KROMANN
REUMERT

Investor Update

November 2018

Content

Market highlights H1+Q3

- During H1 2018, Denmark saw three deals above €1bn, helping Nordic M&A to scale similar heights to those reached during last year's record H1[1].
- In H1 2018, a total of 522 deals were completed across the Nordic countries, and Denmark contributed around 20 % of the deals (103 deals, €14,7bn)[1]. In Q3 2018, we saw a total of 222 deals across the Nordic countries, with a total value of €14.2bn[2]. Denmark accounted for 21 % of the deals (46 deals, 2,35bn)[2].
- Three of the top four deals in the Nordic region in H1 targeted Denmark. In total, Denmark accounted for around 41 % of the total deal value across the region in H1, and Denmark thus became the most targeted country by deal value in the Nordic countries in H1[1].
- In H1, activity was evenly divided between domestic and foreign investment, with intra-Nordic activity (€19.1bn; 379 deals) accounting for more than 50 % of the value while making up more than 70 % of the deals across the region[1].
- One of the biggest deals in Q2 across the Nordics was the €1.9bn merger between the Danish hearing aid producer Widex and Sivantos[1]. Read more about the transaction on page 10.
- The top deal of Q3 was TDC's sale of its Norwegian activities to Swedish Telia for a total of EUR 2.2bn, further illustrating the global trend of consolidation amongst telecoms and media companies[2]. Read more about the deal on page 8.
- Kromann Reumert advised on some of the top deals of H1 pushing its total deal value to €12.9bn across 28 deals in the period, hence topping the legal advisers league table by value[1].

[1] Mergermarket (Pedersen, Frederik Lyng): Nordics Trend Report H1 2018, 2018
[2] Mergermarket (Gilkinet, Olivier): Trend Summary: Nordics 3Q18, 2018

Relationship agreements – the Danish perspective

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Introduction

To investors in significant equity stakes in listed companies, the concept of a relationship agreement as a way not only of ensuring their appointment rights etc. but also of ensuring compliance with corporate governance requirements is a well-known and accepted practice in some jurisdictions.

Under Danish company law, the enforcement of such relationship agreements is, however, problematic. An investor entering into a relationship agreement when becoming a controlling shareholder in a Danish target company must be aware of the regulatory Danish limitations and of the seemingly familiar arrangement not having the desired effect in Denmark.

Relationship Agreements under Danish Law

A relationship agreement is entered into between a listed company and the controlling shareholder and is mandatory for listed companies in certain jurisdictions, such as the United Kingdom. In these jurisdictions, a listed company with a con-trolling shareholder must be able to demonstrate that the company carries out its business independent of the controlling shareholder. As such, the function of the relationship agreement is generally to ensure this independence of the target company, e.g. by stating that all future agreements between the target company and the controlling shareholder will be entered into on arm's length basis. Relationship agreements may also contain provisions preventing the controlling shareholder from interfering in the day-to-day management of the target company.

However, the relationship agreement will normally also provide certain rights for the controlling shareholder, e.g. the right to appoint and/or dismiss specific members of the target company´s management (executive officers and directors of the board). This right of appointment and/or dismissal will naturally vary in line with the percentage of the shareholder's voting rights. The right is therefore perceived as giving investors some form of handle on their appointment rights. This aspect of the relationship agreements, however, causes concern under Danish law, as such specific rights will not be enforceable under Danish company law, in particular because of i) the general principle to treat shareholders equally and ii) the regulatory prohibition against agreements concluded by the management with some shareholders to the disadvantage of other shareholders.

