The Legal 500 Country Comparative Guides

Denmark: Securitisation

This country-specific Q&A provides an overview to securitisation laws and regulations that may occur in Denmark.

For a full list of jurisdictional Q&As visit here

Contributing Firm

Carsted Rosenberg

Authors

Dr. Andreas Tamasauskas
Partner
The Legal 500
ata@carstedrosenberg.com

Michael Carsted Rosenberg
Partner
The Legal 500
mcr@carstedrosenberg.com

1. **How active is the securitisation market in your jurisdiction? What types of securitisations are typical?**

   The Danish securitisation market has been lying more or less dormant since the financial crisis with only a few transactions taking place. Among the more notable transactions are the securitisation of auto-loans by the Danish branch of Santander Consumer Bank AS in 2013 and a securitisation of Danish corporate loans by Nordea Bank AB in 2016. In addition, Danish investment firm Accunia Fondsmæglerselskab founded a Nordic CLO platform in 2015 which so far has issued three CLOs while a fourth one is planned to be issued in March 2020.

2. **What assets can be securitised (and are there assets which are prohibited from being securitised)?**

   In general, all kinds of assets can be securitised. However, certain contractual restrictions may be set out in the receivable documentation (e.g. in the loan agreements or invoices) which contractually prevent or restrict the ability of the originator to assign the receivable in question.

3. **What legislation governs securitisation in your jurisdiction? What transactions fall within the scope of this legislation?**

   Denmark has not adopted any general securitisation legislation as such. Any securitisation will therefore have to be concluded in accordance with the provisions of the applicable general contract law. Receivables which are evidenced by way of a debt instrument (such as a promissory note) as well as trade receivables in general are however subject to the Danish Act on Debt Instruments which contains general provisions on the assignment of receivables, perfection requirements, conditions for set-off, etc. While the act is not specifically aimed at securitisation transactions it has indirect implications for the structuring of securitisation transactions.

   In respect of banks only, Denmark has adopted a special securitisation regime cf. sections 152i – 152y of the Danish Financial Business Act. Pursuant to these provisions, banks may with the prior permission of the Danish Financial Supervisory establish so-called “refinancing registers” with the purpose of securitising parts of their loan portfolios. In practice, the intention is that the banks may sell and transfer the relevant assets to an SPV pursuant to a receivable purchase agreement, which then in turn issues asset-backed securities as in any other securitisation. However, unlike a classic securitisation, the sale of the assets is perfected by merely entering the assets into the refinancing register thereby superseding any requirements to notify the debtors of the transfer, etc.

   The administration of the assets remains with the bank originating the transaction and as a special feature, set-off rights, etc. vis-à-vis the bank are preserved notwithstanding the transfer of ownership of the assets from the bank to the SPV. Once the assets have been properly registered in the refinancing register, they are ring-fenced from the bank’s

creditors.

While the special securitisation regime is flexible in that it not only applies to the transfer of assets to an SPV, but also to other banks or insurance companies, it is limited in its application given that (i) only banks can set up a refinancing register, (ii) only corporate loans (including any security and guarantees securing the debt as well as any derivatives related to the loans) and corporate leasing contracts are eligible as assets for the purposes of the refinancing register and (iii) that the process of establishing the refinancing register and the ongoing obligations make it less attractive for one-off transaction with a limited volume.

So far, no Danish banks have established any refinancing registers.

The EU Securitisation Regulation applies in Denmark.

4. **Give a brief overview of the typical legal structures used in your jurisdiction for securitisations and key parties involved.**

   Danish securitisations tend to be structured as classic true sale structures with the following key parties being involved:

   - an originator originating the deal and selling the assets to the Issuer;
   - an issuer in the form of a bankruptcy remote SPV acquiring the assets;
   - a servicer/administrator servicing or managing the assets. The Servicer may be identical to the originator;
   - a cash manager handling the cash flows;
   - an account bank holding the relevant accounts;
   - a bond/note trustee or bondholder representative (if subject to Danish law) acting on behalf of the bondholders;
   - a swap counterparty in respect of any interest rate or currency swaps;
   - a liquidity facility provider, providing liquidity, if needed;
   - a credit-enhancement provider, unless credit enhancement is done through over-collateralisation, etc.

5. **Which body is responsible for regulating securitisation in your jurisdiction?**

   There is no central regulatory body which oversees securitisations in Denmark. The Danish Financial Supervisory Authority is however responsible for approving and monitoring securitisations which utilise the refinancing register, cf. question 3 above, and in addition keeps a register over any bondholder representatives.

