KROMANN REUMERT

Investor Update

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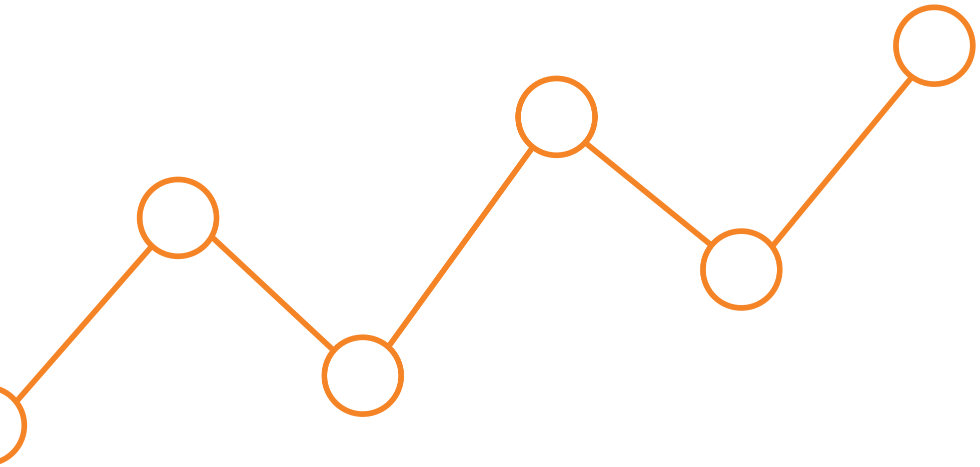

Content

Market highlights – H1 2019

- According to Mergermarket, Nordic M&A followed the wider European trends and saw a downturn in H1 2019, with heightened political and economic uncertainty appearing to suppress deal-making.[1]
- Although Q2 2019 reached more than twice the deal value of Q1, 1H 2019 went down 34 % from H1 2018 (EUR 50.3bn), reaching a total deal value of around EUR 33bn.[1]
- H1 2019 saw a total of 545 deals across the Nordic region. Denmark accounted for almost a quarter of the deals (23.3 %) but only 19.4 % of the total deal value.[1] Denmark experienced a decline in both activity and deal value in Q2 compared to Q1.
- The most targeted sector in H1 was Industrials & Chemicals (120 deals, EUR 6.6bn). With 97 deals, the technology sector experienced more activity in H1 2019 than in the same period in 2018 (79 deals).[1]
- Regarding private equity buyouts, the activity in Q2 returned to more familiar and higher levels compared to Q1, reaching EUR 6bn.[1]

[1] Mergermarket (Klonowski, Jonathan): Trend Summary: Nordic 1H19

A (very) brief guide to set up a joint venture in Denmark

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From many perspectives, Denmark is an attractive place for foreign investors to establish a joint venture. This guide briefly explains the reasons for that and outlines some of the relevant issues to consider when setting up or entering a joint venture in Denmark.

Freedom to choose

There is no separate legislation regulating joint ventures in Denmark, and they are therefore subject to general Danish company law. Accordingly, joint ventures are no more restricted in their activities than any other entities established under Danish law. This leaves investors with a considerable freedom to choose how to set up and operate the joint venture and entails that there are no requirements to establish a joint venture in a specific corporate form.

Notwithstanding the corporate form of the joint venture, the cooperation and legal relationship of the owners/partners should be regulated by the joint venture's articles of association and a shareholders' agreement/partnership agreement, often called a *joint venture agreement*. Note that it is also possible to establish joint ventures on a solely contractual basis, which entails that no corporate form or incorporation process is required.

In terms of language barriers in connection with setting up a joint venture in Denmark, there are practically none. Corporate joint ventures may file Danish founding documents that include a foreign language translation, and contractual joint ventures are subject to no language restrictions. Foreign citizens are free to participate in Danish joint ventures and are only subject to the same rules and requirements as Danish participants.

The freedom to choose extends to defining the purpose of the joint venture and choosing which sector to operate in. To the extent it is not downright illegal, a joint venture can generally operate with any purpose, and all Danish business sectors are directly accessible. However, certain sectors, like the financial and energy sectors, require its players to obtain a licence from the relevant public authority. Accordingly, the sector and any associated specific requirements must be considered when setting up a joint venture.

