February 2022

10 FOCUS AREAS

The legal guide to your business 2022

Pressure on the supply chains | The road(s) to Net Zero | Compliance in practice | Next step for blockchain | E-commerce and platform regulation | ESG due diligence | Sustainability in the construction industry | Responsible tax | Increasing demands on employers | Phasing out of LIBOR

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New year, new legislation

2022 is ahead of us. The last few years have shown how interconnected the world is. In very little time, a local virus outbreak turned into a health crisis and resulted in global challenges with high demand for scarce resources. It called for action and has made it necessary for all of us to navigate a constantly changing reality.

Most Danish businesses handled the crisis impressively and are in a strong position today. Ready to embrace the reopening of society and seize the opportunities that the renewed optimism and global restart bring.

But not everything will return to normal. In very short time, sustainability has moved to the top of the global agenda, and we are generally looking into a changing world that will continue placing greater demands on your business.

With this report, you will be well-equipped to address these future challenges and potentials. We have identified 10 priority areas, which we use as a basis for guiding you through some of the legal areas that we believe are likely to affect your business in 2022.

We hope that you will find new inspiration from the report and use it as a tool to navigate an increasingly complex (legal) world.

Yours sincerely

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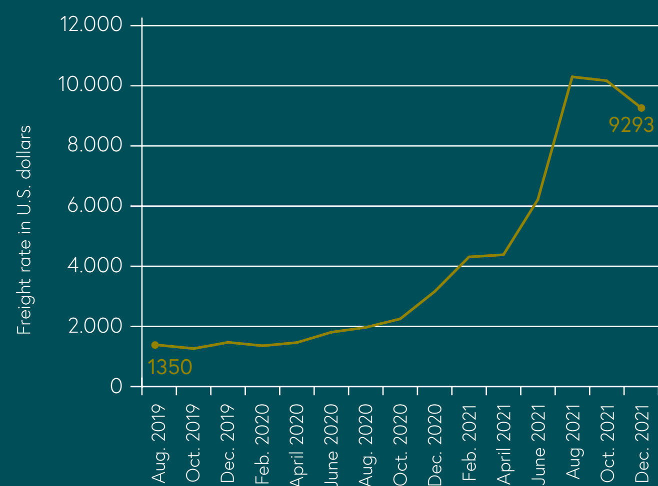
Global supply chains hit by pressure and uncertainty

The COVID-19 pandemic has put global supply chains under pressure and given rise to uncertainty. The pressure on supply chains threatens earnings and affects the ability of many businesses to perform their contracts. Unfortunately, there are many indications that the problems will continue in 2022. In the light of this situation, it may be worth considering whether your business is legally prepared for the market uncertainty, and how your business can best overcome the global bottlenecks from a legal perspective.

Global container freight rate index from July 2019 to December 2021



Price of steel went up

158 %

in Europe from July 2020 to August 2021.

Sources: Statista | Jern & Maskinindustrien

How to deal with the pressure on global supply chains
There are various legal tools available to your business to eliminate the risks associated with the increased pressure on supply chains. Examples of such tools include greater focus on force majeure clauses, variable pricing mechanisms and strategic "dual sourcing", including acquisition of or strategic cooperation with suppliers and business partners through traditional M&A processes.

If the risks are handled properly, it may provide an opportunity to outperform competitors.

Freedom of contract in force majeure clauses
"Force majeure" means events that are (i) unforeseeable and (ii) beyond the parties' control, making them (iii) an impediment to performance of an agreement. If breach of an agreement is due to force majeure, the breaching party is exempt from liability. When negotiating a force majeure clause, the parties generally enjoy freedom of contract, and suppliers should therefore seek to include not only pandemics and epidemics but also possible price increases above a given percentage (based for instance on a recognised index) and general shortage of goods.

Whether the current pressure on supply chains amounts to force majeure is uncertain and will be subject to a specific assessment.

We therefore advise businesses to pay attention when drafting force majeure clauses and to expand their wording.

Points to consider in supply chain contracts
In addition to the force majeure clause, your business should also pay particular attention to other aspects to prevent unexpected supply disruptions, including:

- Price flexibility: Prices may be adjusted according to the open book principle or according to indexes. Which index should be followed for the specific product? At what frequency should prices be adjusted? Should maximum price increases or falls be subject to a cap? If you are a purchaser and not a supplier, it may be better to lock the price. When negotiating price clauses, the cost items of the prices are often split up and used as a basis for agreed price mechanisms.

