned to its previous owner long after closing.

The Act does not provide for a local-effects test. Consequently, foreign-to-foreign transactions will be caught by the Act if the turnover thresholds are met. This is important in relation to, inter alia, full-function joint ventures that may need to be notified in Sweden even though the joint venture itself does not generate any turnover in Sweden.

Where a concentration consists of several transactions between the same persons or undertakings, whereby parts of one or several undertakings are acquired (staggered transactions), any transactions that occurred within a two-year period must be treated as a single concentration for the purpose of calculating the turnover.

In its merger control guidelines, the SCA refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on calculation of turnover and on the concept of undertakings concerned.

Standstill obligation

A notifying party or other participants to a concentration may not take any measures implementing the concentration until the expiry of the statutory review periods provided in the Act. However, the prohibition does not apply if the SCA decides to approve the concentration prior to the expiry of the statutory deadline.

When special circumstances exist, the SCA may grant an exemption from the prohibition set forth above. An example of this is when the acquisition of control takes place over a regulated market (stock exchange) in such a way that in practice it is not possible to notify the concentration before it has been implemented. The SCA's view, according to its guidelines, is that the standstill obligation covers all forms of the exercise of rights attached to the securities. Before the statutory review period has expired, the SCA can, at the request of the acquirer, grant exemptions from the prohibition so that the acquirer can exercise the voting rights attached to the securities in question, if necessary to maintain the full value of the investment and provided it can be done without harming competition.

While the SCA does not have the power to impose fines for infringements of the standstill obligation, it does have the power to unwind a transaction following a substantive assessment. In addition, when necessary, in order to ensure that the parties or other participants to the concentration comply with the standstill obligation, the SCA may order the parties to refrain from implementing the transaction subject to default fine.

Merger control proceedings

Notification

In order to obtain clearance of a concentration subject to a merger control review, the concentration needs to be notified to the SCA. The requirement to notify a concentration is incumbent upon the party or the parties acquiring control. In the case of a merger, the obligation to notify is on both merging parties. There are no filing fees.

A transaction can be notified as soon as the parties can demonstrate a good-faith intention to carry out the concentration (eg, letter of intent or a draft of the agreement) and must be notified before the concentration is implemented. There are no filing deadlines.

Pre-notification contacts are not mandatory. However, there are practical advantages to pre-notification contacts and the SCA encourages the parties to engage in such contacts, in particular in more complicated cases.

The SCA has published a notification form on its website listing the information and documents that the undertakings concerned must submit for the notification to be considered complete.

The form, which must be completed in Swedish, includes questions on the parties, competitors and market conditions, and is similar to the Form CO requirements for notifications under the EU Merger Regulation. More detailed market information and information on the activities of the undertakings concerned is required when the transaction gives rise to affected markets. A horizontally affected market exists when two or more of the undertakings concerned are active within one and the same relevant product market and jointly hold a market share of 20 per cent or more of a relevant geographic market. A vertically affected market exists when one or more of the undertakings concerned are active in a relevant product market which is downstream or upstream from a market of which the undertakings concerned individually or jointly hold a market share of 30 per cent or more.

In Sweden, there is no formal equivalent to the Short Form CO available under the EU Merger Regulation for uncomplicated transactions. However, as described above, some (burdensome) sections in the form are not applicable in the absence of affected markets. In addition, the SCA may agree to waive some of the information required.

The notifying party must formally declare in the filing that the information provided therein is true, correct and complete. If the SCA considers that the information provided is misleading or false, the filing will not be deemed complete. The SCA can also request additional information subject to a default fine. However, the SCA does not have any power to impose any fine in relation to the provision of false or misleading information per se.

Course of proceedings

Once the SCA has deemed a notification to be complete, the review period commences. The SCA shall decide within 25 working days (Phase I) whether to carry out an in-depth investigation (Phase II) or to clear the transaction. Phase I is prolonged by up to 10 working days if an undertaking proposes commitments. The definition of working days is contained in the SCA's guidelines.

In the case of an in-depth investigation (Phase II), the SCA has an additional three months to review the notified concentration in greater detail. The SCA may extend the review period by a maximum of one month at a time with the parties' consent or if there are extraordinary reasons for an extension. The review period can also be extended upon request from a party to the transaction. Further, if commitments are offered later than three weeks before the end of Phase II, an application to extend the time limit is required.

The SCA may also stop the clock and suspend the time limit in either phase, in cases where a party does not comply with an order or requests the clock be stopped.

The SCA aims to clear uncomplicated cases (eg, cases involving no overlaps or vertical links) before the expiry of Phase I and more specifically within 15 working days. The SCA's average review period in Phase I was 16 working days in 2020. In 2020, 59 per cent of the merger cases were cleared within 15 working days and 25 per cent of the cases were cleared within 10 working days. For Phase II cases, the average review period in 2020 was 88 working days.

Further actors: third parties, the general public and other competition authorities

Only the undertakings concerned are treated as parties to the procedure. However, customers and competitors are generally invited to comment on the transaction and members of the general public have the possibility to request access to the salient file.

The SCA publishes receipt of a notification as well as its decisions together with a brief summary of each transaction on its website. As part of its review, the SCA may also contact the customers and competitors that were listed by the notifying party or parties and ask for their views on the notified concentration and implications thereof.

Further, when submitting the notification, the parties are asked to submit a non-confidential version of the notification that the SCA can disclose to third parties. Any member of the general public can request access to the file for information purposes. If such a request is made, the SCA will redact confidential information before granting access and provide the parties with an opportunity to comment on the redactions.

Where appropriate, and in particular in cases involving an international dimension, the SCA may contact the European Commission or any national competition authority to exchange views.

Sweden has entered into an agreement with Denmark, Finland, Greenland, Iceland and Norway on cooperation on competition issues. The agreement facilitates information exchange between the national competition authorities at issue. For these purposes, the national competition authorities arrange conference calls and annual meetings to discuss and exchange views on current trends and ongoing investigations.

In addition, the SCA cooperates with other national competition authorities in the EU pursuant to the Best Practices on Cooperation between Merger Review, adopted in November 2011 by the EU Merger Working Group.

Finally, under EU merger control rules, the SCA cooperates with the European Commission and the other member states' competition authorities concerning referral cases.

Appeals

A prohibition or conditional clearance decision of the SCA may be appealed to the Patent and Market Court. The Patent and Market Court's decision and order can further be appealed to the Patent and Market Court of Appeal, although this requires permission to appeal. Rulings of the Patent and Market Court of Appeal concerning a prohibition or conditional clearance cannot be appealed to the Supreme Court.

The Patent and Market Court has six months to reach a decision counting from the date of receipt of the appeal, and the Patent and Market Court of Appeal has three months at its disposal.

Sanctions

There are no sanctions for failure to notify a notifiable transaction to the SCA. However, should the SCA become aware of such a transaction, it may order the parties to submit a notification subject to a default fine.

Further, if necessary to ensure compliance with the standstill obligation, the SCA can issue an injunction subject to a default fine.

No measures may be taken in respect of a transaction, notified or not, when more than two years have expired since the concentration occurred.

Substantive assessment of concentrations

Threshold for intervention

Under the Act, a transaction must be prohibited if it would significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. The Swedish test is harmonised with the EU Merger Regulation.

In its assessment of whether the test is satisfied, the SCA will consider unilateral, coordinated, vertical and conglomerate effects of a concentration. The SCA's assessment will take into account several factors including market shares, barriers to entry, buyer power and other potential countervailing facts. Where relevant, the SCA will also consider efficiencies and a potential failing firm defence.

The SCA will not consider non-competition issues, with the exception that a transaction cannot be prohibited if doing so would risk the abrogation of essential national interests of security or resources. This exclusion applies only in very special circumstances.

Remedies and prohibition

If the substantive test is satisfied, the SCA can either prohibit the transaction or accept it and impose binding appropriate commitments from the parties to remedy the concerns identified. Remedies could include an order to divest or to take other procompetitive action. The SCA will only accept a remedy if it is considered sufficient to eliminate the adverse effects of the concentration. Any breach of the commitments can be subject to a default fine.

Acquisitions made on a stock exchange or any other recognised market or at an auction may not be prohibited; instead, the disposal of the assets acquired may be ordered.

Since 1993, 14 mergers have been prohibited following the SCA's investigation. The same number during the period 2016 to 2021 (so far) is three. However, in many cases the parties have abandoned the transaction after having received the SCA's statement of objections, without the need for the SCA to pursue the transaction further. Moreover, in some cases the SCA's concerns are resolved via commitments. During the period 2016 to 2020 no cases were resolved with commitments in Phase II. However, there were two such cases in 2021 (see further below). In addition, during 2016 to 2021, three cases were resolved following Phase I commitments (one such decision in each of 2018, 2019 and 2020).

Ancillary restraints

A decision by the SCA to clear a transaction also covers restrictions directly related and necessary to the implementation of the notified concentration. The SCA has not published any guidelines on ancillary restraints, although the European Commission's Notice on Ancillary Restraints provides guidance in matters processed under the Act.

Recent developments and trends

An increase in the total number of notified transactions

As at November 2021, the number of transactions notified to the SCA during 2021 amounted to 116. This was a significant increase compared to the number of notifications submitted in the past five years. In 2020, the number of notified transactions was 80 and 74 were notified in 2019. In its yearly report, the SCA noted that the covid-19 pandemic did not have an immediate effect on the number of notifications. Furthermore, the pandemic did not result in any transactions relating to failing firms.

Main cases of 2021

So far in 2021, the SCA has carried out in-depth investigations (Phase II) in four cases resulting in two conditional clearances (*Altia Plc/Arcus ASA* and *Dagab Inköp & Logistik AB and Axfood Investering och Utveckling AB/Bergendahl Food Holding AB*) and two unconditional clearances (*Tempcon Group Aktiebolag/Lincargo AB* and *Tempcon Group Aktiebolag/Erling Anderssons Åkeri AB*). In addition, the SCA handed down a reasoned decision in *Lyreco SAS/certain parts of Staples Solutions BV*, which was approved after a Phase I review.