6. **Are there regulatory or other limitations on the nature of entities that may participate in a securitisation (either on the sell side or the buy side)?**

   In general, there are no explicit limitations on which entities that may participate in

securitisations. However, regulated financial entities may be subject to restrictions in respect of which assets and asset classes they can invest in and similarly investor protection rules in MiFID may prevent certain investor from investing in asset backed securities.

7. **Does your jurisdiction have a concept of "simple, transparent and comparable" securitisations, following the BCBS recommendations?**

   Yes, although in the form of the Simple, Transparent and Standardised concept set out in the EU Securitisation Regulation (Regulation (EU) 2017/2402), which has de facto superseded the STC concept in the BCBS recommendations.

8. **Does your jurisdiction distinguish between private and public securitisations?**

   There are no general registration or authorisation requirements. If the participants however intend to use the special securitisation scheme in the Danish Financial Business Act cf. question 3, they need to register the refinancing register with the Danish Financial Supervisory Authority. Similarly, bondholder representatives need to be registered with the Danish Financial Supervisory Authority.

9. **Are there registration, authorisation or other filing requirements in relation to securitisations in your jurisdiction (either in relation to participants or transactions themselves)?**

   There are no general registration or authorisation requirements. If the participants however intend to use the special securitisation scheme in the Danish Financial Business Act cf. question 3, they need to register the refinancing register with the Danish Financial Supervisory Authority. Similarly, bondholder representatives need to be registered with the Danish Financial Supervisory Authority.

10. **What are the disclosure requirements for public securitisations?**

    In case of a public securitisation the issuer will need to comply with the obligation in art. 17 of Regulation (EU) 596/2014 on market abuse to disclose inside information. In addition, the issuer may be required to make certain periodic disclosures pursuant to the Danish Capital Markets Act in respect of its financial statements etc. unless exempted.

11. **Does your jurisdiction require securitising entities to retain risk? How is this done?**

    There are no national Danish regulations requiring entities to retain risk in securitisation transactions.

    The EU Securitisation Regulation contains provisions on risk retention inter alia requiring an originator, sponsor or original lender to retain a material net economic interest of the securitisation of at least 5%. In practice the risk retention requirement would be satisfied by

either retaining 5% of each of the securitisation tranches or by retaining the first loss tranche or as a combination of the two, cf. also article 6(3) of the EU Securitisation Regulation.

12. **Do investors have regulatory obligations to conduct due diligence before investing?**

    Institutional investors are required to conduct due diligence before investing cf. article 5 of the EU Securitisation Regulation. As part of the due diligence requirement institutional investors must verify that:

    - That the originator or the original lender only grants credits (giving rise to the receivables which are being securitised) on the basis of sound and well-defined criteria as well as clearly established processes for approving and financing such credits. The originator, sponsors and original lenders must in this connection ensure that the same credit criteria are applied to exposures which are being securitised as the ones which are not securitised;
    - That the originator, sponsor or original lender retains a material net economic interest in the transaction of at least 5 % cf. question 11;
    - That the originator, sponsor or SPV fulfils the transparency requirements in article 7 of the EU Securitisation Regulation and makes the required information available

    In addition to the verification requirements set out above an institutional investor is also required to conduct a more fundamental due diligence assessment of inter alia the risk characteristics of the individual position and the underlying assets as well as an assessment of the structural features of the securitisation which may materially impact the performance of the securitisation position.

13. **What penalties are securitisation participants subject to for breaching regulatory obligations?**

    The sanctions for breaching any regulatory obligations applicable to securitisation participants including any obligations under the EU Securitisation Regulation are in practice fines, although in principle imprisonment of up to 4 months is also sanctioned.

14. **Are there regulatory or practical restrictions on the nature of securitisation SPVs?**

    There are no national Danish restrictions on the nature or establishment of SPVs. In practice Danish SPVs are normally incorporated as public or private limited liability companies with the shares being held by a Danish foundation or a foreign trust.

    The EU Securitisation Regulation bans SPV from being established in third countries which are either listed as a high-risk or non-cooperative jurisdiction by the Financial Action Task Force or which are complying with the standards in the OECD Model Tax Convention on Income and on Capital or the OECD Model Agreement on the Exchange of Information on Tax Matters.

15. **How are securitisation SPVs made bankruptcy remote?**

    The bankruptcy remoteness is achieved by a combination of the following measures:

    - The SPV will be newly incorporated, single purpose entity without any prior history or liabilities;
    - The SPV will be owned by a Danish foundation or a foreign trust and will independent of the originator;
    - No employees and only a very limited number of creditors which are known in advance;
    - All services to be provided by the SPV will be outsourced to third party service providers;
    - All agreements to which the SPV is a party will contain limited recourse and non-petition clauses.