- Limitations of liability: When delays occur in deliveries, it must be determined who is liable. Is your business liable for delays? And, if so, is your liability sufficiently limited in the contractual clauses?

- Insolvency in the supply chain: An increasing number of businesses are facing bankruptcy in the wake of COVID-19. What happens when a partner in the supply chain defaults (for instance a customer, a supplier or a transport operator)? Is it possible to insure against that?

- Strategic dual sourcing: Depending on the needs of your business, it may be strategically wise to consider dual-sourcing agreements with your suppliers. Should you have only one or multiple suppliers? And what are the advantages and disadvantages of the strategy? Should a supplier be geographically closer to you?

- More restrictions: The trend is towards more and more restrictions, not only as a result of COVID-19, but also because of geopolitical uncertainties. The contract should also allow for future public restrictions such as export restrictions.

All of the above should be considered as part of your value chain. What should e.g. be the consequence of a subcontractor's delay or price changes?

Supply chain uncertainties should be taken into account in M&A processes
2021 was a record year for business transfers. Dual sourcing may strengthen the supply chain risk management of your business and can be achieved through acquisition of or strategic cooperation with a partner in the supply chain. Supply chain uncertainty has already increased focus on due diligence processes in connection with business transfers, and this is likely to continue in 2022.

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Is your business ready to meet the ever more urgent demands for CO2 reductions?

With climate change climbing higher and higher on the political agenda and among the priorities of consumers, banks and investors alike, demand for an ambitious green transition strategy rises. Fail to deliver, and your business may lose market shares, capital and customers to competitors who have better grasped the public's insistence on reduced climate footprints among businesses. More and more banks and investors are even beginning to distance themselves from certain industries, and we are seeing discounts being offered in the form of green bonds and other programmes to companies who live up to specific reduction targets or meet pre-defined objectives – all in support of the political COP goals of Net Zero.

More than

2,000

companies worldwide are leading the zero-carbon transition by setting emissions reduction targets through the Science Based Targets initiative (SBTi).

"Given how central the energy transition will be to every company's growth prospects, we are asking companies to disclose a plan for how their business model will be compatible with a net-zero economy,"
Larry Fink, BlackRock.

Source: Science Based Targets 2022

What are the targets, and what can be done?
The concept of Net Zero originated in the Paris Agreement's target of limiting global warming to 1.5°C, which will require a 50% reduction of the world's combined greenhouse gas emissions (2018 level) by 2030 – and that global greenhouse gas emissions reach Net Zero by 2050.

In the context of individual enterprises, Net Zero, according to the Science Based Target initiative (SBTi), means the greenhouse gas emission from an enterprise's value chain (from start to finish, including sup-suppliers, resources and disposal) is reduced in accordance with the Paris Agreement so that the enterprise's net greenhouse gas emission is zero. Any emission which for technical or economic reasons cannot be eliminated must be neutralised or otherwise compensated for.

It is not an equal challenge for all. For businesses in the Western world, achieving substantial climate results is far easier because there is green electricity available, access to subsidies, the stage of technological development is generally high, and consumers are willing and able to pay extra. It is not so in developing countries, where power comes from the local worn-down coal plant, goods and supplies are hauled in old trucks, sub-suppliers have neither the knowledge nor the resources to think of the climate agenda, and the local government lacks the funds to support a green transition. With the Western companies' better starting point, however, also come increased expectations and a stronger demand to deliver.

There is no question that some industries can change their production to meet the SBTi requirements easier than other enterprises in, say, plastics, cement, and aviation. But everyone has something they can do.

Businesses that still have some way to go to reduce their climate footprints will often find a good place to start in:

- reducing power consumption in production by enhancing their climate shell, updating machinery, etc.
- switching to a more climate-friendly source of energy (e.g. establishing solar/wind systems or a 'green' PPA);
- switching to more climate-friendly suppliers and/or components/materials;
- using more climate-friendly materials; and
- choosing more climate-friendly logistics.

Even now, other businesses are looking at how to neutralise the last part of their emissions via carbon capture initiatives or similar.

Can your company afford to pursue an ambitious CO2 reduction strategy?
For most companies, achieving anywhere near carbon neutrality by 2050 will require significant investments over time – and many companies are questioning whether they can afford to make those investments.

Given the current development, however, they may soon find themselves asking whether they can afford not to. Companies that do not get started on the green transition in time may very well be looking at higher taxes, customers seeking carbon neutral supplies to meet their own targets and the demands of their customers, and they could very well find investors leaving them. Already, Danish institutional investors are well on their way to practically excluding a number of industries and, in addition, demanding initiatives and reporting. One such example is given by Bo Foged, Group CEO of ATP:

"All companies in ATP's investment portfolio must deliver Co2 data for their entire value chain in 2025 at the latest."