Altia/Arcus

The Altia/Arcus transaction was a concentration between the Finnish Altia and the Norwegian Arcus. Both undertakings produced, imported, exported, sold and distributed both their own and third-party beverages, in particular wines and spirits. The transaction was also notified in Finland and Norway. After conducting an in-depth investigation (Phase II), the SCA found that

the concentration risked having significant anticompetitive effects on the markets for sales of flavoured spirits/aquavit, cognac and vodka/unseasoned spirits, especially by the creation or strengthening of a dominant position (the parties combined market shares were estimated to 80–100 per cent, 45–75 per cent and 50–70 per cent, on the relevant markets). Moreover, the SCA's investigation showed that the anticompetitive effects were not offset by countervailing factors and could not be properly compensated by the efficiencies asserted by the parties. Altia and Arcus submitted voluntary commitments in order to alleviate the competition concerns identified by the SCA. Several commitment packages were submitted. Ultimately, Altia and Arcus agreed to divest some of their most well-known spirits and vodka brands and either divest one cognac brand or sublicense another to an independent company. A conditional clearance was obtained on 15 April 2021 with the inclusion of the commitments described above. In July 2021, Altia and Arcus proposed Galatea AB as a suitable buyer of the commitment package and this was later approved by the SCA.

Dagab and Axfood/Bergendahl Food

The Dagab and Axfood/Bergendahl Food transaction concerned the undertakings Dagab, Axfood and Bergendahl Food (Dagab and Axfood being part of the same group of companies). The undertakings were all active in the grocery trade, at wholesale and retail levels. The concentration was made up of two transactions:

- the retail transaction, whereby Axfood would acquire joint control over Bergendahl Food's retail division City Gross i Sverige AB; and
- the wholesale transaction, whereby Dagab would acquire all shares in, and sole control over, Bergendahl Food's wholesale division.

During its in-depth investigation (Phase II), the SCA found that the retail transaction did not risk having significant anticompetitive effects. When it came to the wholesale transaction, the investigation showed that the concentration would combine the only two wholesalers providing a full range of assortment to independent retailers (not being part of a retail concept). The SCA assessed whether the wholesale transaction would result in, inter alia, higher prices, worsened delivery terms, vertical foreclosure (in particular in relation to online retailers) and increased entry barriers on the retail market. However, before the SCA could finally conclude its investigation the parties proposed voluntary behavioural commitments in order to alleviate the competition concerns identified by the SCA. In short, the offered commitments meant that:

- Dagab would negotiate with Bergendahl Food's current customers for the purpose of providing these customers with terms and conditions that are equivalent to, or better than, the terms of existing agreements with Bergendahl Food (commitment valid until 1 January 2027 or 2030 depending on the customer's turnover); and
- Dagab would negotiate with new innovative customers to enter into agreements on commercial and non-discriminatory terms in relation to equivalent customers of Dagab (commitment valid until 1 January 2030).

These commitments were accepted by the SCA, which conditionally cleared the transaction on 16 September 2021.

Tempcon/Lincargo and Tempcon/Erling Anderssons Åkeri

Tempcon/Lincargo and Tempcon/Erling Anderssons Åkeri were independent transactions both of which concerned the transport sector and entailed Tempcon's acquisition of sole control over the two target companies. During its in-depth investigation (Phase II), the SCA focused on a narrower segment consisting of temperature-controlled road transport both at national and regional level. During its investigation, the SCA found that the combined market shares would not result in the creation or strengthening of a dominant position. In addition, a win/loss analysis showed that the parties were not the closest competitors. Even though new entry seemed unlikely, the investigation showed that expansion from companies active in temperature-controlled road transport was possible. In addition, there existed a dimension of countervailing buyer power. In light thereof, the SCA found that the transactions would not risk giving rise to significant anti-competitive horizontal effects. In relation to the Lincargo transaction, some market participants had also expressed foreclosure concerns. However, the SCA found that the parties lacked the ability and incentive to foreclose. Consequently, the SCA unconditionally cleared both transactions during its Phase II investigation on 14 October 2021.

Lyreco SAS/certain parts of Staples Solutions BV

The Lyreco SAS/certain parts of Staples Solutions BV transaction entailed the acquisition of sole control by Lyreco of Samba Holdco BV, a newly formed company that included certain parts of Staples Solutions' activities in, inter alia, Sweden. Both parties were active in the provision of office supplies. More specifically, the notified concentration gave rise to an overlap within contract sales of traditional and non-traditional office supplies in Sweden. During the SCA's investigation, it was mainly public customers who expressed concerns that the acquisition would lead to fewer bidders and thus reduced competition in future procurements. According to these customers, there were only a few suppliers who, among other things, had the range and logistics required to be competitive in public procurements. However, the SCA assessed that public customers could in various ways enable more suppliers to participate in public procurements (eg, by dividing bigger contracts into separate sub-segments), and thereby promote increased competition. In addition, a win/loss analysis showed that the parties were not the closest competitors and that enough suppliers would remain post-transaction. The SCA thus unconditionally cleared the concentration during its Phase I investigation on 3 May 2021.

The Competition Regulation

In February 2021, the Competition Regulation entered into force. From a merger control perspective, the regulation contains, inter alia, an obligation for the SCA to give the undertaking concerned the possibility to comment on a draft decision, before the SCA decides to finally block the concentration or impose commitments.

Control of foreign direct investment

From 1 January 2021, the Swedish Protective Security Act contains special rules for operators intending to transfer security-sensitive activities (activities sensitive to Swedish security interests). The rules entail an obligation to carry out a special security protection assessment and a suitability assessment of the transfer, as well as to undergo a consultation procedure with the responsible authority prior to a transfer of the activities. A transfer may not be carried out without the approval of the authority. A transfer in violation of a prohibition is invalid.

Sweden has proposed a new law on investment screening that will have significant implications for transactions. Contrary to the situation in many other countries, there are currently only limited possibilities in Sweden to regulate or prevent foreign direct investments that could entail risks to Swedish security interests. The existing regulatory frameworks, such as the Protective Security Act described above, are limited to certain areas, to certain activities and to specific situations.

A final report, published on 1 November 2021, put forward a proposal for new legislation to address this gap. Some of the main elements in the proposal are:

- anyone planning to make an investment covered by the new legislation should be required to notify the screening authority;
- not only investments made by investors from third countries, but also those made by investors from other EU member states should be subject to a notification requirement;
- an investment where the investor after the investment will control 10 per cent or more of the total number of votes in the undertaking must be notified;
- the screening authority may decide that a transaction cannot be carried out and it is also suggested that the authority should be able to approve the investment subject to conditions; and
- a breach of the legal requirements should be subject to a default fine, ranging from 25,000 to 50 million kroner.

It is suggested that the new legislation should enter into force on 1 January 2023.

3

Private M&A in Sweden

Carl Svernlöv[1]

Common deal structures

Key private M&A deal structures

The purchase of a Swedish business can take a number of different forms. There are three vehicles for taking control of a business in Sweden: via the acquisition of shares, the acquisition of assets or a merger. The most common form of acquisition, especially for the acquisition of a larger business, is the purchase of shares. Transfers of assets are frequently used where only part of a business is transferred and are sometimes preferred in respect of the sale of small businesses. Asset deals may also be negotiated where a purchaser wishes to avoid taking on certain identified liabilities and the seller's position is such that it feels obliged to accept an asset deal. Mergers are rarely, if ever, used for acquisitions, but are used more frequently for internal reorganisation purposes. Swedish limited liability companies may only merge with companies with a legal residence within the European Economic Area (EEA). In practice, companies registered within the EEA will usually be regarded as having their legal residence in the EEA.

In recent years, auction processes have become increasingly common, as competition for target companies has increased. In an auction context, bid process letters are used and bidders are typically instructed to submit an indicative offer initially. Bidders that proceed to the next phase may be instructed to submit a final offer, after having had the opportunity to conduct further due diligence. This final offer may be binding, but always subject to a negotiation of the final sale and purchase agreement.

In a non-auction context, it is common for the parties to agree on a letter of intent or a similar non-binding arrangement setting out the key terms of the transaction prior to spending time and resources on entering into a binding agreement.

Formal mergers are rarely, if ever, used as a purchase structure.

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Different types of limited liability companies

A private limited liability company is not allowed to offer its shares to the public. The shareholders' liability is limited to the amount paid (if any) for the shares that they own. The minimum share capital for private companies is 25,000 kronor. There are no restrictions regarding shareholder numbers.

A board of directors and, frequently, a managing director, manage Swedish limited liability companies. The board of a private limited liability company must consist of at least one director. If the board consists of one or two directors, at least one deputy director must be appointed. The managing director and at least half the number of directors and deputies, if any, subject to permission from the Swedish Companies Registration Office, must be resident in the EEA (ie, the European Union (EU) member states, Norway, Iceland and Liechtenstein). If a managing director has been appointed, he or she is responsible for the day-to-day management of the company.

Key features of a share sale and purchase

Shares in a Swedish company constitute personal property. Thus the Swedish Sales of Goods Act (1990:931) (Sales of Goods Act) is applicable, prima facie, to their sale and purchase. However, it is not entirely clear to what extent the Sales of Goods Act is preempted by the Swedish Act on Debt Instruments (1936:81) (Act on Debt Instruments). The issue is relevant because if the Sales of Goods Act applies, then (in the absence of an express agreement between the parties) a number of provisions of the Sales of Goods Act detailed below would be applicable to a sale of shares. If not, then the Act on Debt Instruments provides that the seller is not responsible for the solvency of the transferred goods unless it has been warranted or represented by it.

Case law indicates that the Sales of Goods Act applies if all the company's shares (or a majority of them) are sold, while the Act on Debt Instruments is applicable if only a small portion of shares is sold. It is not clear, however, what proportion of shares in terms of percentages is involved and when one act takes over from the other. Therefore, purchasers of shares normally require warranties and representations from the seller.

It is possible to contract out of the Sales of Goods Act and this option is used in most cases.

Key features of an asset sale and purchase

In the case of an acquisition of assets, the Sales of Goods Act will apply. This Act establishes strict requirements; accordingly, purchasers should seek extensive indemnifications and sellers should be wary of giving extensive representations and warranties. The Sales of Goods Act regulates the relationship between the seller and the purchaser. The Act contains provisions concerning determining the price; the place of delivery of the goods and the time for performing the purchase contract; any right of retention of goods or withholding of payment; the risk of loss of the goods; the yield on the goods; delays on the part of the seller or the purchaser; defects and deficiencies in the goods; the interest payable on the price; and insolvency rules. Furthermore, the Act regulates the rejection of goods and the repudiation of contracts of purchase, and title to the goods. However, the Act is not mandatory and is usually excluded by an agreement between the parties.

Preliminary documents

The legal force of a letter of intent and term sheets

A letter of intent or term sheet will be entered into in many privately negotiated transactions. Typically, a letter of intent or term sheet would be non-binding on the parties, except in relation to clauses such as confidentiality, governing law and dispute resolution. However, the parties should clearly set out in the letter of intent or term sheet whether the parties intend to be bound (or that only certain clauses will be binding). If the parties do not provide that the document is not intended to be binding, it will generally be considered binding under Swedish law.

