Investor Update

2018Q1

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Market highlights

- In Q1 2018, Denmark contributed around 20 per cent of the deals (57 deals, €11.1bn) across the Nordic region. This is a trend likely to continue throughout 2018, as all major Nordic economies continue to forecast positive economic development and companies look to grow through acquisitions.

- Denmark accounted for 56.2 per cent of the total deal value across the Nordic countries, with 92.3 per cent of this from the top two deals targeting the country. Thus, last year's trend with companies not being afraid to pay up for large companies has not worn off, further emphasizing that many buyers are looking upwards as the mid-market becomes increasingly crowded.

- The Nordic deal count in Q1 2018 accounts for a 16.5 per cent share of the European activity, thus reaching its second-highest percentage on Mergermarket record behind Q2 last year (17.9 per cent).

- 2017 saw a record-breaking number of Danish businesses sold, and the trend appears to continue in 2018. In Q1 2018, a total of 65 Danish businesses was sold. This is a 10 per cent increase compared to Q1 2017 and an 18 per cent increase compared to Q4 2017.

- The vast majority of buyers in Denmark are strategic buyers, and almost half of the Danish businesses sold were sold to foreign buyers.

- To stay ahead of the curve, companies continue to strive to adopt innovative technology (according to Mergermarket).

Nets – a high-profile Danish take-over completed

On 7 February 2018 Nets A/S ("Nets"), a leading provider of digital payment services and related technology solutions across the Nordic region, was acquired by Evergood 5 AS, a newly formed company controlled by funds managed and advised by Hellman & Friedman LLC ("H&F"), following a DKK 33.1 bn (app. GBP 3.9bn) recommended all-cash public tender offer. The deal was backed by Nets' board of directors and executive committee as well as the majority shareholder, AB Toscana (Luxembourg) Investment S.à r.l., which was controlled by funds managed and/or advised by Advent International Corporation and funds managed and/or advised by Bain Capital Private Equity (Europe) LLP alongside a group of minority co-investors. Kromann Reumert together with Freshfields Bruckhaus Deringer LLP advised H&F on the transaction.

An atypical start – or a potential trend?

The Nets takeover was the first major public-to-private leveraged buyout since the acquisition of Danish telecom TDC in 2005 as takeover offers are relatively rare in Denmark, compared to other jurisdictions. In Denmark there are also comparatively less case law and less well established commercial codes of conduct, coupled with a legal regulation that is not very detailed.

Nevertheless, the beginning of 2018 has already seen the completion of two major takeover offers by private equity buyers with the Nets acquisition followed by a takeover of TDC, the major Danish telecoms operator, by a consortium of Macquarie Infrastructure and Real Assets and three Danish pension funds in a deal worth close to DKK 40bn (app. GBP 4.6bn), which have shown that it is possible for private equity funds to execute a complex takeover of a Danish listed company.

Favourable conditions for investors

Generally, takeovers are likely to attract significant attention from media and investors – professional as well as retail. This is particularly the case where the target company is of national interest. The offer for Nets, which operates important financial infrastructure, e.g. the national Danish payment scheme Dankort, was therefore under quite a lot of scrutiny in local as well as international media outlets. However, there is generally a low risk of political interference or regulatory obstructions in takeover situations with the prospect of foreign (private equity) ownership even where the target company is of national interest.

The Kromann Reumert team advising H&F on the takeover offer for Nets was led by partners Jørgen Kjergaard Madsen and Christian Lundgren.

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Recent deals

Conning to acquire part of Global Evolution Fondsmæglerselskab A/S

Kromann Reumert advised the owners of Global Evolution Fondsmæglerselskab A/S on the divestment of parts of their ownership in Conning Holdings Limited.