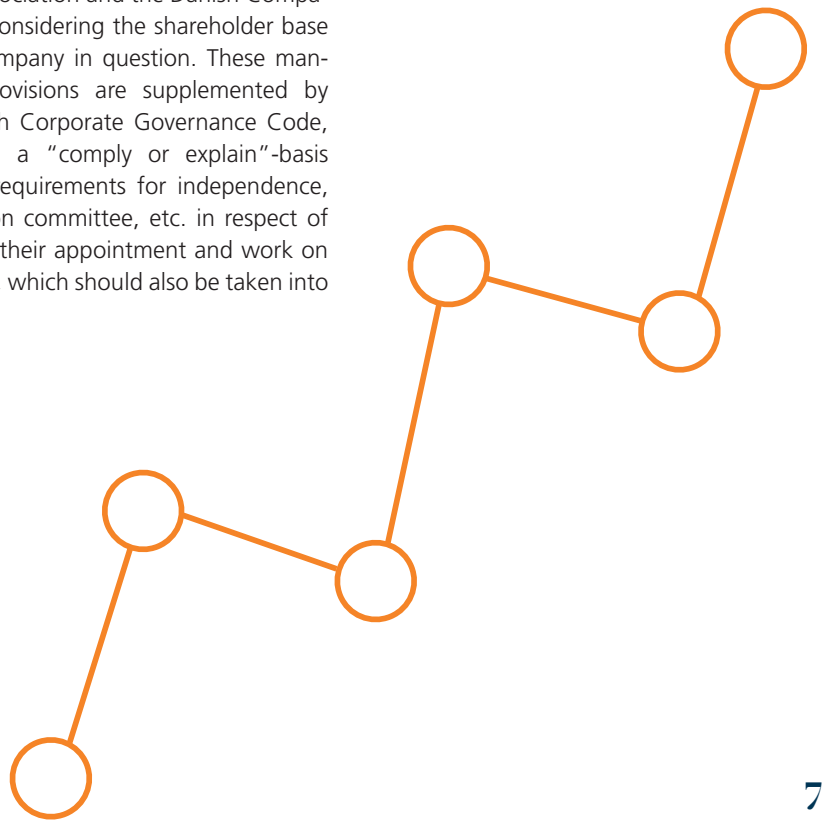
The principle of equal treatment

Section 45 of the Danish Companies Act outlines the principle of equal treatment of the shareholders of a company. This principle entails that all shareholders, in a comparable legal situation, must be treated equally. The purpose of this principle is to safeguard the minority shareholders against unequal treatment by other (controlling) shareholders. A contractual right to nominate directors of the target company would generally be assessed as an advantage to the controlling share-holders and therefore not in compliance with section 45 of the Danish Companies Act.

In addition, section 127 of the Danish Companies Act provides that members of the management of a limited liability company must not conduct any transaction that is clearly likely to provide certain shareholders or others with an undue advantage compared to other shareholders or the limited liability company. Accordingly, the possibilities of the (controlling) shareholder are further limited with regard to agreements by which the shareholder obtains rights to nominate and/or dismiss certain directors.

The effect is that in most scenarios the problematic clauses of the relationship agreement would be considered null and void and would be unenforceable by the investor. In reality, this leaves investors with the simple, yet for some slightly unsettling, choice of simply relying on their ability to nominate and elect directors based on the general framework of the company's articles of association and the Danish Companies Act considering the shareholder base of the company in question. These mandatory provisions are supplemented by the Danish Corporate Governance Code, which on a "comply or explain"-basis sets out requirements for independence, nomination committee, etc. in respect of directors, their appointment and work on the board, which should also be taken into regard.

Needless to say, all of the above is in addition to paying attention to any requirements under or implications of capital markets regulations in the Market Abuse Regulation as well as the applicable issuer rules, i.e. mandatory takeover obligations, disclosure requirements etc.



Recent deals

Kromann Reumert advises Investindustrial on the acquisition of Louis Poulsen

In June 2018, Investindustrial signed a contract with Polaris on acquisition of the lighting manufacturer Louis Poulsen, which is known e.g. for the classic PH lamp.

Founded in 1874, Louis Poulsen has grown into an international business with showrooms in metropolises such as Tokyo, Helsinki and Los Angeles. With exports to more than 50 countries, the company's 2017 revenue exceeded DKK 800 million.

The transaction completed in August 2018 and Louis Poulsen is now part of Investindustrial's portfolio of well-known brands such as Aston Martin, B&B Italia and Sergio Rossi.

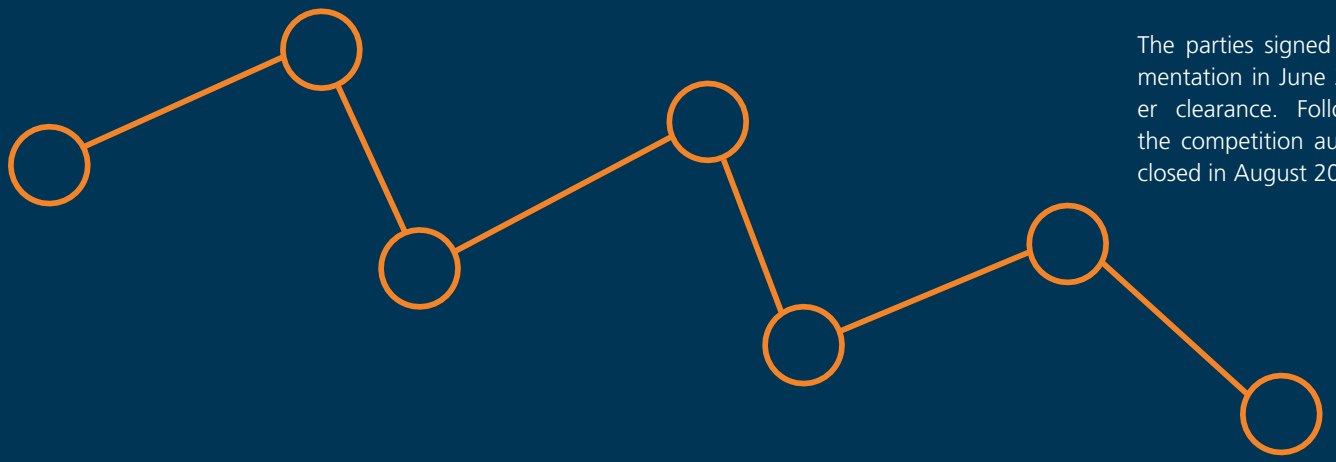
Kromann Reumert advised Investindustrial on the transaction, which was organised as a structured auction process. Kromann Reumert assisted in undertaking the legal due diligence, negotiating the transfer agreement and preparing the transaction documents.