Exclusivity, break fees and confidentiality

- Exclusivity: a term sheet customarily includes provisions on exclusivity during a certain period.
- Break fee: break fees are rarely used, but it is possible to implement and enforce break fees where the parties agree. If break fees are used, they typically intend to cover the costs of due diligence, etc.
- Confidentiality: a term sheet customarily includes provisions on confidentiality.

A confidentiality undertaking or a non-disclosure agreement primarily governing the exchange of confidential information relating to the transaction is often negotiated as a separate agreement at the outset of the transactions, before the parties start exchanging information in connection with a potential transaction or enter into any other term sheet or agreement. Other provisions are typically not supplemented with separately negotiated agreements. Therefore, the term sheet is usually considered sufficient.

Negotiations in good faith

There is no general duty to act in good faith. A party is free to continue discussions in connection with a potential purchase agreement as long as there is a chance, no matter how small, that a transaction may occur as a result of the negotiations. If, however, it becomes clear to a party that it will not pursue a transaction, the party should not continue negotiations in bad faith. If a party continues negotiations knowing that there will not be a transaction, the party may be held liable to pay (restitution) damages.

Foreign investment restrictions

There are no foreign investment restrictions or foreign exchange controls in Sweden.

Due diligence, pricing and closing

Typical due diligence issues

Due diligence in Sweden is typically narrowly scoped, with a focus mainly on identifying the findings of some materiality. Due diligence reports are generally limited to material issues and practical matters that need to be handled in connection with the transaction, and are not very descriptive, unless requested by the buyer. Experienced buyers may request that the due diligence report also focus on matters of importance for the post-closing integration.

The focus areas of the due diligence depend on the nature of the business of the target. In recent years, trade compliance, privacy, anti-bribery, information security and related matters have risen in prominence due to an increased focus on compliance in general.

Independent appraisal

No independent appraisal report to support the valuation of the target company is required in a share deal or in an asset deal. Buyers typically rely on their internal valuations.

Payment

Wire transfers of funds are common. When completing international wire transfers, the SWIFT code international system (a standard used to identify international bank branches which safeguards that the money finds its way to the correct receiver) is commonly used.

There are no foreign exchange control restrictions or other approvals required to transfer funds into Sweden.

Signing/closing

Share sale

Whether signing and closing is simultaneous depends on whether there are conditions that must be satisfied, including regulatory approvals (eg, merger control), divestments of certain parts of the target entity, third-party consents/waivers, drawdown of funds or the resolution of issues discovered during due diligence. Simultaneous signing/closing is common where there are no such conditions to consider.

Asset sale

Simultaneous signing/closing is common in asset sales where there are no conditions to consider that will delay closing. However, the need to get counterparty consent to the transfer of contracts will occasion a bifurcated signing and closing in most cases.

A local acquisition vehicle company may be set up in Sweden in a matter of days. Tax registration may take four to eight weeks but the company may start operations as of filing the tax registration application. No general business licences are required. In some cases, the company may require industry-specific permits or licences.

Approvals and registrations

Foreign investment

Sweden does not require investors to obtain any foreign investment permits or licences.

Merger control

The main regulatory issue that usually arises in private equity new money transactions is mandatory merger control filings.

The Swedish Competition Authority (SCA) may prohibit an acquisition or merger (including, under certain conditions, the creation of a joint venture) if it is liable to significantly impede the existence or development of effective competition in the country as a whole, or a substantial part of it. The Swedish competition test corresponds to the approach adopted in the EU Merger Regulation. If it is sufficient to eliminate the adverse effects of an acquisition or merger, instead of being subject to a prohibition, a party may be required to make commitments, such as divesting an undertaking or a part of an undertaking, or to take some other measure having a favourable effect on competition.

The thresholds for a mandatory notification in Sweden entail two separate but cumulative thresholds (based on the figures for the preceding financial year), as follows:

- the combined aggregate turnover in Sweden exceeds 1 billion kronor; and
- the turnover in Sweden exceeds 200 million kronor for each of at least two of the undertakings concerned.

If the parties' combined turnover in Sweden exceeds the first 1 billion kronor threshold but not the second 200 million kronor threshold, a party can voluntarily notify or the SCA can require a notification where special circumstances exist. The buyer normally makes the notifications.

Other regulatory or government approvals

In general, the sale of shares or assets of a Swedish company do not require other regulatory or government approvals. In some rare cases, the company may require industry-specific regulatory or government approvals.

Employment

Share sale

In a share acquisition, the employment conditions of the employees of the target company remain unchanged since the employer remains the same. In share transfers, the target company is normally not obliged to consult any trade union. However, if the seller is bound by a collective bargaining agreement (CBA) and the transaction would entail a substantial change to the seller's business, the seller may be obliged to consult any union whose members are affected by the pending transaction. If the transaction would entail a substantial change to the seller's business, the seller would then be obliged to consult the unions with which it is bound by a CBA. Similarly, should the transaction entail a substantial change to the working or employment terms and conditions of any employees who are members of any of those unions, the relevant unions should be consulted.

Asset sale

Regarding asset transfers, Sweden has implemented Directive 2001/23/EU relating to safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. This means that upon the transfer of an undertaking or a division of an undertaking, the employees are entitled to transfer to the buyer. The transferred employees have the right to transfer upon the unchanged terms and conditions of employment. The only change is that the buyer is the new employer under the contracts of employment.

In Sweden, an employee may object to being transferred to a new employer. If an employee refuses to transfer, the employee will remain employed with the seller but he or she may then be exposed to a potential redundancy scenario.

If a CBA is in place, the seller is obliged to consult the relevant unions about the pending decision to transfer the business; in the absence of any CBA, the seller is obliged to consult any union that has members among the staff affected. The unions cannot veto the employer's decision; they are merely entitled to be consulted before the decision is made. If the consultation is not concluded properly, the employer will be liable for damages to the unions.

If the buyer does not have a CBA, it will be bound by the CBA of the seller upon the transfer. This could be avoided if the seller terminates the CBA prior to the transfer. Some provisions of the CBA will remain for an interim period.

Tax

As of 2021, the statutory corporate income tax (CIT) rate in Sweden is 20.6 per cent.

No stamp tax or other similar taxes or charges are payable in connection with the execution, delivery, performance or enforcement of a share acquisition.

Stamp duty is only payable on the transfer of real property if the real property is sold as an asset.

Sweden levies withholding tax on dividends. The statutory withholding tax rate is 30 per cent if the dividend is paid to recipients that are not subject to tax in Sweden.

However, dividends are often exempt from Swedish withholding tax or they are subject to a reduced rate of withholding tax by virtue of applicable tax treaties, and they are exempt by way of available reclaim mechanisms in several situations, for example, if the holding criteria in the EU Parent-Subsidiary Directive are met.

No withholding tax is levied on interest payments and Sweden has no formal thin capitalisation rules in place. Nevertheless, interest expenses relating to debts provided by other group companies may only be deducted if certain criteria are met, for example, the recipient of the interest is taxed at least 10 per cent and the main reason for the debt is not for the group to receive a tax benefit. These rules are complex and a proper debt analysis should be conducted before any debt pushdown or other intragroup lending. Interest income will be subject to CIT at statutory rates.

No withholding tax on royalties is applicable. However, unless exempt in accordance with a tax treaty or as a result of the EU Interest and Royalties Directive, foreign recipients of royalties paid by Swedish companies are deemed to have a permanent establishment in Sweden from which the royalty is considered to be paid. The royalty payments are taxed as income from the permanent establishment in Sweden.

Foreign shareholders of Swedish companies are not subject to tax on capital gains in Sweden unless the shares are allocated to a permanent establishment in Sweden. As a consequence of the Swedish participation exemption rules, capital gains from the sale of shares or partnership interests by Swedish companies are exempt from CIT if the sold shares have been held for business reasons. Correspondingly, the acquisition cost is neither deductible nor depreciable. Non-listed shares or interests held as capital assets are always considered held for business reasons. Listed shares or interests held as capital assets are considered held for business reasons if the shares or interests have been held for at least 12 months, and the holder controls at least 10 per cent of the votes or holds the shares as a result of the business conducted by the holder or an affiliate of the holder. If the shares are held in an EU company, the shareholding qualifies as a holding for business reasons as long as the holding is at least 10 per cent and the shares are current assets, and provided that certain conditions are met.

Sweden has a tax consolidation regime in place. A Swedish parent company owning more than 90 per cent of a subsidiary may give or take a group contribution to or from the subsidiary, provided that the ownership has existed during the entire fiscal year of both companies or since the subsidiary started its business and provided that returns are submitted to the Swedish Tax Agency in the same submitting period. Consolidation is also allowed between two subsidiaries.

Tax losses (net operating losses) may be carried forward indefinitely. Tax losses carried forward may be transferred with the company. However, following a change of control in a company (ie, when the decisive influence over the company has changed), there may be

restrictions on the right to deduct losses. These rules are complex and a proper analysis should be conducted before directly or indirectly acquiring a Swedish company with tax losses.

Real property transfer tax

The transfer tax rate is 4.25 per cent for legal entity buyers and 1.5 per cent for individual buyers. The tax base is the tax value (which should correspond to 75 per cent of the fair market value of the property) or the consideration paid if the latter is higher than the tax value. The transfer tax should be paid by the buyer and the seller jointly and severally, but it is customary for the buyer and the seller to agree on which of them will effectively bear the tax (typically, the buyer does). Transfer tax is not recoverable for the acquirer, but it is included in the acquisition price for tax-deductible amortisation purposes and in the acquisition cost for capital gains calculation purposes.

Transfer tax also applies in the event that the transfer, for value added tax (VAT) purposes, would be part of the transfer of a going concern (TOGC) relief. However, real estate transfers are not subject to VAT.

Transfer tax does not apply to gifts, inheritance and certain other qualified transactions. In the event of a transfer within a group of companies, a tax deferral can be obtained.

VAT

As member of the EU, Sweden has implemented the EU VAT Directive. VAT is levied on the transfer of most goods and the provision of most services. The standard rate is 25 per cent. A transfer of shares is VAT-exempt under the Swedish VAT Act. Sweden also has TOGC rules in place with the effect that the transfer of a well-separated business is out of the scope of VAT, provided that the recipient intends to continue the business and it is able to recover VAT.

Antitrust and merger control

Voluntary or mandatory?

Filing is mandatory for concentrations that meet the turnover thresholds.