Issues to consider

> Ownership structure and reserved matters

Typically, joint ventures are owned 50/50 if there are two participating parties; however, a different distribution of ownership may be agreed upon. The relevant ownership structure of the joint venture must be agreed between the parties and is one of the key considerations when setting up the joint venture. Under Danish law, an important ownership interest is 66.67% (2/3 of the voting rights) as such ownership interest will often (depending on the articles of association of the joint venture) enable the majority shareholder to, among other things, amend the articles of association.

However, regardless of the division of ownership between the parties of the joint venture, the joint venture agreement will typically contain certain matters (reserved matters) requiring approval from all participants or the management of the joint venture, such as material changes to budgets or business plans, changes in share capital or field of business, entering into financing agreement above a certain value etc. Accordingly, the control mechanisms of the joint venture as well as the corporate governance must be considered carefully.

> Specific clauses in the joint venture agreement

Generally, when setting up a joint venture, the parties should spend time aligning expectations and discussing how to regulate their relationship in the joint venture agreement.

In many instances it is advisable that the joint venture agreement includes a non-compete clause restricting the participants from competing with the joint venture. Generally, a non-compete clause is accepted under Danish law assuming that the clause is limited to cover the lifetime of the joint venture and only restricts the participants from being active in the same market as the joint venture.

Another issue that the parties should consider regulating in the joint venture agreement is the duration of the joint venture and the process of and conditions for termination. Joint ventures may end suddenly due to, among other things, market conditions or disagreements between the parties, for which reason it is important to include provisions that clearly regulate the termination procedure and conditions. It is therefore advisable early in the process to agree on an exit strategy and termination provisions. In the event of disagreement between the parties, it is crucial that the joint venture agreement regulates how to resolve a dispute between the parties; e.g will the joint venture close down? is it possible for one party to buy the other party out?

> Risk of joint and several liability for contractual joint ventures

A contractual joint venture with an independent management will be at risk of being deemed as a de facto partnership (in Danish: *interessentskab*) if, through its activities, it appears as one party in the eyes of third parties. This would entail that the joint venture participants would be jointly and severally liable for the joint venture's actions. It is possible to regulate the relationship between the participants in the joint venture agreement to ensure that they inter partes are not regarded as members of a partnership. However, such an agreement will not be enforceable against third parties.

> Other legislation to comply with

When setting up a joint venture, the participants should be aware of the obligation to comply with other legislation, e.g. relevant EU law, including AIFMD, AML and GDPR legislation. For example, co-shareholdings in a non-operational (holding) entity domiciled in the EU may, depending on the agreed governance rights etc, trigger AIFMD legislation, as such holding entity may be defined as an alternative investment manager. Being subject to AIFMD legislation would be associated with costs and a non-insignificant regulatory burden. The scenario is relevant where the joint venture parties wish to have a holding structure above the operational entity(-ies) for tax or other structural reasons. Further, participants should carefully consider whether the obligation to file for a merger clearance is necessary, as this can be a heavy process to go through.

Recent deals

Kromann Reumert advised Axcel in its divestment of the EG Group

Kromann Reumert has acted as lead counsel to Axcel in connection with the fund's divestment of the EG Group (formerly EDB-Gruppen) to the private equity firm, Francisco Partners, for a price of DKK 3,7 billion.

Kromann Reumert has inter alia advised on the transaction structure, vendor due diligence, matters relating to the management incentive scheme, the merger control aspects of the transaction as well as on the preparation and negotiation of the transaction documentation. The deal was closed on 3 June 2019.

Kromann Reumert advised SNIPR Biome in a Series A investment

Kromann Reumert advised SNIPR Biome on the raising of USD 50 million from the Lundbeck Foundation, Dutch LSP, German Wellington, and Danish North-East Family Office (Nefo).

SNIPR Biome is a Danish CRISPR Microbiome company aiming to develop CRISPR-based medicines to kill off bacteria. The CRISPR technology makes it possible to identify and remove specific target bacteria, leaving the rest of the microbial community intact and unharmed. The investment is one of the largest Series A investments done in Europe and proceeds are to be used to advance CRISPR-based microbiome drugs to human clinical trials. Kromann Reumert assisted SNIPR Biome with preparing and negotiating transaction documentation. The deal was closed in March 2019.