TDC sells its Norwegian activities to Swedish Telia

Kromann Reumert advised TDC A/S on the sale of its activities in Norway, including TDC AS and GET AS, to Telia at a price of NOK 21 billion.

The Norwegian cable-TV company GET was acquired by TDC in 2014 at a price of DKK 12.5 billion and represented until the sale 16% of TDC's total revenue.

The deal was closed on 15 October 2018.



Netcompany Group A/S publishes Offering Circular and the indicative price range for its intended initial public offering

The IT company Netcompany went public in June. Kromann Reumert advised the financial advisors on the IPO, namely Danske Bank, Deutsche Bank, Morgan Stanley and SEB.

The market cap of Netcompany at listing was DKK 7.75 billion.

Kromann Reumert advises Coop in historic real-estate transaction

Coop, one of Denmark's largest retail operations, has sold a 131,300 sqm real-estate complex to Denmark's second largest real-estate company Dades A/S. Coop's financial advisor Catella considers the sale to be one of the largest transactions ever in the Aarhus area.

During the entire process, Kromann Reumert assisted Coop in e.g. preparing the vendor due diligence, and in drafting and negotiating the transaction documents.

The parties signed the transaction documentation in June 2018 subject to merger clearance. Following approval from the competition authorities the deal was closed in August 2018.

Hear the church bells ring: Widex A/S and Sivantos Pte. Ltd combine forces

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On 15 May 2018, the Tøpholm and Westermann families and EQT Partners signed an agreement combining the two manufacturers of hearing aid devices Widex A/S ("**Widex**") and Sivantos Holding Singapore Pte. Ltd. ("**Sivantos**"). The merger will create a global hearing aid company and result in a business with an accumulated number of employees exceeding 10,000 and a combined revenue exceeding DKK 12 billion. The combined group will be owned jointly by EQT and the Tøpholm and Westermann families.

"The two families have built this company in completely equal ownership. Now it is time to bring in a third party, EQT, which has been a very interesting process and one in which, of course, you get to really know the values that are important to them," says Christian Lundgren, one of the partners leading Kromann Reumert's team on the transaction.

Founded in Denmark in 1956, Widex has developed into a successful business where innovation is rooted deep in the core. This has resulted, among other things, in the world's first digital in-the-ear hearing aid and unique wireless technology developed internally within the organisation.

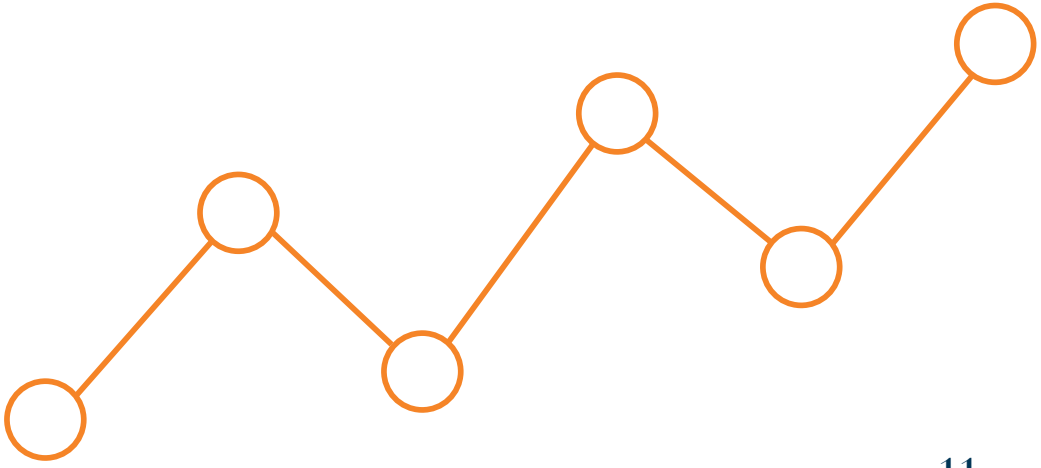
Kromann Reumert advised the Tøpholm and Westermann families in the transaction drawing from our vast experience in complex multi-jurisdictional transactions and involving a large number of dedicated specialists from corporate/M&A, anti-trust, life science, intellectual property etc. The transaction is subject to customary closing conditions including regulatory approvals.