If the parties' combined turnover in Sweden exceeds the first 1 billion kronor threshold but not the second 200 million kronor threshold, a party can voluntarily notify or the SCA can require a notification where special circumstances exist. Filing is suspensory and thus approval must be obtained prior to closing.

Jurisdictional thresholds

The national thresholds for Sweden entail two separate (but cumulative) thresholds, as follows:

- the combined domestic turnover exceeds 1 billion kronor; and
- the domestic turnover of each of at least two parties exceeds 200 million kronor.

If the parties' combined turnover in Sweden exceeds the first 1 billion kronor threshold but not the second 200 million kronor threshold, a party can voluntarily notify or the SCA can order a notification where special circumstances exist. One example of such special circumstances is a situation where a strong market operator in a concentrated market acquires a newly established competitor to prevent the new competitor competing with the acquiring company. In addition, (valid) complaints from customers or competitors to the SCA may potentially trigger

a notification order from the SCA . It is unlikely for special circumstances to be available if the target's turnover in Sweden does not exceed 25 million kronor.

Statutory deadlines within which the SCA must make a decision

Phase I is 25 working days from the date on which a complete notification is received by the SCA. However, when a party offers commitments, the period may be extended to 35 working days. Approximately 65 per cent of all notifications are approved within 15 business days and 30 per cent of all notifications are approved within 10 business days.

Phase II is three months from the launch of an in-depth investigation. The Patent and Market Court may extend this period for one month at a time if the parties give their consent or, if there are exceptional circumstances, this period may be extended without consent.

Is there a deadline for notifying?

No. The transaction cannot be implemented without the approval of the relevant authority.

The Swedish Competition Act (2008:579) establishes that a merger notification may be made as soon as a party or any other participant can demonstrate that they intend to merge.

Compliance matters

Legal framework for domestic bribery

In Swedish legislation, there is no distinction between the bribery of public officials and private bribery. There is also no distinction between the bribery of foreign and domestic public officials. However, the involvement of a public official will act as an aggravating circumstance and make it more likely that a benefit is deemed a bribe. Bribery is regulated under Chapter 10, section 5 a-e of the Swedish Penal Code (1962:700) (the Penal Code). Some ancillary legislation could be applicable in relation to bribery issues, such as the Swedish Marketing Act (2008:486) and the Swedish Income Tax Act (1999:1229).

Facilitation payments

The Penal Code does not recognise facilitation payments. Facilitation payments are considered improper benefits and therefore they constitute bribery. Cash payments to public officials may objectively be seen as improper due to the nature of the benefit (cash) and the position of the receiver (public official), and they are considered particularly sensitive. Therefore, facilitation payments would be considered illegal.

Are there any compliance programmes in place?

The Penal Code does not specifically recognise compliance programmes as instruments to mitigate or eliminate the liability of legal entities before the crime of corruption has been committed. However, legal entities could partly mitigate their criminal liability if they adopt an effective compliance programme.

A company that is found not to have done what could be reasonably expected to prevent bribery may receive a corporate fine. By adopting a compliance programme, a legal entity reduces the risk of not having done what can reasonably be expected to prevent bribery from taking place and therefore the risk of receiving a corporate fine is reduced. However, a compliance programme is not an effective defence if individuals in leading positions or with a special

responsibility for supervision have committed the bribery. If a corporate fine is issued, the existence of a compliance programme may reduce the amount of the fine.

The Penal Code does not view the absence of a compliance programme a crime.

Compliance programmes

Legal framework

The Penal Code does not recognise or regulate the elements of a compliance programme.

Recommended practice

In the absence of explicit legal provisions regarding compliance programmes, adopting a compliance programme is a recommended measure that can mitigate criminal liability by contributing to the view that a company has done what can reasonably be expected to prevent bribery from taking place. Preventive actions taken as part of a compliance programme may also be considered in determining the corporate fine.

In addition, some companies are required to provide a sustainability report, according to the Swedish Annual Reports Act (1995:1554) (Annual Reports Act). Those companies are companies that fulfil more than one of the following conditions:

- companies where the average number of employees in the company during each of the past two financial years amounted to more than 250;
- companies where the company's reported total assets for each of the past two financial years amounted to more than 175 million kronor; and
- companies that reported net sales for each of the past two financial years that amounted to more than 350 million kronor.

According to the Annual Reports Act, the sustainability report should include information about how the company works to counter corruption.

Jurisdiction to prosecute corruption

The Swedish Prosecution Authority has jurisdiction to prosecute corruption cases, which are processed and executed by prosecutors at the National Anti-Corruption Unit of the Swedish Prosecution Authority.

Post-acquisition integration

Planning is key for a successful post-acquisition integration to identify any tax, legal or operational blocking points or issues that need to be resolved prior to the integration. Post-acquisition integration is usually made by way of an asset transfer or merger.

An asset transfer is quicker and it can be completed in a short period. A merger takes approximately three to four months to complete. The process for merging a subsidiary is slightly simplified compared with sister companies.

Generally, consent is required to transfer any third-party contracts by way of an asset transfer; in a merger, contracts transfer by way of universal succession. However, a merger involves a notice to all of the disappearing company's creditors.

There are no general licence requirements for carrying out operations in Sweden, but licence and permit requirements apply in certain industries. Examples include the healthcare

and financial services industries and businesses with an environmental impact. In these situations, time needs to be built into the integration planning for obtaining the necessary permits and licences.

Transitional services arrangements are common where only part of the operations of the seller are sold and the business may not be able to function on a stand-alone basis immediately.

Transferred employees have the right to transfer on unchanged terms and conditions of employment. Union consultations may be required. Harmonisation of the employment terms and conditions to adapt to the terms applied at the buyer is normally done during the year following the transfer.

4

Data Privacy and Cybersecurity

Camilla Sand Fink and Amanda Langeland Knudsen[1]

Introduction

Data privacy in M&A transactions

In the Nordic countries, data privacy is mainly governed by the EU General Data Protection Regulation[2] (GDPR). 'Personal data' covers an extensive range of different information about natural persons and, according to the GDPR, 'personal data' means 'any information relating to an identified or identifiable natural person, who can be identified directly or indirectly'.[3] Furthermore, 'processing' means 'any operation or set of operations that is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organising, structuring, storage, adaption, alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'.[4]

In practice, these wide definitions of personal data and processing mean that the vast majority of European companies' processing of information on employees, private customers, business partners, newsletter recipients, website users, etc, is subject to the GDPR.

Consequently, when dealing with Nordic M&A transactions all parties involved in the transaction should be aware of the personal data often handled throughout the transaction and the data privacy considerations at all stages of the transaction, including especially the parties' disclosure of personal data, international data transfers, the use of data processors and the general security level when handling personal data.

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2 Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

3 Article 4(1) of the GDPR.

4 Article 4(2) of the GDPR.

Furthermore, the parties should be aware of the risks for both buyer and seller if the target company's general data privacy compliance level is insufficient and the consequential risk of legal, reputational and other commercial exposure. Typically, the main risks in practice are the risk of losing business partners owing to contractual compliance issues, the administrative burden of handling data subject rights requests as well as any complaint to the competent data protection agency and at worst the risk of criminal proceedings and being imposed with a fine or other sanctions. If the target company is subject to the GDPR, infringement may result in the target company being fined up to €20 million, or up to 4 per cent of the total global annual turnover of the preceding financial year, whichever is higher.[5]

This chapter reviews the main data privacy issues in the different stages of Nordic M&A transactions and the focus throughout the chapter will be on share transfers, unless otherwise specified.

Applicable data privacy law in Nordic M&A transactions

Many M&A transactions have an international scope and involve transacting parties, the target company, employees, service providers, advisers, etc, from more than one country.

The GDPR applies to the processing of personal data in the context of the activities of an establishment of a data controller or data processor in the EU or EEA regardless of whether the processing takes place in the EU or EEA, or if the processing activities are carried out by a party not established in the EU or EEA but in a place where EU law applies by virtue of public international law. Furthermore, the GDPR applies to the processing of personal data of data subjects in the EU or EEA by a controller or processor not established in the EU or EEA when the processing is related to the offering of goods or services or monitoring of behaviour within the EU or EEA.[6]

For example, if the target company headquarters are established in the EU or EEA with branches established both in the EU or EEA and in third countries but all administration, HR, marketing, etc, is handled at the headquarters, the target company's processing of personal data is subject to the GDPR regardless of whether the personal data is related to a branch outside the EU or EEA. Furthermore, a target company established outside the EU or EEA but operating in the European private consumer market will be subject to the GDPR with regards to the processing of European customer data and website monitoring (cookies).

The Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, are members of the EU or EEA and subject to the GDPR, whereas Greenland and the Faroe Islands are neither members of the EU nor the EEA and therefore not subject to the GDPR.

In addition to the GDPR, Denmark, Finland, Iceland, Norway and Sweden have passed national supplemental data privacy legislation, which must be interpreted in accordance with the principles in the GDPR and the respective national legislation is therefore largely similar across these countries.

Both Greenland and the Faroe Islands have passed national data protection legislation, which to a certain extent is equivalent to the GDPR. Furthermore, the EU Commission has adopted an adequacy decision regarding the Faroe Islands' level of data protection, meaning that the Faroe Islands is a 'safe third country'.

5 Article 83 of the GDPR.

6 Article 3 of the GDPR.

Notwithstanding the overall similarity in Nordic data privacy legislation, it is important to note that Greenland and the Faroe Islands are not subject to the GDPR, and that there are fundamental differences in the national data privacy legislation of the Nordic countries, for example, regarding the legal grounds for processing national security numbers, information related to criminal convictions or personal data related to children. Furthermore, it is important to note that any rules governing the processing of personal data in other national legislation (lex specialis) as a clear starting point will take precedence over the GDPR and the national supplementary data privacy legislation.

Data controllers and data processors

Initially, the target company must establish the parties' respective data responsibility regarding the personal data that is to be processed and disclosed for the purpose of the transaction process. Naturally, the target company acts as an independent data controller with regard to the personal data related to the target company's employees, customers, newsletter recipients, etc.

As a clear starting point the seller, the potential buyer, external legal counsel, accountants and real estate agents all act as independent data controllers[7] with regard to the personal data disclosed in connection with the transaction, whereas data room providers or third-party administrators typically act as data processors, which means that they process the disclosed personal data on behalf of the data controller (the target company), and that the data controller and the service provider are obliged to enter into a data processor agreement (DPA).