To go under the radar is no longer possible, it seems, with more and more ESG ratings focusing specifically on the climate footprints of the individual enterprises, and more and more banks are beginning to make ESG ratings of their own on corporate customers. Businesses therefore have no choice but to adjust to the new, green reality – whether they would care to or not.

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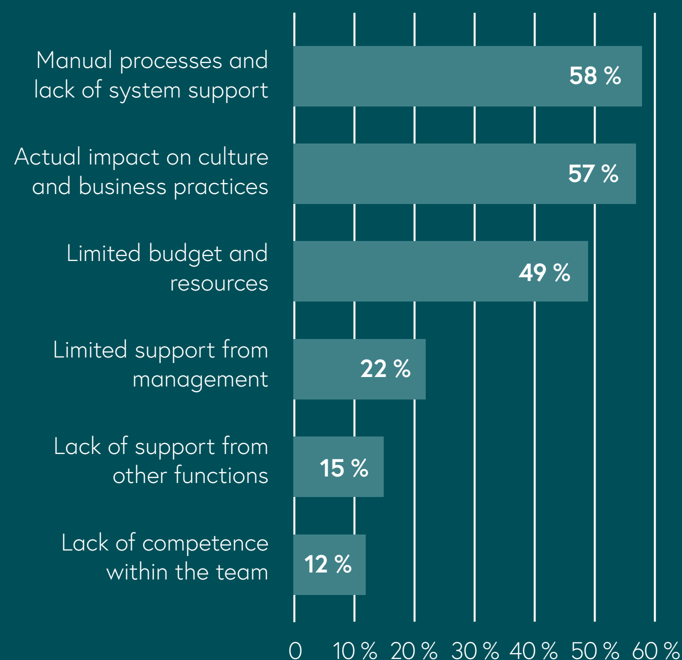
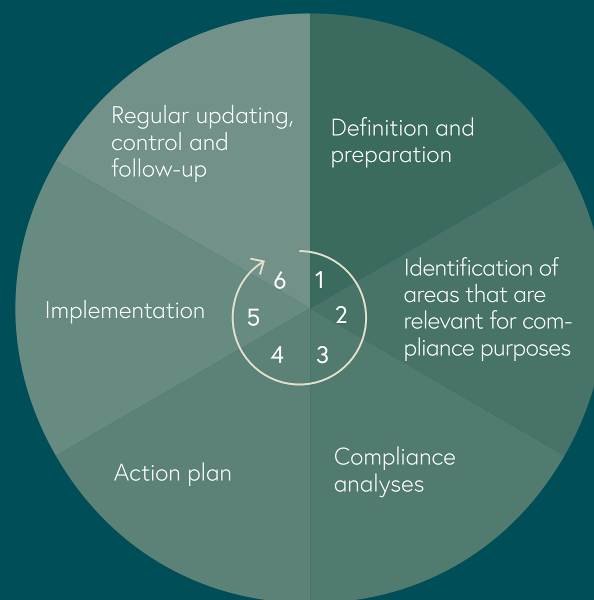
Has your business solved the compliance code?

With increasing regulation and reporting requirements, compliance has in recent years been an important topic on the agenda for organisations. Non-compliance not only involves financial risks but can also cause serious harm to the organisation's reputation. However, in order to implement compliance in practice in your organisation, it is important to understand what it means, and which steps you may take.

Which are the biggest challenges for the Ethics & Compliance team?





Kromann Reumert's compliance model

Source: Nordic Ethics & Compliance Survey 2021

Choice of compliance approach
Compliance means "compliance with rules". But compliance is a dynamic concept, and the definition of it is fluid. The management should set the organisation's overall level of ambition before launching a compliance project.

In overall terms, there are three compliance approaches:

- With the restrictive approach, the ambition is to comply with all legal requirements. This approach is often used in the financial sector, the utility sector, and the pharmaceutical industry, which are all strongly regulated sectors.
- The risk-based approach is based on a risk assessment with the organisation targeting its compliance efforts at pre-defined (high) risk areas.
- With the ethics-based approach, the organisation not only undertakes to comply with the legal rules, but also to meet certain ethical standards that have either been laid down by the organisation itself or by third parties. This approach is to a large extent based on self-regulation through codes of conduct and voluntary compliance with (industry) standards.