Widex: *"Helping people hear is our business"*

- Widex was founded in Denmark in 1956 by the two Danish Tøpholm and Westermann families.
- **Net turnover 2016/17:** DKK 4.346 billion (approx. EUR 585 million)
- **Employees:** 4,000 worldwide, approx. 850 of these in Denmark.

Sivantos: *"We invent the future of better hearing and understanding"*

- Sivantos dates back to 1878 and was part of Siemens AG hearing aid division (Siemens Audiology Solutions) until EQT divested the Siemens Audiology activities from the Siemens Group in 2015.
- **Revenue 2017:** EUR 967 million
- **Employees:** 6,000 worldwide



Adopted: New rules may minimise permanent establishment risk for foreign investors in Danish private equity and venture funds

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On 1 July 2018 an adjustment to the Danish tax rules for permanent establishments of foreign investors entered into force.

The new rules seek to alleviate the need that foreign passive investors in certain Danish structures, such as private equity or venture funds, create an often complex and burdensome structure to prevent the formation of a Danish permanent establishment. Potentially, the new rules will make Danish private equity and venture funds even more attractive investment vehicles for foreign investors. They can be established as Danish limited partnerships with tax transparency and limited liability and – if the investor does not conduct business activities for Danish tax purposes – be organised with relative ease.

Permanent establishment risk for foreign investors in Danish private equity and venture funds

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 were made either

I. through a fixed place of business in Denmark, or
II. through a dependent agent in Denmark.

Danish private equity and venture funds were therefore forced to try to reduce this risk through complex structuring of the funds. Furthermore, the structing did not eliminate the risk 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 new rules

To create a Danish permanent establishment, the foreign investor must have activities in Denmark.

Pursuant to the new Danish rules on permanent establishments, investments in shares, receivables, debt and financial instruments are only considered activities under the permanent establishment rules if the foreign investor is deemed to be "conducting business activities" ("*næringsdrivende*") in Denmark.

Passive investment (i.e. income from passive investment in shares, bonds, etc.) through a fixed place of business in Denmark, or through a dependent agent in Denmark, will therefore no longer necessarily create a Danish permanent establishment. The permanent establishment and accompanying tax liability will only occur exist if the investor for Danish tax purposes is deemed to also be conducting business activities in Denmark.

Consequently, a passive investor in a Danish private equity or venture fund that is deemed not to be conducting business activities for Danish tax purposes has no need to counter the rules on permanent establishments by structuring the investments in such a way that they do not constitute a fixed place of business.

Conducting business activities

The Danish Ministry of Taxation has not provided crystal clear guidance or interpretation of the term "conducting business activities" in relation to the new rules but states instead that each investment must be assessed on a case-by-case basis.

The legislative history behind the amendment does, however, provide some points of reference:

- As a main rule, an investor whose object is investment in shares and acquisition of receivables, debt and/or financial instruments, will be deemed to be "conducting business activities", if the shares etc. were acquired for the purpose of an onward sale and the business is performed on some sort of regular basis. This could mean that if a foreign investor was investing in a Danish hedge fund structured as a Danish transparent entity, then the foreign investor would – due to the activities of the hedge fund – likely be deemed to be "conducting business activities".

- Long-term investments, e.g. 10- or 20-year investments in infrastructure, can be used as an argument against being deemed to be "conducting business activities". However, it will still require a case-by-case assessment.

- An assessment must be made of each investment and investor. In a limited partnership, one limited partner may therefore be deemed to have a permanent establishment due to the partner's business activities overall, where-as another limited partner, with the same investment in the partnership, may not.

In theory, the new rules are welcomed and much needed as the Danish Tax Authorities and the Danish Tax Tribunal have been inconsistent in their rulings on permanent establishments. Unfortunately, without much guidance or case law governing when or how an investor "conducts business activities" in Denmark, passive investors still do not know the full scope of the new rules.

As such, passive investors may still need to adhere to the old rules and continue to make sure that they do not have a fixed place of business in Denmark, or a dependent agent in Denmark.

Rise of unitranche financing in the Danish mid-market?

Following the 2007 credit crunch and the subsequent financial crisis, unitranche facilities have become a significant financing option in Europe. A recent survey shows that unitranche financing now accounts for around 55 % of the funding for primary European mid-market.