Normally, the data processor will provide the DPA in connection with the data room service agreement, but as data controller the target company has the overall responsibility for the processing of the personal data and is therefore legally obliged to ensure that the data processor meets the requirements of the GDPR. Consequently, the target company must ensure that the DPA meets the requirements of article 28 of the GDPR as well as any applicable supplementary data privacy legislation.

When personal data is disclosed between independent data controllers, there are no legal requirements in the GDPR for the parties to enter into any agreements regarding the parties' responsibilities, and the parties are overall responsible for their own compliance with the GDPR when processing the personal data disclosed in relation to the transaction. Consequently, the seller should already in the early stages of the discussions with a potential buyer consider including the highest possible level of data protection in addition to the common confidentiality clauses set out in the NDA (eg, a warranty from the potential buyer that the disclosed personal data will be handled in accordance with applicable data protection legislation). Conversely, the potential buyer may seek a warranty from the seller that any disclosure of personal data in connection to the transaction is lawful.

Due diligence – disclosure of personal data

In a typical scenario the potential buyer conducts a detailed investigation of the target company in order to determine the business case and legal, financial or other risks associated with the completion of the transaction in question. Consequently, the due diligence process will involve

7 Article 4(7) of the GDPR.

the target company's disclosure of personal data to the potential buyer, including but not limited to personal data regarding employees, service providers, business partners, customers, etc.

When the target company is subject to the GDPR, the target company must meet the requirements for processing of personal data under the GDPR to be able to legally disclose personal data to a potential buyer, including the general principles as laid down in article 5 of the GDPR:

- lawfulness, fairness and transparency: personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject;[8]
- purpose limitation: personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner incompatible with those purposes;[9]
- data minimisation: personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed;[10]
- accuracy: personal data shall be accurate and kept up to date;[11]
- storage limitation: personal data shall be kept in a form that permits identification of the data subject for no longer than is necessary for the purposes for which the personal data are processed;[12] and
- integrity and confidentiality: personal data shall be processed in a manner that ensures appropriate security of the personal data.[13]

Legitimate purposes and data minimisation

When establishing the target company's legitimate purpose to disclose personal data to the potential buyer, the target company must assess whether the specific personal data is necessary for the potential buyer to evaluate the target company and to close the transaction. If the specific personal data is unnecessary for the fulfilment of theses purposes and the target company fails to otherwise establish a legitimate purpose for the disclosure, the disclosure will be illegal. The legitimate purpose must be based on a 'need to know' and not a 'nice to know' assessment as well as on a case-by-case basis.

In this regard, it is important to note that personal data may go unnoticed in key documents that are fundamental for the potential buyer to be able to assess the target company. For example, there may be various personal data in employment agreements, settlement agreements, purchase agreements, documents related to legal disputes, etc. As a rule, redaction difficulties or the inconvenience redaction or anonymisation might entail do not establish a legitimate purpose for disclosing unredacted documents including personal data that is essentially irrelevant to the potential buyer.

Personal data in such key documents and other personal data irrelevant to the transaction or unnecessary for the fulfilment of the parties' legitimate purposes for the disclosure must therefore be redacted or otherwise anonymised prior to the disclosure.

8 Article 5(1)(a) of the GDPR.
9 Article 5(1)(b) of the GDPR.
10 Article 5(1)(c) of the GDPR.
11 Article 5(1)(d) of the GDPR.
12 Article 5(1)(e) of the GDPR.
13 Article 5(1)(f) of the GDPR.

The establishment of a legal basis for disclosure of personal data

The target company must ensure that the impending disclosure of all necessary personal data to the potential buyer is lawful.

In practice, the target company must establish a legal basis for the disclosure of 'ordinary personal data' such as names, contact information, education, salary, title, etc, in accordance with article 6 of the GDPR.

Furthermore, it is important to note that the different national supplemental data privacy legislation to some extent may provide a specific legal basis regarding some categories of ordinary personal data (eg, national security numbers and information related to criminal convictions or children).

Provided that the target company has established a legitimate purpose, the target company may as a starting point disclose relevant ordinary personal data to a potential buyer with reference to the legal basis in article 6(1)(f) of the GDPR according to which the processing of personal data is lawful 'if the processing is necessary for the purposes of the legitimate interests pursued by the parties, except where such interests are overridden by the interests or fundamental rights of the data subject', because the parties have a legitimate interest in selling or buying the target company, or – if applicable – with reference to the legal basis in article 6(1)(c) the GDPR according to which the processing of personal data is lawful 'if it is necessary to comply with legal obligations'.

In general, it is not advisable to rely on consent[14] as a legal basis for the disclosure of personal data in relation to an M&A transaction because the premise of a valid consent is that it is given freely and may be withdrawn at any time. In most categories of data subjects whose personal data is to be disclosed in connection with the transaction, consent is therefore not possible to obtain because information regarding the M&A process in practice will be strictly confidential at this stage of the transaction process. If disclosure of personal data in the due diligence phase must exceptionally be based on consent, it is important to note that the consent must be a freely given, specific, informed and unambiguous indication of the data subject's wishes to be lawful.[15]

In terms of 'sensitive personal data' such as information regarding health, trade union membership, political beliefs or sexual orientation, the target company must establish a legal basis for the disclosure in accordance with article 9 of the GDPR.

As a starting point, disclosure of sensitive personal data requires consent from the data subject,[16] which is normally impossible in the due diligence phase because of the confidential nature of the transaction process. The target company may to some extent be able to disclose sensitive personal data lawfully with reference to the legal basis in article 9(2)(b) of the GDPR, according to which the processing of such personal data is lawful 'if it is considered necessary for the purposes of carrying out the obligations and exercising specific rights of the target company or the data subject in accordance with employment law, social protection law or collective agreements', but in general it is recommended that all sensitive personal data is anonymised prior to disclosure thereof to the potential buyer if at all possible.

14 In accordance with article 6(1)(a) of the GDPR.

15 Article 4(11) of the GDPR.

16 Article 9(2)(a) of the GDPR.

When assessing the legal basis for disclosing personal data in relation to the due diligence process, it is important to note that the national supplemental data protection laws may also provide one or several legal bases for the processing of specific categories of personal data. For example, if a Danish target company subject to the GDPR and the Danish supplemental Data Protection Act is to establish legal grounds for the disclosure of national registration numbers, the Danish Data Protection Act provides legal basis if disclosure is requested by a public authority.[17] Furthermore, if the target company wishes to disclose information related to criminal convictions, the Danish Data Protection Act also provides a specific legal basis, if disclosure is necessary for the purpose of legitimate private or public interests, except where such interests are overridden by the interest in keeping the information confidential.[18]

The establishment of a legal basis for third-country transfers

According to article 44 of the GDPR, transfers of European personal data to countries outside the EU or EEA (third-country transfers) are restricted and may only take place under the conditions laid down in articles 45 to 49 of the GDPR to ensure that the level of data protection guaranteed by the GDPR is not undermined.

If the personal data is to be disclosed to a potential buyer, external adviser or data processor established outside the EU or EEA, the target company must ensure that the relevant third country provides an adequate level of data protection[19] or that the receiving party can provide appropriate safeguards[20] prior to the disclosure.

It is important to note that in general 'transfer of personal data to third countries' not only includes actual transfer of the data but also includes when the data is made accessible to entities outside the EU or EEA,[21] which means that the rules apply when a target company makes personal data available to a potential buyer established outside the EU in the due diligence phase of an M&A transaction.

The different options for establishing legal basis for the third-country transfer are laid down in articles 46 to 49 of the GDPR. If the EU Commission has not adopted an adequacy decision[22] regarding the third country to which the personal data is to be transferred, it is common to establish an adequate level of protection by entering into the EU Commission's standard contractual clauses[23] in accordance with article 46(2)(c) of the GDPR, which must include a transfer

17 Section 11(2)(3) of the Danish Data Protection Act.

18 Section 8(4) of the Danish Data Protection Act.

19 Article 45 of the GDPR.

20 Article 46 of the GDPR.

21 EDPB Guidelines 05/2021 on the interplay between the application of article 3 and the provisions on international transfers as per chapter V of the GDPR: https://edpb.europa.eu/system/files/2021-11/edpb_guidelinesinterplaychapterv_article3_adopted_en.pdf.

22 At the time of writing, the EU Commission has adopted adequacy decisions regarding transfers to: Andorra, Argentina, Canada (commercial organisations), the Faroe Islands, Guernsey, Israel, the Isle of Man, Japan, Jersey, New Zealand, Switzerland, the United Kingdom and Uruguay.

23 The standard contractual clauses are available on the EU Commission website: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en.

impact assessment following the *Schrems II* ruling of 16 July 2020 by the Court of Justice of the European Union.

Transparency

The target company must also ensure that the data subjects whose personal data are to be disclosed in relation to the transaction are provided with the mandatory information regarding the processing activities in accordance with articles 13 and 14 of the GDPR.

Thus, in the initial stages of an M&A transaction, information regarding the transaction discussions will be strictly confidential and the target company is therefore unlikely to be able to provide employees, customers, etc, with any information regarding the disclosure of their personal data to the potential buyer, data providers, etc.

In practice, the target company should therefore provide employees, customers, etc, with general information regarding the processing of their personal data in relation to possible future transactions, when initially collecting the personal data from the data subject. Such information is usually provided to the data subjects in the company's internal and external privacy policy. Furthermore, the target company should always seek to minimise the disclosure of personal data by anonymising personal data to the extent possible without compromising the potential transaction.

Normally, the potential buyer has only limited access (in the data room) to the personal data in the due diligence phase, and at this stage the potential buyer is as a starting point not considered to be processing the personal data in the terms of article 4(2) of the GDPR, hence the obligations to provide information on the processing activities in articles 13 and 14 of the GDPR are unlikely to apply.

If the potential buyer is exceptionally processing the personal data received from the target company during the transaction process, the buyer will not have obtained the personal data directly from the data subjects but from the target company, which means that the rules on providing information to the data subject in article 14 of the GDPR apply. However, the obligations laid down in article 14(1-4) may not apply if complying with these obligations 'is likely to render impossible or seriously impair the achievements of the objectives of the processing'.[24] Whether or not this exemption applies must be assessed on a case-by-case basis.

Notwithstanding the above exemptions for the buyer to comply with its obligations under articles 13 and 14 of the GDPR, the buyer must provide the data subjects with the information when the transaction is final and public, and its confidential nature no longer prevents the buyer from complying with these obligations.