FLSmidth acquires IMP Automation Group

Kromann Reumert advised FLSmidth on its acquisition of IMP Automation Group, which provides automated laboratory solutions for the mining industry.

Kromann Reumert acted as global counsel to FLSmidth on the transaction, which spanned Australia, South Africa, Brazil and Canada and involved multiple German-law issues.

The transaction called for, among other things, the drafting of transaction documents governed by the laws of Western Australia and demonstrated Kromann Reumert's growing outbound capabilities. The deal was closed in May 2019.

Nordic Capital acquires Conscia from Axcel

Kromann Reumert advised Nordic Capital in connection with its acquisition of Conscia from Axcel.

Founded in 2003, Brøndby-based Conscia delivers IT-infrastructure solutions and around-the-clock service in the network, datacentre and mobility industries to sizeable private enterprises and to public institutions.

Kromann Reumert advised Nordic Capital through all stages of the process, including on due diligence, bidding, the drafting and negotiation of transaction documents, and on the handling of W&I insurance.

The transaction was closed on 30 April 2019.

TDC acquires Firmafon

Kromann Reumert advised the owners of Firmafon on the sale of all the shares in the telecommunication/software company Firmafon ApS to telecommunication conglomerate TDC.

Besides the founders, among the owners of Firmafon were Seed Capital and a number of business angels.

Firmafon sells telecommunication solutions and software to corporate customers.

Kromann Reumert advised Firmafon in all stages, from term sheet to closing, which took place on 28 February 2019.

Kromann Reumert advises on merger of Widex and Sivantos

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The two hearing aid businesses Widex and Sivantos announced on 16 May 2018 their merger into a joint global enterprise valued at more than DKK 52bn. The merger was subject to approval by the authorities in a number of countries and by the European Commission. Following a lengthy approval process, the transaction was ultimately completed on 28 February 2019.

Widex and Sivantos are both global players in the hearing aid industry. Widex was founded and, until the merger, owned by the two Danish families of Tøpholm and Westermann. Sivantos, formerly the hearing aid division of Siemens, was acquired by private equity fund EQT in 2015 and is now headquartered in Singapore.

With the merger of Widex and Sivantos now completed, a new joint company under the name of WS Audiology A/S has been formed and now ranks as one of the industry's three biggest companies, especially boosting its development capabilities. The merged group is headed by Widex CEO Jørgen Jensen.

Kromann Reumert served as leading legal advisers to Widex and the two families throughout the process, which involved an unusually large team of approx. 100 lawyers and competition economists from Kromann Reumert. From due diligence over competitionlaw approvals to negotiations and drafting of extremely comprehensive contract documents.

Christian Lundgren served as responsible partner on the case together with Jakob Hans Johansen.

"We are proud that we were allowed advise Widex and the owners on this unique transaction, which serves to illustrate our philosophy of working very closely together with the client to ensure the best and most value-adding solution. It was a global transaction, involving multiple jurisdictions, and – drawing on our international experience and expertise and with respect for the values that were important to the owners of Widex – our task was to make sure everything came together and to advise the owners and the management. The merger of Widex and Sivantos creates an even larger business with a global outlook, which ultimately benefits not just hearing aid users, but also Danish society at large." – Christian Lundgren, Partner

What to be aware of when investing in insolvent businesses

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In this article, we share a few highlights from the updated chapter on transfer of insolvent businesses in the leading Danish M&A textbook "*Køb & Salg af Virksomheder*" (in English: *M&A transactions*) by Jóhannus Egholm Hansen and Christian Lundgren. Below a few highlights on how to achieve success are mentioned.

With the market for regular M&A transactions still very active, one would expect the niche market for insolvent business transfers to be at an alltime low. However, in 2018 we saw some major Danish companies in various sectors undergo insolvency proceedings, including retailer Top Toy/ToysR'Us, insurance agent Husejernes Forsikring, airline Primera Air, wind turbine group Total Wind and furniture manufacturer Tvilum. These bankruptcies all involved complex business and/or asset transfers. Although these insolvency proceedings may have come as a surprise to many, economic commentators see them as a natural consequence of the growing competitiveness of Danish businesses fueled by the current market conditions (with the retail sector, in particular, in disruption).