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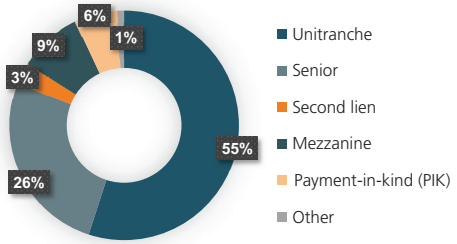
Funding structure – European Mid-Market deals



Source: Deloitte Alternative Lender Deal Tracker Summer 2018. For the purpose of the deal tracker, Deloitte classify senior only deals with pricing L+ 650 bps or above as unitranche. Pricing below this hurdle is classified as senior debt.

Although it is difficult to determine whether the survey gives the full picture of the funding sources in the European mid-market, the survey indicates that unitranche lending is a significant funding source in the European mid-market.

The Nordic market appears to be behind Europe in this trend, which may be due to the fact that the deals in the Nordic market have been smaller than in the larger markets in Europe and due to a well serviced loan market in the Nordic region, which have both offered a competitive bank market and various other alternative sources of funding such as direct lending from pension funds.

We are now beginning to see the first unitranche facilities appear in the Danish mid-market and Kromann Reumert have been advising on several of these structures. Below, we provide a brief introduction to unitranche financings and some of the advantages and challenges seen in the Danish market.

What is unitranche financing?

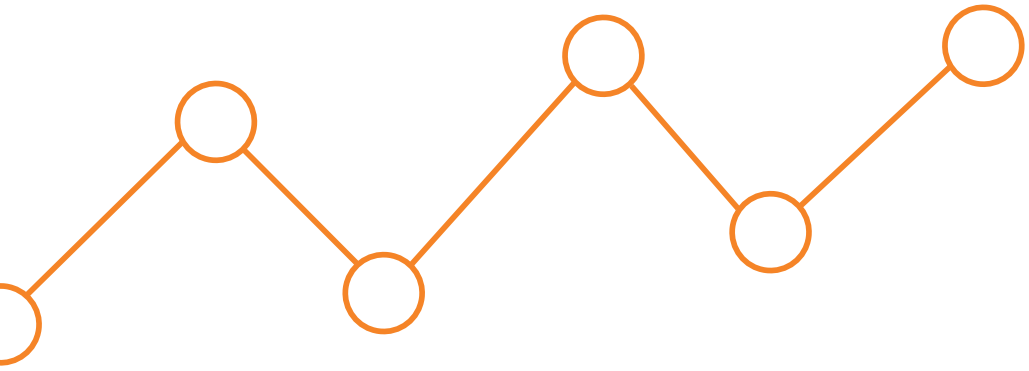
In LBO financing, sponsors may be required to raise both senior and junior debt to fund the acquisition of a target in the mid-market. In a traditional LBO financing structure, such debt is usually provided in separate tranches: (i) a senior facility (e.g. term loan A) which is made available by one or more commercial banks and (ii) a junior/mezzanine facility (e.g. term loan B) which may be provided by an institutional investor such as a pension fund or debt fund.

A unitranche simplifies the traditional LBO capital structure by replacing the separate senior and junior/mezzanine tranches with one single tranche, i.e. a single/'uni' tranche facility. The unitranche facility combines the senior and junior debt into one tranche and carries an interest rate reflecting the weighted average pricing of both senior and junior/mezzanine debt.

In most cases, the unitranche facility is accompanied by a super senior tranche provided by a commercial bank which includes financing products that require bank services (loan servicing/management, treasury functions, borrower reporting and monitoring structures etc.). Accord-

ingly, the super senior tranche will usually include traditional banking facilities, such as revolving, overdraft, guarantee, hedging, capex and/or acquisition facilities. In the European market, the super senior tranche will most often be documented in the same facility as the unitranche facility, but the super senior facility may also be documented by a separate facilities agreement and we have seen such alternative structures in the Danish market.

LBO debt	Traditional LBO capital structure	Unitranche LBO capital structure
Senior Debt	Senior facility including senior term loan (e.g. term loan A) and revolving credit etc. provided by one or more banks	Unitranche facility including (i) senior and junior debt (combined in one term loan tranche) provided by an institutional lender and (ii) super senior revolving credit etc. provided by bank
Junior Debt	Junior/mezzanine facility which may be provided by institutional lender (e.g. term loan B)	
Equity	Equity provided by sponsor and any re-investing sellers etc.	Equity provided by sponsor and any re-investing sellers etc.



Who provides unitranche facilities?

Unitranche facilities are often provided by a sole alternative lender rather than a bank. Unitranche lending is viewed as an attractive investment by several alternative finance providers which may offer an interesting risk/return ratio. Due to the risk profile of unitranche debt (i.e. the element of the junior debt), unitranche lenders will often take greater interest in the borrower's business and may also require a more active monitoring of the business than other lenders.