Appropriate security level

Normally, the target company will disclose relevant documents and information to the potential buyer in a data room set up and hosted by an external data room provider. When selecting the data room provider, it is important to ensure that the data room provider is able to provide a high level of data security to minimise the risk of data loss, third-party disclosure or other security breaches. Furthermore, the target company must ensure that the service provider is able to delete any personal data in accordance with the target company's retention policy. The target

24 Article 14(5)(b) of the GDPR.

company's requirements for the data room provider's data security, deletion, etc, are governed by the DPA, as the data room provider as a rule will act as data processor.

Furthermore, the parties should carefully consider who is granted access to the data disclosed in the data room and ensure that the terms of access are sufficient.

In case of a data breach that compromises personal data for which the target company is responsible, the target company shall without undue delay and no later than 72 hours after having become aware of the breach, notify the competent data protection agency of the data breach, unless the breach is unlikely to result in a risk to the rights and freedoms of the data subjects whose personal data have been compromised.[25] According to several European data protection authority guidelines, most personal data breaches will result in a risk to the rights and freedoms of the data subject and shall consequently be notified to the competent data protection agency.

Due diligence – target company compliance

Before the GDPR came into force on 25 May 2018, most companies in the Nordic countries did not worry much about data privacy, because infringement of the data privacy legislation in general was not fined or otherwise associated with any substantial risk of sanctions or commercial exposure. Infringement of the GDPR and the national supplemental data privacy laws is subject to a fine up to €20 million or up to 4 per cent of the total global annual turnover of the preceding financial year, whichever is higher. Furthermore, mainly owing to the massively increased general focus on data privacy compliance resulting from the GDPR and technical developments, non-compliance with data privacy rules will in many cases be associated with considerable commercial risks (eg, the risk of losing a supplier or customer or consumer boycotts if a company is perceived as irresponsible in terms of data privacy). Naturally, due diligence regarding the target company's data privacy compliance level has become more common in Nordic M&A transactions post-GDPR and an important part of the due diligence process, because the potential buyer must be able to assess the overall conditions of the target company, including the scope of any post-transaction GDPR compliance work, the risk of fines or other sanctions or commercial exposure of non-compliance, which may damage the target company or the potential buyer's reputation.

Naturally, the extent of due diligence regarding data privacy compliance should reflect the target company's business area, the amount of data processed by the target company regarding employees, private customers, newsletter recipients, etc, the size and public profile of the target company. For example, if the target company has few employees and only operates within the B2B retail market the risk of data subject requests, complaints, data security breaches, etc, is significantly lower than if the target company's business consists of acting as data controller, if the target company operates within the B2C market or if the target company's business include processing of sensitive or confidential personal data.

Information on data privacy compliance

Regardless of the target company's business and size, the potential buyer should as a minimum request the following documents and information regarding the target company's data privacy compliance level in the due diligence phase.

25 Article 33 of the GDPR.

Mandatory records and documentation for legal basis

- Mandatory article 30 records of processing, including an overview of the categories of personal data collected and processed by the target company, retention policies, description of recipients of the personal data, any third country transfers, etc.
- Consent management procedures, including procedures for ensuring adequate documentation and handling of consent withdrawal.
- Overview of all processing activities based on consent and a copy of all relevant consent forms (eg, newsletter recipients, website users, customers and employees).
- Employee model contracts regarding the processing of employees' personal data in marketing material.

Data security

- IT security policies, IT risk and compliance analysis, and description of the procedures for review of such policies.
- An overview of all technical and organisational security measures.
- Data breach policies and data breach registry for the past five years.
- Data processing impact assessments.
- Details on the monitoring of emails, telephone, internet and social media use.
- Details about procedures for tracking employees (GPS tracking, time and attendance systems, etc) and the use of camera surveillance.

Data subject rights

- Internal and external privacy policies or other policies or notices used to inform data subjects about the processing of their personal data in accordance with articles 13 and 14 of the GDPR.
- Details about the procedures in place to comply with articles 12 to 22 of the GDPR (data subject rights).
- An overview of data subject requests, claims or expected claims from data subjects for the past three years.

Data protection authority audits and criminal proceedings

- An overview of conducted or pending Data Protection Authority audits for the past five years.
- An overview of any corrections or sanctions imposed by Data Protection Authorities for the past five years.
- An overview of any police reports, criminal proceedings or fines imposed regarding the target company's processing of personal data.

Employee training

- Overview of awareness training ensuring that all employees comply with the target company's policies when handling personal data.

Data protection officer and representatives

- Assessment of whether a data protection officer has been appointed.

Disclosure of personal data

- An overview of any joint controllers and copies of any joint data controller agreements.

- An overview of all data processors and copies of all data processor agreements.
- An overview of all transfers of personal data outside of the EU or EEA and the legal basis for the transfer including copies of any standard contractual clauses, transfer impact assessment, binding corporate rules, etc.
- An overview of the latest data processors audit including any general audit management policies.

Asset transfers

In contrast to share transfers, the ownership of the personal data included in an asset transfer and thus the identity of the data controller will change from the seller to the buyer when an asset transfer is closed. In a due diligence context, the seller's obligations to establish a legitimate purpose and a legal basis for disclosure of personal data are similar to the target company's obligations as described in this chapter regarding share transfers. However, when closing an asset transfer and handing over the assets, the change of ownership means that the seller must establish a legitimate purpose as well as a legal basis for transferring the personal data included in the asset transfer to the buyer. Moreover, for the same reason the buyer must ensure the legal basis for the buyer's onward processing of the personal data.

In general, a private customer database may be disclosed to the buyer when closing an asset transfer, but the transfer of the personal data from the seller to the buyer should, as a clear starting point, be based on the private customers' consent in accordance with article 6(1)(a) of the GDPR or on the parties' legitimate interests in closing the transfer in accordance with article 6(1)(f) of the GDPR. The assessment of the legal basis for the seller's transfer of the personal data and the buyer's onward processing of the personal data must be assessed on a case-by-case basis considering the categories of personal data and the purposes for which they were initially collected.

For example, if a cleaning company that provides a fixed subscription cleaning service to private customers purchase a private customer database from another cleaning company, the buyer may not subscribe the purchased customers to its services without the customers' consent. Conversely, if a retail company purchases a private customer database, the stock and pending purchase orders from another retail company, the buyer is likely to be able to complete the order and consequently process the customers' personal data on the basis of the parties' legitimate interests in the customer receiving the purchased goods in accordance with article 6(1)(f) of the GDPR.

Post-closing

When completing the transaction, the target company will remain the data controller in relation to the personal data regarding its employees, customers, etc, even though the ownership of the target company changes.

If the target company is not part of a group and remains an independent company post-closure, the data privacy issues related to the transaction post-closure are limited, because there is no change of data controller, and the target company will as a starting point continue processing personal data as before the transaction. That said, it is important that the parties ensure that the personal data disclosed in the data room are deleted and that any personal data stored must also be deleted when the seller's legitimate purpose for storage of the personal data ceases.

However, if the target company is part of a group or is intended to be integrated in a new group post-closure (or both), several data privacy issues must be noted both by the selling group and the buying group, including that the selling group must assess how long it has a legitimate purpose for processing personal data regarding the target company's employees, customers, etc, and ensure that the personal data are deleted when the legitimate purpose ceases.

Furthermore, the buyer must ensure that the data subjects are provided with the information laid down in articles 13 and 14 of the GDPR, but the buyer must also ensure that the target company's processing activities are or will be covered by the group's existing data processing agreements, if the target company's data are to be integrated in the group's IT systems, and assess whether extending any inter-group data processing agreements is necessary. The buyer should also ensure that the target company's employees are trained in the buyers' policies on handling personal data. Furthermore, the buyer must ensure that any non-compliance issues found in the due diligence process are rectified.

Concluding remarks

Both the seller and buyer in an M&A transaction must be aware of the comprehensive volume of personal data processed by companies in general and thus the data privacy issues related to an M&A transaction both in terms of the target company's disclosure of personal data in the due diligence phase and in terms of the buyer being able to assess the risk of legal, reputational and other commercial exposure if the target company's compliance level is insufficient.

5

Dispute Resolution in Denmark

Peter Clemmen Christensen[1]

Litigation versus arbitration

In Denmark, arbitration is the most favoured means of dispute resolution in connection with M&A disputes owing to several internationally common factors.

In arbitration, the parties are offered the opportunity to appoint a tribunal consisting of technically competent and specialised arbitrators, who can apply specialist knowledge to often technically complex and industry-specific disputes. It is possible for the parties to agree to appoint arbitrators without official legal qualifications if the dispute is more technical than legal in nature. Such access does not exist for litigation to the same degree.

The flexibility of arbitration proceedings and the parties' ability to tailor the procedure, choice of law and venue to suit their needs are features that are often attractive to parties to M&A disputes, including and especially in cross-jurisdictional disputes.

One of the most coveted features of arbitration as opposed to litigation in Denmark is the fact that the parties can agree to full confidentiality of the proceedings as well as the final award. However, full confidentiality in arbitration is not a general rule in Denmark and must be specifically agreed upon by the parties.

The flexibility of the proceedings is not limited to strictly procedural matters. The parties also control the taking of evidence, choosing what evidence to submit and what evidence to request from their opposing parties.

The arbitral tribunal may participate ex officio in the taking of evidence, and it is also often used to cooperate with the national courts in taking evidence, especially where such documentation requires enforcement of interim measures.

The predictability and effectiveness of arbitral proceedings also make arbitration a more attractive venue for commercial parties in M&A disputes. Whether in institutional or ad hoc arbitration, the arbitral tribunal is quick to set out submission deadlines and hearing dates early in the arbitral proceedings – usually immediately following the appointment of the tribunal. This

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lends a higher degree of predictability for the longevity of disputes to the parties and allows parties to consider expected periods requiring increased expenditure of time.

In almost all cases, arbitration also remains the more time-effective alternative since the parties can customise their submission deadlines to fit their timing requirements. The arbitral tribunal, whether appointed institutionally or ad hoc, is also quick to schedule early court hearing dates, as opposed to the Danish national courts, which must navigate a complex scheduling of court hearings across a multitude of ongoing cases. The covid-19 pandemic has had a particularly significant impact on the Danish national courts' listing times, leading to some court hearings being scheduled one-and-a-half to two years after initiation in certain local Danish jurisdictions. For reference, the Danish Institute of Arbitration aims to conclude arbitration cases within six months.

The finality of arbitral awards, of course, also adds to the effectiveness of these cases since appealing national courts' decisions can add several more years to a case that has already been brought before the district courts.

When it comes to enforcing arbitral awards in Denmark, Denmark has unconditionally ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention). Arbitral awards rendered in Denmark are enforced pursuant to section 38 of the Danish Arbitration Act. This procedure requires submission of an approved copy of the arbitral award, the arbitration agreement and, if necessary, an authorised translation of these documents.