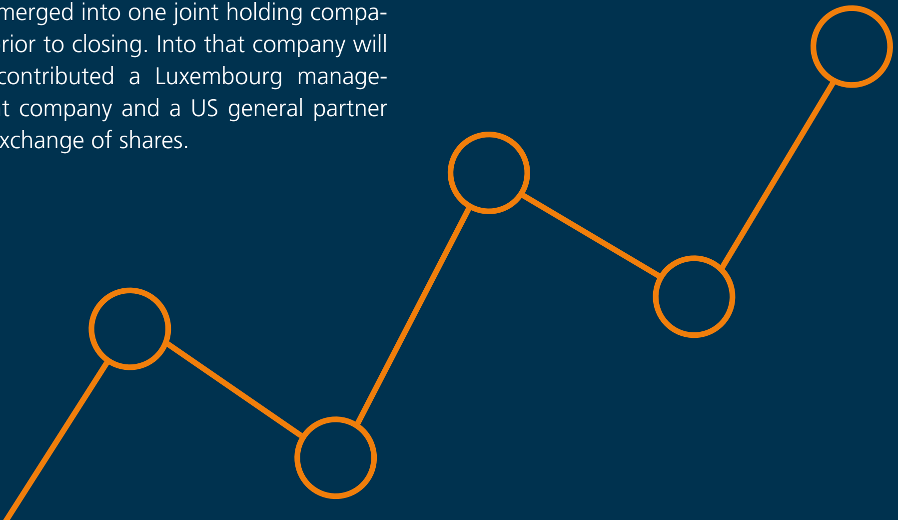
A US-based asset manager ultimately owned by Taiwanese life insurance company Cathay Financial Holding Co. Ltd., Conning manages a portfolio of USD 120bn worldwide.

Global Evolution is a Danish asset manager based in Kolding, Denmark, and has USD 6.6bn under management. The company is a leader in investments in emerging market government bonds and currencies.

The transaction involves a restructuring of the Global Evolution group of companies, with a number of holding companies being merged into one joint holding company prior to closing. Into that company will be contributed a Luxembourg management company and a US general partner by exchange of shares.

Conning is set to acquire 45 per cent of the shares in the joint holding company from the founders of Global Evolution and the passive investors, corresponding to all shares in a newly-established share class carrying special financial rights. Also, Conning will increase its ownership through a number of agreed investment rounds, buying additional shares from the majority shareholders regularly over a period of several years, thereby acquiring control of the joint holding company.

The transaction, expected to close in spring 2018, is contingent on a number of conditions, including approval by the Danish Financial Supervisory Authority and the corresponding Luxembourg and Taiwanese authorities.



REMONDIS acquires majority shareholding in M. Larsen Vognmandsfirma A/S

Kromann Reumert advised REMONDIS International GmbH on the acquisition of Danish waste collection and services provider M. Larsen Vognmandsfirma A/S. The transaction implies that REMONDIS acquires 85 per cent of the shares in M. Larsen from the company's current owner, who retains a 15 per cent shareholding. The acquisition of the majority of the shares in M. Larsen strengthens REMONDIS's position in the Danish market within waste management services.

Saxo Bank sells Saxo Privatbank to Alm. Brand Bank

Kromann Reumert advised Saxo Bank on the divestment of the activities in Saxo Privatbank to Alm. Brand Bank at a price of DKK 360 million. With the transaction, Alm. Brand Bank takes over Saxo Privatbank's seven branches across Denmark and can add another 17,500 new customers to its 50,000 existing ones. With the divestment of Saxo Privatbank, Saxo Bank keeps its activities within investment banking with a focus on global capital markets.

Scandinavian Tobacco Group acquires leading US cigar retailer

Kromann Reumert advised Scandinavian Tobacco Group on its acquisition of Thompson and Co. of Tampa, Inc. ("Thompson"). The purchase price amounts to USD 62 million. Closing of the deal took place at the end of March 2018.

Thompson is a leading online retail cigar business in the US, a market where approximately two-thirds of all handmade cigars are sold online. A family-owned business, Thompson was founded in 1915 and is based in Tampa, Florida. It has annual net sales of around USD 100 million and employs 185 people. Thompson provides Scandinavian Tobacco Group with access to a substantial and attractive customer base, auction and retail websites as well as a retail store and a call-center facility in Tampa.