Particularly lending funds such as Ardian, Ares, Babson Capital, Bluebay, GE Capital, ICG, Macquarie, Highbridge, Hayfin and Alcentra are active in the European market.

How is unitranche financing documented?

In unitranche financing, all facilities are usually documented in one single loan agreement including (i) the super senior tranche and (ii) the unitranche facility. Accordingly, the super senior and unitranche facilities will have a common set of representations, undertakings and events of default. In some cases, the unitranche lender may require stricter financial covenants than the super senior lender considering that the unitranche lender is more exposed. Such requirements may give rise to discussions with Danish banks acting as super senior lenders.

Usually, only one set of guarantees and security will be granted in favour of a common security agent holding it on behalf of the various finance parties and there will typically be an intercreditor agreement regulating the rights of the different creditor groups (including the super senior lender, the unitranche lender, hedging providers, shareholder lenders and intra group lenders).

We have seen cases in the Danish market, where the super senior facility and the unitranche facility are documented separately. Such structures will provide the super senior lender with a separate documentation, which it may enforce but the relationship between the creditors is still be regulated by an intercreditor agreement. In these cases, there will typically also be an alignment of representations, undertakings and events of default in the two sets of facility agreements.

Unitranche financing may offer more flexible terms than traditional LBO financing. This is partly because alternative lenders may be willing to accept different risk profiles than those usually accepted by banks.

In the European mid-market, unitranche facilities are usually based on the Loan Market Association's (LMA) leveraged facilities agreement with the necessary consequential changes and adjustments. A new precedent intercreditor agreement for super senior/senior facilities

was published by the LMA on 17 May 2018 aimed at inter alia unitranche financing. The new intercreditor agreement is based on the LMA's existing intercreditor agreements but contains certain improvements of the super senior lender's position compared to the super senior/high yield bond documentation, which may ease the discussions between unitranche lenders and Danish super senior lenders. The LMA has not produced a standard facility agreement for unitranche lending and this may still present an obstacle, as the template LMA facility agreement requires significant adjustments in order to accommodate the super senior/unitranche structure.

What are the key characteristics of the unitranche facility?

The terms of unitranche facilities vary considerably from deal to deal, but usually have the following key characteristics:

- **Interest, tenor and amortisation:** Unitranche lenders may be able to offer more flexibility in terms of interest structures, including both traditional floating rates (based on LIBOR or EURIBOR) as well as PIK, PIK toggle, fixed interest and other structures. Similarly, unitranche lenders may be able to offer various tenors and repayment profiles including both long term lending, bullet loans, cash sweep structures and loans with fixed amortisation profiles. If a super senior facility is in place, it will carry its own interest rate reflecting its super senior status.

- **Prepayment/call protection:** The borrower will often be required to pay a premium to the lender (i.e. a "make-whole amount'), if the borrower repays all or part of the unitranche debt within a certain period before maturity (i.e. a 'non-call period'). The terms of such provisions are often strongly negotiated and vary considerably. However, it is not unusual that prepayments are subject to a 12 to 24 months non-call period. Similar structures are seen in the Danish high yield bond market and direct lending from the Danish pension funds.

- **Covenants:** The LMA's leveraged facilities agreement – on which unitranche facilities are usually based – includes a full suite of standard financial (maintenance) covenants and other standard covenants. As in other types of financing, these covenants are often negotiated. Due to the more risk profile and that the unitranche lender may be closer to the business than other lenders, the financial covenants may be more customized to the individual business.

- **Ranking:** The super senior facility and the unitranche facility are usually described as pari passu ranking and until an enforcement event occurs both facilities will be entitled to receive payments on a pari passu basis. Any proceeds from enforcement of the common security and other amounts payable to the common security agent will be applied in accordance with a payment waterfall whereby the super senior facility will be paid prior to the unitranche facility. The financing structure may also include swaps and other derivative transactions, which may rank in the same manner as the super senior facility. The ranking of payments in an insolvency event or an acceleration event has been subject to discussions in Danish unitranche transactions, but the new senior/super senior intercreditor agreement published by the LMA includes certain changes to the parties' position in these scenarios compared to the position in the super senior/high yield notes intercreditor agreement. The changes may ease these discussions.

- **Mandatory prepayments:** Customary mandatory prepayments from the LMA documentation will often be included in unitranche financings. Preenforcement, the application of mandatory prepayment proceeds from disposals, insurance claims etc. are often subject for negotiation between the super senior lender and the unitranche lender in Danish (and other European) transactions because the super senior lender wants to protect its super senior position.

