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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

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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.

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