New types of Danish alternative investment funds

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On 22 May 2018, the Danish Parliament is expected to pass a new bill introducing two new types of Danish alternative investment funds; an alternative investment fund with variable capital (AIF-SICAV Fund) and an alternative value fund (AIF Securities Fund).

The two new types of alternative investment funds are not subject to any investment restrictions and may therefore invest in all asset classes, including loans, real property and other tangible assets. This represents a significant advantage compared to the existing Danish capital associations, which may only invest in financial instruments covered by the Danish Financial Business Act.

Like capital associations, both AIF-SICAV Funds and AIF Securities Funds benefit from a robust legal regime authorising the establishment of sub-compartments (potentially with different unit classes) with separate liability, investment strategies, investors, portfolio managers/investment advisors, etc. within the same alternative

investment fund. The fact that fund sponsors can promote different investment strategies to different investors within the same alternative investment fund (with one board of directors, one set of Articles of Associations, one alternative investment fund manager and one depositary) represents a cost-saving benefit.

Whereas the AIF-SICAV Fund is a separate legal person, the AIF Securities Fund is not. The AIF Securities Fund is deemed part of the legal entity – in the form of a Danish alternative investment fund manager – which has established the fund.

An AIF-SICAV Fund may be managed by a manager of alternative investment funds or by an investment management company authorised to manage alternative investment funds in Denmark or another EEA Member State. However, only a Danish alternative investment fund manager can establish and manage an AIF Securities Fund.

Purpose of the new funds

These two new types of alternative investment funds are introduced to contribute to an increase in exports of Danish asset management services and facilitate easier access to capital for businesses.

In practice, investment firms or alternative investment fund managers may use an AIF-SICAV Fund or an AIF Securities Fund – divided into sub-compartments each representing an asset class to be offered to investors (e.g. shares, bond, real property and alternatives) – as a joint investment vehicle through which each individual investor can be offered investment exposure tailored to the varying needs of the investor over time, managed through a portfolio management agreement entered into between the investor and the investment firm or alternative investment fund manager. The sub-compartment structure will allow the asset manager to easily redeem units in one sub-compartment (representing one asset class) and use those funds to invest in another sub-compartment (representing a different asset class) when changing the asset allocation of an investor.

Private equity funds in Danish withholding tax cases

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Kromann Reumert's tax group represents several international groups and private equity funds in leading cases concerning interest and dividend withholding tax currently pending before the Court of Justice of the EU (CJEU) for preliminary rulings. On 1 March 2018 Advocate General Kokott issued her opinions in the cases.

Background

In the cases, the Danish Ministry of Taxation argues that parent companies in other EU member states receiving interest and dividend cannot benefit from the EU Interest and Royalties Directive (2003/49/EC) and the EU Parent Subsidiary Directive (90/435/EEC) because the companies are allegedly conduit companies, even though they have civil law claims to the payments. Consequently, the companies are subject to Danish withholding tax.

Dividend cases – no beneficial owner requirement

The Danish Ministry of Taxation acts as applicant in the dividend cases before the Danish Eastern High Court, having lost already before the Danish National Tax Tribunal and subsequently appealed to the Danish courts. Notably, the Tax Tribunal found that the involved parent companies were entitled to invoke the Parent Subsidiary Directive already because they fulfil the objective criteria under the Directive. In this regard, the Tribunal pointed out that the Directive does not contain a beneficial ownership requirement and therefore, no beneficial owner assessment is required.

The Advocate General concurs with the Danish Tax Tribunal in this regard. Consequently, a parent company domiciled in another member state receiving dividends from its Danish subsidiary must be considered as the dividend recipient covered by the Parent Subsidiary Directive.

Facultative anti-abuse rules in EU directives cannot have direct effect

Both directives offer member states the option of applying domestic or agreement-based provisions for the prevention of fraud or abuse. Denmark had not implemented any such measures in the relevant income years, nor did general Danish anti-abuse regimes (the Danish principles concerning "substance over form" and concerning the rightful recipient) offer any basis for disregarding the dividend and interest payments. The referring Danish High Court specifically confirms this in the orders for preliminary references to the Court of Justice.