- **Amendment and waivers:** If the unitranche and super senior facilities are subject to a common facilities agreement, the amendment and waiver provisions in the LMA documentation will usually be adjusted to reflect the interest of the two lending groups. The unitranche lenders will often be majority lenders and will wish to avoid excessive veto rights for the super senior lender, who, on the other hand, will typically require certain minority protections. If the facilities are documented in separate facilities, restrictions on amendment and waivers may be included in the intercreditor agreement. These matters have been subject to some discussions in Danish transactions.

- **Enforcement:** In the European market (and in the new intercreditor agreement published by the LMA), the unitranche lender will initially control enforcement. Any enforcement by the super senior lender will be subject to the occurrence of a Material Event of Default and the expiry of a standstill period. Both the definitions of the Material Events of Defaults and the length of the standstill periods have led to discussions between the super senior lenders and unitranche lenders in the Danish market.

Pros and cons for the borrower

Pros	Cons
› A single term facility with the same leverage as a combined senior and mezzanine facility.	› A bank facility in the form of a super senior facility will typically be required and the relationship between the unitranche lender and the super senior lender entails some complex intercreditor issues. Especially in a less developed unitranche market such as Denmark, these issues may give rise to (lengthy) discussions.
› Alternative lenders may be willing to consider risk profiles which may not be accepted by banks.	› Call protection may lock the borrower in an expensive financing relative to the market.
› More flexible interest structures may be available. Little or no amortisation and longer tenor may also be achievable.	› Unitranche lenders may want to be closer to the business due to the risk profile and may have certain requirements to board representation and covenants.
› Front loaded liquidity/shareholder distribution may be available if the Borrower has a strong cash flow, which may be of particular interest to PE funds aiming to optimize their IRR.	› Alternative lenders may be less likely to consider the long-term relationship with the borrower in connection with defaults, waivers, consents and amendments.
› Covenants may be customised to the individual borrower's.	› Refinancing opportunities with alternative lenders may be more uncertain and costly.

Your documentation must be fully satisfactory when letting out converted premises at free market rent

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In recent years, a large number of office buildings in the major Danish cities have been converted into residential flats. The reason for the large number of conversions is – among other things – that a lot of new and modern office buildings are being developed, so the old office buildings are becoming less attractive to commercial tenants. At the same time, there is an increasing flow of people who want to live in the centre of the cities, which creates an increasing need for residential flats. Since the possibilities of developing new properties in the cities are very limited, and since many foreign investors are seeking to invest in residential properties in Denmark, conversion of commercial properties into residential flats is an obvious alternative for property developers. As a result, an increasing number of real-estate transactions today concern commercial properties that are converted or intended to be converted into residential flats.

Conversion of a commercial property into residential flats is even more interesting if the flats can be divided into and sold as owner-occupied flats. By doing so, property developers are given the opportunity to exploit the high prices per square meter for residential flats in the major cities by selling the owner-occupied flats after the conversion. Even when it is not possible to divide a property into owner-occupied flats, it may still be profitable to convert the property into residential leases. This, however, is mostly the case if the rent may be determined under the rules on free market rent (as the property developer thereby obtains the highest possible rent).

When making a conversion from commercial leases to residential leases, the property developer (as landlord) must be able to document that the converted flat was in fact used for commercial purposes as of 31 December 1991. If the landlord cannot document such historical use, the landlord is not entitled to claim free market rent from the residential tenants. Instead, the landlord will be left with the option of claiming an often substantially lower rent from the tenants.

Accordingly, in a project aiming to convert a property from commercial leases to residential leases, it is imperative that the landlord – prior to the conversion – has investigated whether it can be documented that the converted leases were in fact used for commercial purposes over 26 years ago (!!), as the whole basis of the project – namely the expected (high) rental income – may otherwise be lost.

In general, it may prove difficult to document the historical use, as it is not possible to retrieve a historical owner's property return (BBR-meddelelse) from the municipal authorities. Also, the municipal authorities are not always in possession of records regarding the use of the property as of "the golden deadline" exactly: 31 December 1991. If any reconstruction, joining of leases etc. have occurred in the period from 31 December 1991, this will simply hamper the procurement of the documentation even further.

Usually, in order to find documentation for the use of the property and the leases as of 31 December 1991, the land-lord must review the building archives of the relevant municipality, which contain information on former building cases for properties within the municipality. It is not certain that the building archives will contain the necessary documentation, and reviewing the archives can be a burdensome process. If the archives have been digitalised, the review can be made online. However, in the Municipality of Copenhagen, a review can only take place as a physical review, as the archives of the Municipality of Copenhagen have not yet been digitalised.