16. **What are the key forms of credit support in your jurisdiction?**

    Over-collateralisation and/or subordinated loans seems to be most prevalent forms of credit support/ credit enhancement.

17. **How may the transfer of assets be effected, in particular to achieve a 'true sale'? Must the obligors be notified?**

    In general, the debtors must be notified in order to achieve a true sale of the receivables, save for the instances where the receivables are in bearer form, e.g. promissory notes or where the originator has set up a refinancing register (cf. question 3 above) in which instance the entering into of the relevant receivable (e.g. the loan agreement) will be sufficient for perfection and true sale purposes.

18. **In what circumstances might the transfer of assets be challenged by a court in your jurisdiction?**

    The transfer of assets will most likely be challenged in the event of the originator's insolvency. The basis for any challenge will be that the transfer does not constitute a true sale either because the sale has not been duly perfected or because the sale is re-characterised as a secured loan transaction. A re-characterisation of the transaction will not in itself invalidate the transaction if the relevant perfection requirements have been complied with, but it could arguably become subject to greater scrutiny as to whether the transaction or parts thereof could be voidable.

    In addition, if any commingling of funds has occurred (if the originator also acts as servicer and collects the receivables) or if the originator otherwise has had an unrestricted access to the collected funds, the this would likely be challenged by a bankruptcy trustee and could potentially jeopardise the issuer and the bondholders interest in such funds.

19. **Are there data protection or confidentiality measures protecting obligors in a securitisation?**

The General Data Protection Regulation applies to the gathering and processing of personal data, i.e. information about an identified or identifiable natural person and contains in addition to a number of fundamental principles provisions about the processing of personal data, consent, rights of the data subject as well as transfer of data to non-EU countries. If the underlying assets are e.g. consumer loans, auto-loans or credit card receivables, then data protection compliance becomes imperative.

If the originator is a bank or another financial institution which is subject to the provisions of the Financial Business Act, then the originator has a fundamental duty of confidentiality towards its customers which in general prevents it from disclosing information about customers or their loans/credits with the bank to third parties without their informed prior consent, subject to certain narrow exemptions in relation to administration and marketing.

20. **Is the conduct of credit rating agencies regulated?**

Credit rating agencies are subject to Regulation (EU) no. 1060/2009 on credit rating agencies (as amended by Regulation (EU) 513/2011 and by Regulation (EU) no. 462/2013) as well as the supplemental provisions in sections 343o and 343p in the Danish Financial Business Act.

21. **Are there taxation considerations in your jurisdiction for originators, securitisation SPVs and investors?**

For originators the transfer of the receivables would constitute a disposal which is subject to Danish capital gains tax. Apart from that the transfer of the receivables is not subject to any transfer, stamp or registration taxes.

In general, payments on the underlying receivables between non-related parties may be made to a Danish SPV without any tax deductions. Unless a tax transparent structure is used, a Danish SPV must pay taxes on its income, but will be able to deduct interest on the bonds issued by it, provided that these are deemed to constitute debt for Danish taxation purposes.

Investors deemed resident in Denmark for taxation purposes are subject to capital gains taxes. Denmark does not apply any withholding tax on interest payments under bonds (save for certain controlled/intra-group debt) in respect of investors which are not otherwise subject to Danish taxation.

22. **To what extent does the legal and regulatory framework for securitisations in your jurisdiction allow for global or cross-border transactions?**

There are no formal restrictions preventing global or cross-border transactions and there is no legal requirement that e.g. the receivable purchase agreement, etc. must be subject to

Danish law, etc. If however, as part of the transaction, personal data is transferred to non-EU entities, certain safeguards must be implemented.

23. **To what extent has the securitisation market in your jurisdiction transitioned from IBORs to near risk-free interest rates?**

The transition from IBORs to risk-free interest rates is not that progressed in the Danish market and given the limited number of securitisations taking place, it is difficult to assess how far the transition has been implemented. However, given that Danish securitisation documentation and structures are often based on international – namely English precedents and given that the investor base is often international – it is likely that future securitisations will be based on risk-free interest rates.

24. **How could the legal and regulatory framework for securitisations be improved in your jurisdiction?**

The special securitisation scheme in the Danish Financial Business Act – the refinancing register – could be improved by broadening the scope of it by including other asset classes such as consumer loans and credit card receivables as well as expanding it to non-bank originators. That being said, the current dormant status of the Danish securitisation market is more likely caused by economic and commercial factors (such as easy access to bank funding, substantial competition in the finance market leading to low credit margin as well as a limited pool of homogenous assets suitable for securitisation) than by an inadequate legal and regulatory framework.