

CLIENT BRIEFING

# DANISH BANKING LAW

A BRIEF INTRODUCTION

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This brief introduction to the main aspects of Danish banking law is intended to provide our international clients with a useful overview when structuring Danish finance transactions.

## 1. INTRODUCTION

### 1.1. The Danish Banking Sector

Denmark has a well-functioning banking sector consisting of approximately 80 Danish credit institutions, holding either a banking or a mortgage credit license, which are under the primary supervision of the Danish Financial Supervisory Authority. More specifically, the Danish banking sector comprises banks, savings banks and mortgage credit institutions.

Banks are organised as limited liability companies, are often publicly listed, and provide finance for everything from private individuals over small businesses to large Danish and international corporations. Traditionally, Danish banks have been organised as universal banks and therefore, there are no specific distinctions between commercial banking and investment banking (although the investment banking activities for practical purposes are often separated into special departments or divisions within the banks). The largest Danish banks are Danske Bank A/S, Nordea Bank Danmark A/S and Jyske Bank A/S.



Historically, savings institutions have been owned by their own customers, and they have traditionally provided finance for private persons and small businesses within a certain area. Therefore, they often have a strong local or regional presence. However, within the last few years, a number of savings institutions have been converted into limited liability companies and have been listed in order to make their business model more viable and their access to capital easier.

Mortgage credit institutions are essentially “niche banks” in the sense that they only finance real estate. Unlike banks, they do not fund themselves through deposits or loans etc. but solely through issuance of mortgage-backed bonds taking the form of covered bonds. The stable funding enables mortgage credit institutions not only to offer very attractive interest rates, but also to offer fixed-rate mortgage loans with maturities of up to 30 years.

A number of mortgage credit institutions are either owned by banks or form part of the same group as banks forming a number of financial conglomerates, which are able to provide the full spectrum of banking and mortgage credit services.

## 1.2. Legal Framework

As a civil law country, Danish law is to a certain degree codified. In relation to banking law, the main acts are the Contracts Act, the Interest Rate Act, the Debt Instrument Act and the Credit Agreement Act. Notwithstanding this, Danish banking law largely operates on a “freedom to contract” principle, with the only major exception being consumer credit, which is heavily regulated in the Danish Credit Agreement Act. Therefore, the parties to a commercial loan transaction are more or less able to agree on whatever terms they find appropriate for the specific transaction.

Danish credit institutions as such are subject to the provisions of the Danish Financial Business Act, which however only contains very few conduct of business rules.



## 2. LOAN AGREEMENTS AND FACILITY AGREEMENTS

### 2.1. Traditional Danish Loan Agreements

The vast majority of all Danish corporate credits are typically evidenced by traditional short form loan agreements consisting of a short form loan agreement or a debt instrument setting out the commercial terms of the loan (i.e. the name of the borrower, loan amount, rate of interest, repayment and any security or guarantees to be provided) and a set of standard terms and conditions applicable to all credits from the relevant bank. Overdraft facilities are also quite common and are typically evidenced by a short form overdraft facility agreement and a standard set of terms and conditions.

In general, such facilities are uncommitted and therefore repayable on demand (or repayable on short notice, typically 14 days), irrespective of whether an event of default has occurred or not.

Apart from the commercial terms, the loan agreements are standard loan agreements with very little, if any, room to negotiate the other terms.

### 2.2. LMA-Style Loan Agreements

Committed facilities are primarily used in leveraged finance transactions, large-scale investment grade transactions and large real estate finance transactions. Such facilities are often evidenced by facilities agreements based on the standard agreements published by the Loan Market Association and then tailored appropriately to fit the individual transaction. Certain major banks and banks which are other-wise very active within the market will have their own standard LMA-based loan agreements which they seek to impose on the borrower as a starting point for the negotiations. Depending on the size of the transaction, whether it is syndicated or not and the bank(s) in question, some banks may instruct external lawyers to draft the loan documentation. Often, such loan documentation will also be based on the LMA's recommended forms of loan agreements, although they may be shortened a bit, a so-called "LMA light".

In most cases, the governing law of the loan agreement will be Danish law – especially if the bank or the syndicate banks are Danish – but the language of the loan agreement will often be English.

The loan agreements as such will often be heavily negotiated by the borrower.

Some major corporate borrowers – primarily borrowers with an excellent credit rating – have recently started introducing their own standard loan agreements based on which they are prepared to borrow. Often, such loan agreements will also be based on the LMA recommended forms but will only have a few basic representations and warranties, a few covenants and a reduced set of events of defaults with substantial grace periods and materiality tests.



## 3. SECURITY INTERESTS

Danish law recognises two different forms of security interests: mortgages and pledges.

### 3.1. Mortgages

A mortgage is a non-possessory security, which comes in the form of either a fixed mortgage over a specific asset or a floating mortgage (a charge) over a number of non-specified assets within a certain group of assets.

Fixed mortgages will often be taken over the following assets:

- Real estate
- Vehicles
- Chattels
- Intellectual property rights
- Certain electronic, registered securities (dematerialised securities)

Floating mortgages/charges can only be granted in respect of:

- Certain business inventory (e.g. inventory, operating machinery, tools, vehicles etc.)
- Receivables originating from the mortgagor's business.

The security is granted by way of an electronically filed mortgage which may either specify the loan being secured and the terms of the loan (an ordinary mortgage) or may just specify the amount which is being secured, in which case the terms of the loan follow from an underlying loan agreement (an owner's mortgage or an indemnity mortgage).