If you are the owner of a property which can be converted from commercial use to residential use, or if you are considering acquiring a property which has already been converted into residential use and is being leased under the rules on free market rent, you are strongly advised to consider whether the necessary and adequate documentation of the historical use of your property is available. If the historical use of the converted leases cannot be documented, there is a high risk that the tenants may claim that the rent must be lowered resulting in substantial losses for you as the landlord of the converted leases.

New Danish Act on Trade Secrets

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On 9 June 2018, the new Danish Act on Trade Secrets came into force. The Trade Secret Act is based on an EU Directive intended to strengthen the protection of trade secrets and provide a homogenous framework for businesses across the European Union. Thus, to a wide extent, similar rules on trade secrets will apply throughout the Member States. For investors, the rules on trade secrets are particularly relevant when it comes to assessing if a business has taken necessary steps to protect its core values such as trade secrets. Below we highlight the basics of what investors need to know about the new Danish Act.

Better overview

In Denmark, the rules on trade secrets were previosly spread over various statutory acts and regulations. One of the purposes of the new Act is to gather the rules in one place to make it easier for businesses to form an overview of the rules and know how to enforce their rights.

However, businesses still have to (also) know the rules on economic espionage in the Danish Penal Code, good marketing practices according to the Danish Marketing Practices Act, the Danish Act on Restrictive Covenants in Employment Contracts and, in certain situations, the Danish Administration of Justice Act.

Uncertain protection of oral information

The Act contains a provision describing when the acquisition of a trade secret is unlawful. However, the provision is somewhat unclear when it comes to trade secrets disclosed orally. According to the legislative history behind the Act, the rules do not extend to oral instructions on, for example, how to perform a job. It is therefore uncertain whether a trade secret, which is oral only, is protected against unlawful use and disclosure if there is no agreement to that effect.

However, a purposive interpretation and the imprecise criterion about 'honest commercial practices" will presumably have the result that oral secrets may enjoy protection as well.

Do technical drawings, bids, etc. enjoy less protection than before?

It is also uncertain whether the new Act – to the same extent as before – protects technical drawings, specifications, formulas, models, bids etc. against unlawful use and disclosure.

In some situations, such information will not necessarily be considered trade secrets within the meaning of the Act because the information does not meet the requirement about being secret. The Danish Marketing Practices Act therefore contained a special rule providing that such information was protected even if it did not meet the requirements for being trade secrets. That special rule was repealed by the new Act.

New 6-month time-limit

The Act introduces a 6-month time-limit for filing a court application for prohibition, injunction, recall of goods from the market, depriving goods of their infringing quality, and/or destruction in relation to infringement of a trade secret.

However, the time-limit does not begin to run until the business owning the trade secret has sufficient knowledge of the infringement to be able to initiate the proceedings. The uncertainty as to when the time-limit actually begins to run will in many situations obviously become subject to dispute.

It is therefore important for businesses to plan a clear strategy for the handling of trade secret issues, thus making e.g. the collection of documentation and the ne-

gotiations with the infringing party more efficient and allowing the businesses to meet the time-limit.

The legislative history behind the Act contains no information as to whether it is possible to agree on another time-limit. It is therefore uncertain whether such agreement will be accepted by the courts.

Better opportunities of receiving damages and compensation

In order for a business to be awarded damages for infringement of a trade secret, it has previously been a condition that the business could prove the amount of its loss. The new Act allows businesses to include in the calculation the profit made by the infringing party. Accordingly, it will be possible for a business to be awarded damages exceeding the loss proved to have been suffered. It is still a requirement, though, that the business can render probable the suffering of an actual loss.

The Act also provides that, in addition to the damages, a business may be awarded compensation for the non-financial damage incurred by the business.

Will it be easier to obtain a preliminary prohibition or injunction?

It is new that the conditions for obtaining a preliminary prohibition or injunction are now laid down in the new Act. The Act and its legislative history leave the immediate impression that it has become easier to be granted a preliminary prohibition or injunction. The Act stipulates, however, that the courts must take into account the legitimate interests of the parties, the consequences of the infringement, and the impact which the granting or rejection of the application could have on the parties. The question is, therefore, whether the courts will tend to carry out the same balancing as before.

What should investors focus on in particular?

When assessing a business' investment potential, investors should particularly focus on:

- the extent of trade secrets – to what extent are the business activities based on the use of trade secrets?
- internal business procedures – does the business have a well-considered protective strategy, and are the steps taken by the business to keep its trade secrets secret up-to-date and sufficient?
- employment and cooperation contracts – does the business have a systematic approach to contractual protection of trade secrets? Do employment contracts, cooperation contracts and non-disclosure agreements (if relevant) protect oral information, technical drawings, specifications, formulas, models, bids, etc.?
- strategy for handling of trade secret issues – does the business have a proper strategy, and is it ready for the new 6-month time-limit?

KROMANN REUMERT

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