Enforcing international awards originating from nations that are parties to the New York Convention follows the same procedure as domestic awards. Generally, the Danish national courts are not reluctant when enforcing arbitral awards originating from New York Convention nations, unless these are unenforceable as a matter of public policy.

Arbitration in Denmark is generally seen as more expensive compared with litigation. Generally, the cost-effectiveness of arbitration over litigation will depend on whether the proceedings are institutional or ad hoc, and whether the parties appoint one or three arbitrators. It is possible to conduct cost-effective arbitral proceedings regarding limited specific legal disputes, when the parties have a shared intention of reducing courts, for example, by appointing a sole arbitrator, conducting a minimal exchange of pleadings and choosing a local venue. However, as a rule, arbitration in Denmark is more expensive than litigation.

Arbitration

The Danish Arbitration Act is based on the UNCITRAL Model Law of 1985. The Arbitration Act applies to arbitral proceedings taking place in Denmark, regardless of the nationalities of the parties and the choice of law. The Arbitration Act is based on the principles that a valid arbitration agreement relieves the Danish courts of jurisdiction, and a rendered arbitral award is legally binding between the parties and is recognised and enforced by Danish courts.

The Danish Arbitration Act does not contain formal requirements regarding arbitration agreements or clauses. Under Danish law it is not a requirement that an arbitration clause be in writing, although it is advisable.

Generally, the Danish courts take a pro-arbitration approach and accept arbitration agreements on the conditions outlined in the Model Law. They accept the principle of competence–competence, the ability of the arbitral tribunal to rule on its own jurisdiction and competence.

The doctrine of severability also exists in Danish law, meaning that an arbitration agreement is not, for instance, affected by the invalidity of the main contract establishing the legal relationship between the parties.

Institutional and ad hoc arbitration

Institutional arbitration is readily available to parties in Denmark. Parties may choose between several permanent arbitration institutions with their own set of established arbitral rules, reminiscent of other internationally recognised arbitration institutions.

Two commonly used institutions are the Danish Institute of Arbitration and the Danish Building and Construction Arbitration Board, specialising in construction law disputes.

Institutional arbitration is generally considered to be a more time-efficient choice compared with ad hoc arbitration and leads to fewer procedural disputes, since the procedural rules are thoroughly laid out in the institute's rules. Conversely, this also means that the preparation of institutional arbitration disputes is less flexible than their ad hoc counterparts.

Ad hoc arbitration entails that the parties to a dispute have all but complete control of the constitution and organisation of the arbitral proceedings, including deciding how the costs of the case are determined and distributed between the parties. The procedural framework is completely flexible to be controlled by the parties, subject only to matters of public policy.

Procedural rules

The Danish Arbitration Act only applies to the procedure of an arbitral dispute where the parties have not agreed otherwise. The arbitral tribunal must consist of three arbitrators, unless otherwise agreed.

The parties each have 30 days to appoint an arbitrator. The two appointed arbitrators have 30 days to appoint a third arbitrator, being the chair of the arbitral tribunal. If this process gives rise to issues resulting in the inability of the parties to appoint a tribunal, each of the parties can refer to the Danish courts and request that they appoint the remaining arbitrators.

A person who has been chosen to become an arbitrator in a dispute must immediately inform the parties of any factors that may compromise his or her impartiality and independence during the treatment of the dispute. The parties can object to a choice of arbitrator only where there is a reasonable suspicion regarding his or her impartiality or independence or if the arbitrator does not possess the qualifications that the parties agreed would be required.

If a party objects to the appointment of a specific arbitrator, the objecting party must submit a written letter of objection to the arbitral tribunal within 15 days after the party became aware of the relevant facts. If the objection is dismissed, the objecting party can appeal the dismissal to the Danish courts within 30 days after the dismissal.

Handling of the appeal by the Danish courts does not stay the arbitral proceedings.

As mentioned, an arbitral tribunal can determine the validity of the arbitration agreement, including the jurisdiction of the tribunal. An arbitration clause included in a contract is regarded as a separate agreement, independent of the rest of the contract. This means that an arbitration clause contained in an invalid contract can still be determined to be valid. An objection pertaining to the legal competency of the arbitral tribunal must, at the latest, be made in the defendant's first address to the tribunal regarding the merits of the case. If the arbitral tribunal chooses to determine its legal competency as an interim ruling, the ruling issued by the tribunal can be appealed to the Danish courts within 30 days. The appeal also does not stay the arbitral proceedings.

Domestic or foreign arbitral awards have a binding effect in Denmark and can be enforced according to the Danish Administration of Justice Act's rules regarding enforcement of judgments. The party invoking the arbitral award or requesting the enforcement of said award must present a legalised copy of the arbitral award and the arbitration agreement. The arbitration award is recognised or enforced, unless the party against whom the award is being invoked requests that the award be set aside and proves that the conditions listed above apply.

Litigation

The Danish judicial system is characterised by a considerable degree of transparency and trust, owing primarily to the fact that most commercial cases in Denmark are open to the public. Furthermore, all commercial cases are made available to the public, with some being published in the Danish Legal Gazette.

This transparency often conflicts with the confidential nature of commercial disputes, especially M&A disputes, which is why arbitration remains the favoured venue for such disputes.

The Danish court system consists of various courts in a three-tier hierarchy. At the top of the hierarchy is the Supreme Court. In the middle are the two High Courts: Eastern and Western High Court. The lowest courts are the 24 District Courts, located throughout the various regions of Denmark. Parallel to the District Courts are the two special courts: the Maritime and Commercial Court and the Land and Registration Court.

A trial will generally start at a District Court. A judgment rendered by a District Court can be appealed to the High Courts and, if permission is granted by the Appeals Commission Board, the judgment rendered by the High court can be appealed to the Supreme Court.

The Maritime and Commercial Court deals only with cases relating to trademarks, international cases, marketing law and commercial maritime matters. Some of these types of cases must be brought before the Maritime and Commercial Court unless otherwise agreed by the parties (see below). Cases regarding insolvency and bankruptcy arising in the Greater Copenhagen judicial district must be brought before the Maritime and Commercial Court.

The Maritime and Commercial Court is especially relevant in relation to transnational litigation, as it can be, and often is, chosen by the parties to hear cases regarding international commercial matters in the first instance instead of the District Courts. This is especially the case in relation to disputes between corporations based in different countries, or in cases where both corporations are domiciled in Denmark, but the activities performed by the parties are international in nature. The crucial element is that the subject matter of the case be of an international nature. The Maritime and Commercial Court is in Copenhagen.

The High Courts of Denmark consist of the Eastern and Western High Courts. The Western High Court treats cases originating from the Jutland Peninsula, while the Eastern High Court treats cases originating from elsewhere in Denmark. The Western High Court is in Viborg in Jutland, while the Eastern High Court is in Copenhagen.

The Supreme Court is the highest and final instance in the Danish court system and is in Copenhagen. The Supreme Court consists of 18 Supreme Court judges, one of whom is the Supreme Court President.

The Danish legal system is based on the two-tier principle, meaning that a case generally can be tried before two courts. Thus the main rule is that litigants are entitled to appeal as a matter of right.

Judgments made by the High Courts (when the High Court acts as a court of first instance) may be appealed to the Supreme Court, without exception. Judgments passed by the High Courts as a court of second instance cannot be appealed to the Supreme Court. However, the Appeals Permission Board can permit the appeal of a High Court judgment to the Supreme Court. Permission is granted when a case is of general public importance.

Judgments made by the Maritime and Commercial Court can be appealed to the High Court, without exception. Judgments made by the Maritime and Commercial Court also can be appealed to the Supreme Court, if the case is of general public importance, is precedent-setting or if there are other reasons to allow the appeal directly to the Supreme Court.

Judgments rendered in the EU or EFTA are recognised by Danish courts under article 36 of the Brussels I Regulation. Danish courts can refuse recognition of judgments rendered in the EU or EFTA if any of the limited exceptions in article 45 applies.

Refusal of recognition of judgments is possible if the judgment is manifestly contrary to public policy in Denmark, the judgment was rendered in default of appearance because of a lack of service of the statement of claim upon the defendant, the judgment is incompatible with a judgment given between the same parties in Denmark, or the judgment is incompatible with an earlier judgment given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in Denmark, according to the Brussels I Regulation.

In theory, article 223a of the Administration of Justice Act allows for the Danish courts to recognise foreign civil or commercial judgments rendered outside the EU or EFTA. However, article 223a has never been exercised, and judgments made outside the Brussels I Regulation or the Lugano Convention's scope of application in general cannot be recognised or enforced in Denmark.

However, in a judgment by the Eastern High Court in 2001, the High Court ruled that a group of creditors were allowed to lodge their claims in an estate in liquidation by referring to previous Argentinian civil judgments. The Argentinian judgments were thus recognised by the Danish High Court. In the grounds of the judgment, the High Court emphasised that the Argentinian judgments were rendered in a country that was the proper venue for the trial, well founded and compliant with the general principles of Danish law, and not subject to errata and omissions.

Alternative dispute resolution

Mediation is finding increasing use in Denmark and is offered and actively suggested by the national courts as well as the Danish Institute of Arbitration.

The Danish Institute of Arbitration adopted a set of mediation procedural rules in 2015, the Rules of Arbitration Procedure (the Rules). The mediation starts when the Danish Institute of Arbitration receives a Request for Mediation (see article 3 of the Rules), accompanied of a fee of €1,300. If the dispute is settled, the parties can request that the settlement be confirmed in the form of a final arbitral award on agreed terms; it means that the settlement may be enforceable at the ordinary courts to the same extent as any other arbitral award. If the mediation ends without reaching a settlement, the parties can agree that the dispute be solved by arbitration administrated by the Danish Institute of Arbitration and in accordance with the Rules.

M&A disputes in Denmark

Overview of common M&A disputes in Denmark

M&A disputes can arise at all stages of an M&A transaction – pre-signing, between the time of signing and closing and post-closing. Post-closing M&A disputes are the most common in M&A transactions.

Pre-signing disputes

Under Danish law pre-signing disputes are not seen very often. Parties are free to negotiate and end negotiations at their sole discretion. Under Danish law parties are obliged to a duty of loyalty, also in the pre-contractual phase. Liability for a party in this phase will therefore require that the party has acted negligently or in bad faith, perhaps entering the negotiations in bad faith. It is, however, very difficult to prove that a party has acted negligently or in bad faith in connection with the negotiations or ceasing negotiations in the pre-contractual phase. In the rare occasions where liability of a party for bad faith may be established, it is most likely to result in liability for damages for costs related to the contract negotiations.