According to the Advocate General, Denmark cannot rely on the right for member states to voluntarily implement anti-abuse provisions if it has not transposed any such provisions. This is in line with established case-law on direct effect. A rule in a double taxation agreement corresponding to Articles 10 and 11 of the OECD Model Tax

Convention also cannot be treated as sufficient transposition, the Advocate General concludes. These OECD provisions contain beneficial ownership requirements concerning dividend and interest payments.

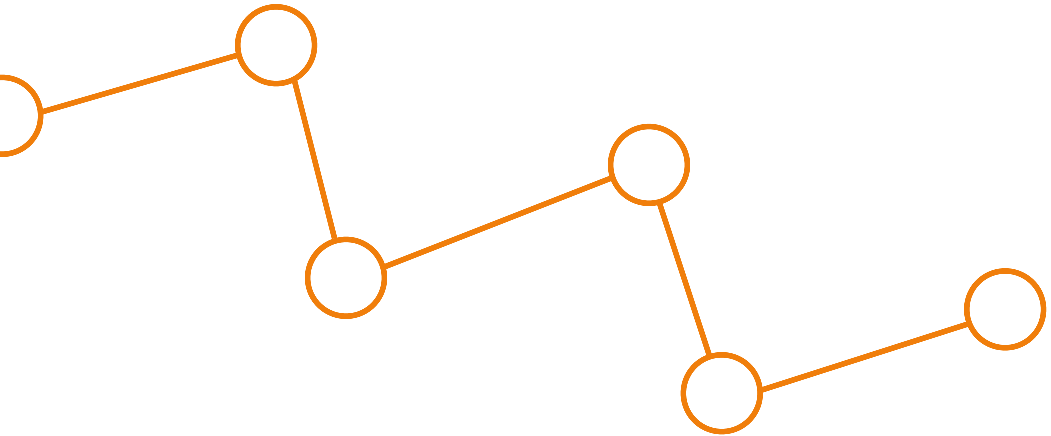
Comments and next step

Advocate General Kokott offers an analysis in line with established case-law, coupled with the following introductory remarks:

"In light of the angry political mood concerning the tax practices of certain multinational groups, drawing that dividing line is no easy task for the Court of Justice and not every action by an individual to reduce their tax should be open to a verdict of abuse."

This must be read as a word of caution from the Advocate General to the CJEU not to just give in to the prevailing political sentiment, but to stick to the basic European internal market rights and a proper construction of the EU Directives.

Although the CJEU follows the recommendations by advocate generals in most of cases, opinions are not binding. If the CJEU were to back the Danish tax authorities' interpretation, it could potentially be very damaging for e.g. private equity funds operating out of Luxembourg, including the many funds established there for reasons unrelated to tax. It could also create uncertainty more generally within the internal market, concerning source taxation.



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New legislative proposal to minimize risk of permanent establishment for investors in private equity and venture funds

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On 23 February 2018, the Danish Ministry of Taxation released a new legislative proposal for public enquiry. The purpose of the new proposed legislation is, inter alia, to adjust the Danish rules on permanent establishments for foreign investors in private equity and venture funds.

In Denmark, private equity and venture funds are typically established as limited partnerships. This is desirable due to the tax transparency and limited liability that such structures offer to investors. Historically, there has been a risk of investors in Danish private equity and venture funds being held to have a permanent establishment in Denmark through their passive investments in such funds, if their investments are made either:

i. through a fixed place of business in Denmark, or
ii. through a dependent agent in Denmark.

Previously, these risks have been mitigated by structuring the investments in such a way that they did not constitute a fixed place of business, and by not having persons concluding contracts on behalf of the investors. However, the risks were not eliminated completely, as rulings from the Danish tax authorities and the Danish Tax Tribunal have been inconsistent in their interpretation of the Danish permanent establishment rules.

The purpose of the new legislative proposal

The recent changes to the OECD Model Tax Convention and the concept of permanent establishment regarding dependent agents, so as to include not only include persons who concludes contracts, but also persons who play a principal role leading up to the conclusion of a contract, may further increase the risk of a permanent establishment for investors in private equity and venture funds.