Stakeholders should act diligently when facing financial difficulties

Danish legislation supports the principle of limited liability, and an investor entering the Danish market should therefore not be overly worried about the risk of incurring personal liability. However, investors (and the management they put in charge) should always be aware of the interests they are required to protect and should the business plan not materialize into a profitable business, management could face personal liability if it does not shift focus.

Should the new business become insolvent, management must shift its attention away from safeguarding the interests of the business and instead focus on safeguarding the principle of equal treatment of creditors.

Should the management fail to do so, the directors could be held personally liable for the creditors' losses and could also face disqualification proceedings (in Danish: *konkurskarantæne*), preventing the individual members of management from serving as members of the management in Danish companies for up to three years.

Drafting is the key to success

The idiom "*the devil is the detail*" is key in the drafting process in connection with insolvent business transfers. Although each case is different, a common characteristic of such transfers is the limited time available for the parties to close a deal. In a distressed situation, focus will often be on the practical and factual circumstances of the target rather than on the general terms, which are usually standard bankruptcy ("as is") terms.

Although time-consuming, it is always advisable (and usually practically possible) for an investor to visit the site and to interview key personnel, as future conflicts may easily be avoided by gaining firsthand knowledge of the practical surroundings where the business has been conducted. Such visit and interviews may give the investors a better idea of the assets, employees and know-how necessary to achieve the objectives of the future business plan, thus allowing them to address key issues in the transfer documentation and increase the chances of making the business viable again.

Restructuring proceedings under the Bankruptcy Act present tools and obstacles

Investors should also be aware that commencement of restructuring proceedings under the Danish Bankruptcy Act (in Danish: *rekonstruktion*) for the purpose of acquiring an insolvent business is a formalistic procedure and can be a difficult process.

The possibility of commencing proceedings was introduced in 2011, one of the objectives being to make it easier to acquire insolvent businesses. This objective has been partially achieved by providing investors with certain tools, enabling investors to maintain the profitable parts of the business (e.g. by compulsory acceptance of both new debtors on certain agreements and valuations of pledged assets as well as revival of terminated agreements).

However, certain formalities also have to be observed in connection with restructuring proceedings, and these can be counterproductive when trying to save a business (going concern). In contrast to bankruptcy proceedings, a business transfer cannot be completed without formal approval by both the creditors and the bankruptcy court. Also, a court-appointed accountant – with limited or no prior knowledge of the business – must be involved. These formal requirements often prove (too) time-consuming and can impede the objective of saving a viable business.

Careful attention to employees

An investor entering the Danish market through acquisition of an insolvent business should be aware of certain employee-related issues which may both be helpful and harmful in the process of establishing a successful business.

In general, the Danish Transfer of Undertakings Act (in Danish: *virksomhedsoverdragelsesloven*) makes a new owner liable for employees claims against the selling entity if the employees have not been dismissed and released at the time of the transfer. The act is based on the EU TUPE regulation.

Obviously, the employees will often have irreplaceable knowledge of a business, and therefore retention of key employees will often be a prerequisite of a successful business transfer. This prerequisite can often be fulfilled with the help of the legal entity selling the business as employees will often have preferential claims reaching beyond the date of termination of their employment (e.g. claims for compensation in the notice period etc.). Thus, the selling entity will happily let an investor take over such employees. Under certain circumstances, such transferred liabilities can also be set off against the purchase price for the business, effectively reducing the financing needed to acquire the business.

If the selling entity is being administered in bankruptcy, the Danish Employees' Guarantee Fund (in Danish: *Lønmodtagernes Garantifond*) must compensate the employees for any claims they may have against the selling entity relating to the period before the date of the bankruptcy order, and therefore the new owner will only be liable for any claims arising after that date, which will often be limited. Hence, bankruptcy proceedings may be helpful in limiting an investor's liability to employees.

However, based on recent case law investors should pay attention in *pre-pack scenarios*. Firstly, an investor must be very careful not to *de facto* conclude the business transfer before a bankruptcy and before the business has been officially taken over. In such cases, the investor may be held liable for all claims irrespective of the bankruptcy and irrespective of later dismissals. This calls for careful timing (i.e. patience) with respect to negotiation and start of operations. Also, an investor should be very careful in securing a remedy against the selling entity, should the investor be seen to have taken over more employees than originally planned.