The parties may agree pre-contractual documents such as letters of intent, term sheets or similar types of pre-contractual documents. Under Danish law such pre-contractual documents used in M&A processes are non-binding, unless otherwise indicated. This is relevant, for example, in terms of confidentiality undertakings, exclusivity clauses and regulation on governing law.

Pre-signing disputes can arise in relation to such confidentiality undertakings, exclusivity clauses or similar where the parties prior to signing have undertaken certain obligations in these pre-contractual documents. A party's breach of confidentiality undertakings can be difficult to prove. Under Danish law unauthorised disclosure of trade secrets, such as know-how, business-critical information and technological know-how, where an actual interest in secrecy can be proven, is prohibited. Furthermore, a loss can also be difficult to prove, but if a breach of a confidentiality undertaking is documented the court or arbitral tribunal may lower the demands for documenting the actual loss and can be inclined to fix damages at its discretion if the likelihood for a loss has been established.

Breach of exclusivity clauses is most likely to result in liability for damages for costs related to the contract negotiations.

Disputes between signing and closing

Disputes between signing and closing are not often seen and will often relate to fulfilment of the agreement's conditions precedent.

In most cases the parties will do their best to meet the conditions precedent as the agreement has been signed and the parties have a clear and mutual interest in closing the agreement. Sometimes material adverse consequences clauses or hardship clauses are seen in agreements, allowing a party to cancel the transaction in the event of material adverse consequences. Disputes regarding what a material adverse consequence may therefore arise, but are rarely seen in Denmark.

In the event a party fails to fulfil the agreed conditions precedent for closing or fails to comply with the agreed closing conditions, the party in breach can be liable for damages.

Post-closing disputes

The most common type of M&A disputes in Denmark are those following the completion of a transaction – post-closing disputes. These disputes comprise a wide range of different disputes. The most common areas where post-closing disputes can arise are as follows.

Representations and warranties

Post-closing disputes often concern the seller's representations and warranties when they are not fulfilled or complied with following the buyer's takeover of the target company. Such disputes will often include contract interpretation as to the representations and warranties and in accordance with Danish law, the intent of the parties is decisive if such intent can be documented.

It will often be necessary to look closely into the negotiation history, the due diligence process and any other disclosures to be able to make the wording of the agreement clear. It is recommended to keep all such records available and to the extent possible as part of the agreement. It is also relevant to examine what the buyer knew or ought to have known based on the due diligence process and the data room material disclosed to the buyer and the buyer's advisers.

For tax reasons, damages paid owing to breach of representations and warranties is agreed to be a reduction in the purchase price in the transaction agreement.

Price adjustments

Disputes concerning adjustment of the purchase price are a common post-closing dispute. Often these types of disputes arise owing to unclear description of the basis for the price adjustment. Price adjustment disputes are often referred to experts as a preliminary step. Even if an expert decision is agreed upon to decide a matter concerning a price adjustment dispute, the parties' dispute may end in arbitration as other legal issues or facts are also likely to be disputed.

It is advisable to define the adjustment mechanism as clearly as possible to avoid misunderstandings or room for interpretation at a later stage where the transaction has been completed and the parties' interest mutual interest in the deal has been replaced by more opposite interests (eg, it is advisable to be more detailed in defining the calculation method). If possible, a calculation example of the price adjustment mechanism could reduce the risks of disputes post-closing. References to accounting principles or generally recognised accounting principles are, for instance, broad definitions that leave room for interpretation.

Accounting principles are necessary in the most common price adjustment regulation to define items such as enterprise value, locked-box method (which includes an enterprise value calculation at a fixed date prior to closing), equity regulation and earn-outs (see below). As such it may often be relevant to be very clear what accounting principles mean in the agreement to avoid misunderstandings at a later stage.

In terms of price adjustment regulation, the locked-box mechanism may reduce disputes on price adjustments, but this is a consideration of the pros and cons that must be made by the parties and their respective advisers in the M&A transaction.

Earn-outs

Disputes concerning earn-outs are probably the most common type of post-closing dispute between parties, and a type of price adjustment, as referred to above. The reason is the nature of the earn-out, where the opposite interests of the buyer and the seller following closing will increase in terms of the parameters included in the calculation of the earn-out. Following closing

of the deal the seller will not have influence on the target company and underperformance by the company will be subject to arguments about the buyer's poor management, business decisions or similar arguments and, on the other hand, the buyer may argue that it is the result of a development in the market post-closing or even owing to the seller's poor management decisions prior to closing. There are many variations in the arguments seen in disputes.

Earn-out is often used where the parties during the negotiation phase are too far apart in terms of valuation of the target company and therefore agree that the purchase price must be paid subject to specific conditions, and maybe even in more than one instalment during the period after closing the transaction.

A few notes on damages

In M&A transactions in Denmark it is a standard term in the agreement that the buyer is unable to terminate the agreement or to claim a proportionate refusal in the event of material breach. The buyer is consequently entitled to claim damages only. Under Danish law damages are calculated as the actual loss and the non-breaching party bears the burden of proof of such loss.

In Danish transaction documents some definition of calculating the loss is typically agreed to ensure that the loss is no higher than the actual loss and that the loss is not calculated using a multiple such as the multiple used in calculating the purchase price where relevant.

Minimum threshold, basket and liability cap regulation are normally used in Danish transaction as well as modifications thereto in the form of specific indemnities. As such the parties seek to define liability and damages in as detailed a way as possible to avoid the Danish regulation by law that includes liability for the full loss documented.

Under Danish law agreed limitations of liability are likely to be disregarded by Danish courts or arbitration tribunals, based on Danish case law, in the event of gross negligence or wilful misconduct performed by the party in breach. However, such definition is commonly included in the transaction agreement.

Conclusion

Arbitration is the most used method of dispute resolution in M&A disputes. The parties are recommended to discuss the preferred choice of dispute resolution in the same manner and at the same time as discussing other parts of the transaction documents.

Danish arbitration regulation offers the parties a high degree of flexibility and time efficiency compared with ordinary courts as well as the opportunity to appoint specialist arbitrators to the tribunal with specific competencies within the specific matter at hand in the dispute.

It is advisable to be very specific in defining the issues where disputes are most likely to arise, such as pricing mechanisms, earn-outs and representations and warranties. The more detailed and clear the definition, the less risk of a dispute's arising at a later stage; however, the risk cannot be eliminated.

Clear records of due diligence, questions and answers, correspondence and historic negotiations should be kept for documentation purposes and for the purpose of avoiding disputes at a later stage or in the event of a dispute, to enable the parties to have comprehensive documentation of the steps in the transaction.

Appendix 1

About the Authors

Peter Clemmen Christensen
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Peter Clemmen Christensen is a partner with 20 years' experience within litigation and arbitration and is a partner in Lundgrens' dispute resolution team in Denmark. He is highly specialised within litigation and dispute resolution and focuses particularly on disputes relating to M&A transactions, corporate ownership, commercial contracts and insolvency cases. He also has vast experience in M&A transactions, drafting of contracts and company law.

Peter Clemmen Christensen has the right to appear before the Supreme Court and conducts many cases before courts and arbitration tribunals on behalf of Danish and international clients. He has conducted several international arbitration cases in Denmark as well as abroad.

Peter Clemmen Christensen is also a qualified mediator and has acted as an arbitrator.

Camilla Sand Fink
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Camilla Sand Fink is a senior associate and head of the data privacy team at Clemens Law Firm, part of one of the leading and most experienced data protection law practice groups in Denmark. Camilla has a background as corporate legal counsel and GDPR compliance officer in an international energy group headquartered in Denmark. Camilla provides data protection advice within all areas of data protection law, including compliance assessments and implementation issues, data privacy due diligence, interpretation of the GDPR as well as handling of rights requests, data breaches and complaints to the Danish Data Protection Agency. Camilla advises all client types and has been involved in several national and international compliance projects for mainly medium-sized and large companies and multinationals. In addition, Camilla is network leader in a data protection network facilitated by one of the leading legal network and course providers in Denmark, and regularly gives presentations on personal data challenges and issues. Camilla has extensive litigation experience and is qualified to appear before the Danish High Courts.

Emma Johansson

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Emma Johansson is a competition law expert advising clients on various aspects of competition law. She has broad international and domestic experience in matters including merger control and cartel and other antitrust investigations. Her experience includes various sectors, notably private equity, pharmaceuticals, telecommunications, industry and retail. She also has experience from working at Swedish courts. She completed her Swedish law degree at the University of Uppsala, followed by LLM degrees at the College of Europe in Bruges and Columbia Law School, New York. Emma is a member of the Swedish Bar Association and the New York Bar.

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Amanda Langeland Knudsen is a fifth-year law student specialising in data privacy. Amanda has been part of Clemens Law Firm's data privacy team for more than two years, where she works part-time along with her studies. Amanda provides data privacy advice within all areas of Danish data privacy law and specialises in data processor audits. Amanda will finish her law degree at Aarhus University in June 2022.

Lars Lüneborg

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Lars Lüneborg is a partner and head of banking and finance at Horten. He is a specialist in banking and finance law and has substantial international experience from working in the City of London for several years. He has acted for both lenders and borrowers and sponsors and he has gained commercial insight from a secondment to a major investment bank in London.

Lars advises on a wide range of areas within banking and finance – primarily on national and international transactions involving syndicated loans, leveraged finance, financial restructuring and general corporate finance. Lars has substantial experience in drafting and negotiating loan agreements, intercreditor agreements and security documents and in complex project management across jurisdictions.

Lars is a member of the International Bar Association and the Danish Association of Banking and Finance Law.

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Carl Svernlöv is a partner at Baker McKenzie. He has been listed as a highly recommended lawyer in several law publications, and practises in the areas of mergers and acquisitions, corporate law and corporate governance. He is co-head of the company and stock market law department at Baker McKenzie's Stockholm office, as well as being a member of the Scientific Counsel of non-profit Stockholm Centre for Commercial Law. Carl Svernlöv is the author of 12 books and around 200 articles on Swedish and international business and commercial law.

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Johan Wahlbom is a senior manager specialising in competition law matters. He advises Swedish and international clients on both domestic and cross-border matters. He has extensive experience that spans complex merger control matters to dawn raids carried out by both the European Commission and the Swedish Competition Authority, internal investigations of potential anti-competitive conduct as well as competition law litigation. The sectors involved have ranged from private equity to insurance, telecommunications, industry and retail. He also has experience from working at Swedish courts. Johan is a member of the Swedish Bar Association.

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