The mortgage itself has to be registered with a central register in order for the security to be perfected. Depending on the asset used as security, the mortgage will have to be registered with either (i) the Land Register (real estate), (ii) the Car Register (certain vehicles), (iii) the Chattels Register, sometimes referred to as the Persons Register (chattels, intellectual property rights, business inventory and receivables in relation to a floating mortgage etc.) and (iv) the VP Securities services (electronic registered securities).

In general, an official registration fee of DKK 1,660 + 1.5 per cent of the nominal value of the mortgage is payable upon registration.

A mortgage is in general enforced through the local bailiff's court by way of a public auction, although other enforcement mechanisms may be agreed upon between the parties. In case of the debt-or's/mortgagor's bankruptcy, the enforcement process must be initiated by the bankruptcy trustees. However, a creditor may demand that the enforcement process is initiated within 6 months after the bankruptcy.



## 3.2. Pledges

A pledge is a possessory form of security where the pledgee (or the pledgee's representative) either takes possession of the asset (chattels, negotiable securities, etc.) or notifies the debtor of the security (receivables, non-negotiable shares).

The pledge is granted on the basis of a pledge agreement between the pledgor and the pledgee specifying the asset being subject to the pledge and the additional terms of the pledge. The following assets will often be pledged:

- Chattels
- Receivables
- Physical securities (shares, promissory notes etc.).

Since the security is perfected by taking possession of the assets or giving notice to the debtor (receivables etc.), there is no need to register the security and no registration fees apply.

Enforcement of a pledge would be either by way of a public auction or (depending on the assets in question, the terms and the security agreement) by way of a private sale. In case of bankruptcy, the enforcement process remains in the hands of the creditor irrespective of the bankruptcy.

## 3.1. Security Agents

While Danish law does not as such recognise the concept of a trust and consequently the concept of a security trustee, security agents are commonly used in secured syndicated transactions. Following the amendment of the Danish Securities Trading Act in 2013, the security can be granted directly to the security agent as such for and in favour of the existing lenders/bondholders from time to time. Thus, the old practice of granting the security directly to the individual lenders/bondholders has been abolished to a certain extent.

In relation to bond issues, the security agent inter alia needs to be registered with the Danish Financial Supervisory Authority in order to benefit from the amended agency rules in the Danish Securities Trading Act. If no registration has been made, it will depend on general principles of agency law whether the security agent can represent the bondholders and if so to what extent.

There are no registration requirements for security agents in relation to syndicated loans.



## 4. FINANCIAL ASSISTANCE

### 4.1. General

The Danish Companies Act operates with a strict financial assistance regime, which in general prevents a company from providing financial assistance in connection with the acquisition of itself or its parent company. In essence, a Danish company is not allowed to:

- advance loans or otherwise make funds available to a potential buyer in connection with an acquisition of itself or its parent; or
- guarantee or provide any security for any loans used to acquire itself or its parent company (“acquisition debt”).

The restriction prevents a target company from providing any form of upstream security or guarantee. Any security or guarantee provided in breach of the restriction will be void if the beneficiary (i.e. typically the financing banks) was or should have been aware that the relevant security or guarantee constituted unlawful financial assistance. In addition, the management of the target company providing the financial assistance will be liable for damages and subject to fines from the Danish Business Authority, being the relevant supervisory agency.

In order to avoid any such issues, it is customary to insert limitation language in the relevant facilities agreement specifying that any security or guarantee granted shall not secure or guarantee any acquisition debt and will be deemed not to have been granted or issued, if this would otherwise constitute unlawful financial assistance.

Unlike a number of other jurisdictions, Danish law does not provide for any kind of “whitewash” procedure. Acquisition debt will continue to be characterised as acquisition debt irrespective of when it was incurred and irrespective of any intermediate refinancing.

### 4.2. Lawful Financial Assistance and Debt Push-Down

Notwithstanding the general prohibition on financial assistance, the Danish Companies Act does allow a target company to provide financial assistance in connection with its own takeover in certain limited circumstances, provided that inter alia the following conditions are met:



- The target company's central governing body (in general the board of directors) must present a written report at a general meeting in relation to the proposed financial assistance which includes information on (i) the reason for the proposed financial assistance, (ii) the company's interest in providing financial assistance, (iii) the conditions on which the financial assistance is provided, (iv) the consequences of the financial assistance for the company's liquidity and solvency, (v) the price to be paid by the third party for the shares in connection with the acquisition of the company.
- The general meeting must resolve to provide the financial assistance with a qualified majority.
- The financial assistance so provided must not exceed what is reasonable taking into account the company's financial position, and such financial assistance is in any circumstance limited to that part of the company's funds which would otherwise be available for dividend distribution.

In addition, the report prepared by the target company's central governing body must be published through the filing system of the Danish Business Authority.

In practice, lawful financial assistance within the meaning of the Danish Companies Act is rarely used. Instead, market participants prefer a "debt push down" whereby funds are made available to the target company in order to finance an extraordinary dividend distribution post-acquisition, which in turn is used to repay the acquisition debt on the BidCo level.

## **5. ROME II REGULATION AND THE EUROPEAN INSOLVENCY REGULATION**

Pursuant to the European Council's Edinburg Decision of 12 December 1992 and the Protocol to the Treaty of Amsterdam on the position of Denmark, Denmark does not participate in the judicial cooperation within the European Union. From a banking perspective, this entails that neither Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations nor Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) are applicable in Denmark.

Therefore, the choice of a governing law other than Danish law to govern the non-contractual obligations of e.g. a loan agreement may not be upheld by Danish courts. Similarly, it is currently uncertain to what extent Danish courts will enforce a foreign bankruptcy order in respect of the debtor's Danish assets.



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