Denmark is becoming a more attractive fund jurisdiction

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Changes in 2018 to Danish financial regulation and tax laws have meant that Denmark is now becoming a fairly attractive funds jurisdiction. This article explains why and summarises the characteristics of the most common Danish fund structures.

Danish law allows for a suite of different fund structures that are costefficient and flexible to accommodate for the different needs of sponsors, managers and investors.

Elimination of permanent establishment taxation of foreign investors

On 1 July 2018 an adjustment to the Danish tax rules for permanent establishments of foreign investors entered into force (see previous Investor Update for Q3 2018).

The new rules alleviated concerns that foreign passive investors in certain Danish fund structures, such as private equity or venture funds, would become subject to Danish permanent establishment taxation. Potentially, the new rules will make Danish investment funds more attractive for foreign investors.

Most common fund structures

Below is a summary of key features of some of the most used or novel types of fund structures available under Danish law.

Fund vehicle/ Key feature	Danish Limited Partnership (in Danish: *Kommanditselskab*)	Capital association (in Danish: Kapitalforening)	AIF-SIKAV
Limited liability	Yes	Yes	Yes
Investment restrictions	None	Financial instruments (as defined in MiFID II, Annex 1, Section C)	None
Compartment structure possible	Possibly by contract but not by statute	Yes	Yes
Tax transparent	Yes	No	No
Flexibility on governance	Yes, although the GP must be granted certain governance and financial rights	Governed by a BoD and an alternative investment fund manager	Governed by a BoD and an alternative investment fund manager
AIF	Yes, depending on whether it raises capital from a number of investors for the purpose of investing it in accordance with a defined investment policy for the benefit of those investors	Yes, by definition	Yes, by definition
Allows for commitment-based capitalisation with capital calls	Yes	Yes	Yes

Unlike Luxembourg, traditionally a large fund jurisdiction, none of the Danish fund vehicles are subject to any requirement to be licensed by the Danish Financial Supervisory Authority (unless organised as selfmanaged alternative investment funds under the Danish Alternative Investment Fund Managers Act).

The Limited Partnership

The limited partnership seems the logical choice for a singlestrategy fund and is typically used for buy-out funds, loan funds, infrastructure funds, etc. It offers tax transparency and a high degree of flexibility to govern the rights of the limited partners and the general partner in the limited partnership agreement. With jurisprudence dating back to its introduction as a legal organisation form in the second half of the 19th century[1], there is a considerable degree of legal certainty to rely on.

[1] The Danish Limited Partnership is modelled over the German Kommanditgesellschaft

The Capital Association

Since its introduction as a legal organisation form in 2013, the capital association has been used inter alia (i) as a fund-of-one multi-strategy investment vehicle of a particular life insurance company or pension fund, where each strategy is handled in a separate compartment, or (ii) as an umbrella fund offering multiple institutional investors with different strategies to invest through their own compartment in a costefficient structure with a joint alternative investment fund manager, one depositary, and one set of Articles of Association.

The AIF-SIKAV

The AIF-SIKAV is the newest type of fund structure and – like the Luxembourg RAIF – offers a great degree of flexibility to support any type of investment strategy, governance, and investor composition.

It is a separate type of company governed by Part 23 of the Danish Alternative Investment Fund Managers Act with limited liability for its investors and a variable capital (i.e. like a Luxembourg SICAV, it offers issuance and redemption of shares without having to comply with the onerous rules on increase and reduction of share capital in a typical limited liability company).

It may be open-end or closed-end depending on the sponsor's preference. An asset manager wishing to offer its customers the opportunity to invest in a wide variety of assets can establish an AIF-SIKAV with compartments for each asset class (equities, fixed income, real estate, hedge funds, PE funds, infrastructure, etc.) and then allocate the customer's funds to each of those compartments based on the individual customer's risk appetite, with the option of easily changing the strategic and tactical asset allocation over time.

Distribution

For fund managers with a global distribution strategy, Luxembourg and Irish funds have the advantage of being known brands (although this is more true in the UCITS space than in the non-UCITS space) which many investors will instinctively be comfortable with.