To ensure that Denmark remains an attractive country for foreign investors and that said private equity and venture funds do not become taxable to Denmark without so intending, the Danish Ministry of Taxation has proposed new legislation. The new proposed legislation entails that passive investments (i.e. income from passives investments in shares, bonds, etc.) will not become taxable to Denmark, as income of this nature is now considered out of scope for the Danish definition of permanent establishment, unless the investor in a Danish private equity or venture fund is deemed as conducting business activity (in Danish *"næringsdrivende"*) by investing in Denmark.

The consequence of the new legislative proposal

The new legislative proposal should mitigate the risk of foreign passive investors becoming taxable to Denmark through investments in private equity and venture funds and ensure a more consistent interpretation of the rules by the Danish tax authorities. However, it should be noted that the new legislative proposal only in part solves the uncertainties for foreign investors in Danish private equity and venture funds, as the Danish tax authorities may still deem certain investments as business activities and thus in scope for the Danish permanent establishment rules.

It is our view that, should the new legislative proposal be passed in its current form, Danish private equity and venture funds will remain attractive investment vehicles for foreign investors. Kromann Reumert will follow the progress of this legislation carefully.

If the new proposed legislation is passed without changes, it will take effect on 1 July 2018.

Denmark – a netting-friendly jurisdiction for physical energy trading

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When the new Danish Capital Markets Act entered into force on 3 January 2018, it did not only implement various MiFID II provisions in Danish law, it also introduced an extended scope of the types of financial obligations which can be subject to close-out netting and financial collateral arrangements. This important amendment facilitates that physical energy trading may now benefit from these important risk-mitigating measures, which are considered key components in the trading in derivatives by banks, investment firms and other derivatives traders.

Prior to 3 January 2018, the Danish close-out netting regime was based solely on the EU Collateral Directive, which provided a robust basis for allowing banks, investment firms and other derivative traders to agree with binding effect also for third

parties that they had the right to terminate, also in case of bankruptcy of their Danish defaulting counterparty, and net all outstanding amounts under the master agreement into one single sum. In addition, it was possible to make use of the rules on financial collateral arrangements, which for example allow transfer of title as a security interest, provision of top-up collateral due to market movements, and the right to appropriate the posted financial collateral and take the value into account when calculating the termination net amount.

Physical energy trading has only to a limited degree fallen within the scope of these rules, which basically meant that positions between counterparties from a credit perspective had to be looked at on a gross basis, since the risk in a bank-ruptcy scenario was that a Danish bankruptcy trustee would affirm those contracts which had a positive market value (i.e. would be "in-the-money" for the now bankrupt Danish party) and disclaim those which had a negative market value (i.e. would be "out-of-the-money" for the now bankrupt Danish party), leaving the counterparty worse off than if the value of all positions could be netted out. Before 3 January 2018, this was the legal position also for transactions traded under a master agreement, such as the EFET General Agreement, which in many ways are similar in a default scenario to a derivatives master agreement, such as the ISDA Master Agreement.

"Claims originating from agreements on energy products"

As a Danish law invention, the scope of financial obligations has now been expanded for both financial and non-financial entities to also cover "claims originating from agreements on energy products". Defined in the Capital Markets Act, the term comprises claims originating from contracts and derivatives in the following products, irrespective of how they are traded, and irrespective of whether they may only be cash-settled due to a default or other termination event: Natural gas, electricity, coal, oil or biofuel or transportation thereof, and CO2 allowances and certificates for energy based on renewable energy (in Danish VE-beviser).

Accordingly, it is now possible for counterparties to be protected by the close-out netting and financial collateral arrangement rules when they set up their master agreements and collateral documents, such as a credit support annex, in respect of such energy-related claims with their Danish counterparties.

As far as we are informed, this is a fairly unique legal position within the European energy market, and it may even in-spire other jurisdictions to reform their rules as well for the benefit of the European physical energy trading going forward.

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