For funds with a Northern European distribution strategy, we believe it is relevant to consider one of the Danish fund structures. Denmark has a disproportionally large pension fund industry compared to the size of the country and thus a large potential investor base. For Danish institutional investors, the Danish fund vehicles will be recognised and generally preferred over, say, Luxembourg and Irish fund structures. For institutional investors in other Scandinavian countries, it should be relatively easy to become comfortable with the Danish fund vehicles, given the general similarities of the Scandinavian legal systems.

Political and regulatory climate

For fund sponsors and institutional investors alike, it will be reassuring to know that the Danish political climate is stable.

The Danish Financial Supervisory Authority is a sensible and generally pragmatic regulator. Passporting by a Danish licensed AIFM to market units or shares in a Danish fund in other EEA jurisdictions typically works smoothly.

Building a data centre in Denmark: Key local partners

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A string of tech companies are choosing Denmark as the site of their new European data centres. In a series of features, Kromann Reumert summarises some of the critical issues facing developers and investors. In this article, we discuss the Danish landscape and key local partners.

Denmark has a highly developed free market and the World Bank currently ranks Denmark among the top countries for ease of doing business.

One of the reasons for this ranking is Denmark's a well-functioning and transparent public sector with English-speaking personnel, hardly any corruption, and generally a high level of service.

The process for registering a (limited liability) company in Denmark is very easy and, subject to KYC and other formalities, can be completed within hours.

However, in connection with large-scale infrastructure projects, getting on the right footing at the local district level is imperative for success.

Invest in Denmark

Invest in Denmark is a federal organisation which has been set up to broker and help foreign businesses that wish to do just that: invest in Denmark.

As they put it themselves: "*We provide tailor-made solutions for foreign companies looking to set up or expand business or research activities in Denmark.*"[1]

The organisation employs consultants specialising in the digital sector who can provide you with benchmarking analyses, fact-finding tours, contact to potential partners, industry insights as well as advice on framework conditions.

Getting in touch with Invest in Denmark is a good place to start for data centre developers, as they can help locate suitable sites and – especially in the early stages – facilitate a dialogue with local government.

Local government

Denmark is divided into five regions which are further divided into 98 municipalities. Both regions and municipalities are run by locally elected politicians.

Municipalities lay out and decide on municipal and district plans that specify how areas may and may not be used. Municipalities also issue building permits, making them a key partner for developers.

Most permits are issued within six weeks in zoned areas – the fastest processing time in Europe – but the 98 municipalities differ in their dealings with and overall approach to businesses.

Most municipalities see great potential in hosting data centres, and some go the extra mile to attract them. In a few instances, some local authorities have even had tailor-made local plans made ready in advance for locations ideally situated close to main utilities.

Utilities

Another key partner is Energinet, a federal organisation that owns, operates and constructs the Danish high-voltage grid which supplies electricity to consumers and businesses.

[1] https://investindk.com

Smaller data centres typically deal with local energy distributors. For smaller data centres, such as colocation data centres, Denmark is rich in plug and play sites situated close to electricity supply.

Typically, developers and operators of hyperscale data centres deal directly with Energinet because of the amount of energy required, including – in some instances – the requirement for the facility to be transmission connected rather than connected to the distribution network.

While the many new data centres are still viewed in a positive light, concerns have been raised about their impact on the energy infrastructure. Regulations providing for reutilization of excess heat along with other issues can make energy a delicate topic. We will take a closer look at this in an upcoming feature.

Local counselling

The friendly, easy and transparent business climate notwithstanding, there are numerous small oddities in the Danish system and culture that can cause problems for developers and owners of data centres.

Apart from energy, an issue that needs certain attention and local counselling is the process of buying up land, especially if a larger area is needed.

Typically, the envisaged project site may be owned by a few large and several smaller landowners. Further, it may also be necessary to acquire adjoining residential homes, in order to implement the required local plan and secure support from neighbours and community. Understanding local interests and sentiments are crucial in handling the acquisition process. Disenchanted neighbours and local politicians can stir a commotion in local media, which can easily turn into nationwide news, given the small size of the country.

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Kromann Reumert's vision is "We set the standard". Good is not enough – we want to be the best. We provide value-adding solutions and advice with full involvement and commitment. We get there by focusing on quality, business know-how, spirited teamwork, and credibility. We are Denmark's leading law firm, and our offices are located in Copenhagen, Aarhus and London.

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