The above compliance approaches can also be used in combination. Depending on the organisation's activities and their commercial significance, the organisation may adopt the restrictive approach in cases of particular importance and a more risk-based approach in other cases or areas.

Management support
The management's support is crucial to ensure continued compliance in the organisation. The board of directors should set the overall compliance objectives and establish adequate risk management and internal control procedures. The board of directors will often have a supervisory role. The executive board should draw up and implement specific measures and establish a compliance procedure that meets the objectives set by the board of directors.

Kromann Reumert's compliance model
When an organisation starts a compliance process, the structure is important. The structure should be seen as a tool to remember all necessary steps, including by taking all relevant areas into account and driving the process forward.

Kromann Reumert's compliance model consists of the following 5 phases:

Phase 1 | Here, the project is defined, and the preparations start. The organisation should develop a project vision and goal. Furthermore, budgets and resources must be established, and a timetable should be drawn up. In this phase, the organisation should also identify the rules to be taken into for compliance purposes.

Phase 2 | Here, the business areas and work processes that are relevant for the regulatory framework are identified. During this phase, the organisation may focus on the rules, on the processes or on the systems, or on a combination of these.

Phase 3 | Here, the compliance analysis is made. The organisation must take a critical look at its current processes and procedures and check if they are in accordance with the relevant rules, and any non-compliance must be analysed.

Phase 4 | Here, an action plan is drawn up, which identifies the priority areas and which may be used as a basis going forward.

Phase 5 | Here, the organisation implements the action plan. This may involve drafting of relevant documents and implementation of any new processes and system changes. Focus should also be on employee training.

When all the phases have been completed, the organisation must remember to keep its compliance work updated, for instance by following up on the project every 3rd, 6th and 12th month. The organisation should note that compliance work is a dynamic process, and that changes in legislation can lead to changes in the compliance project.

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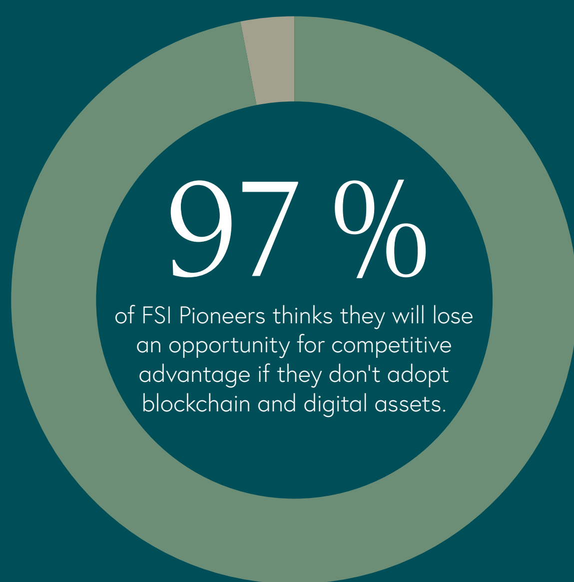
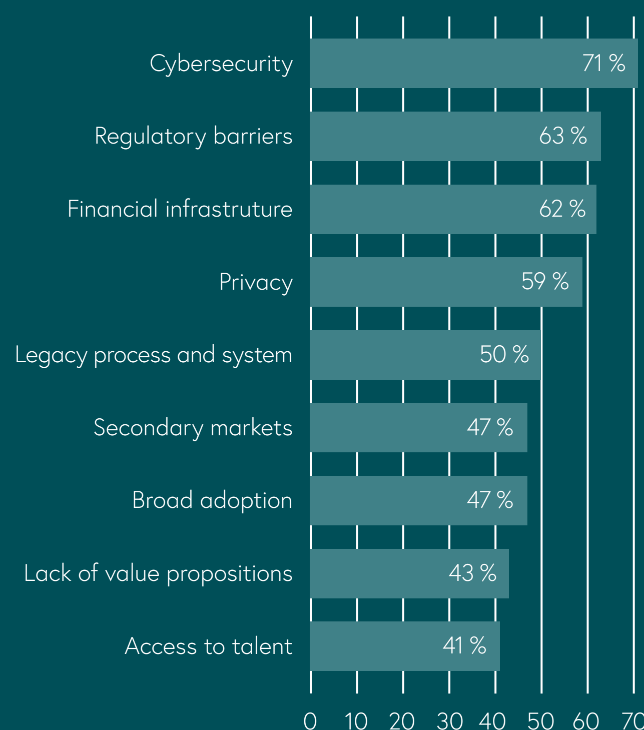
Is blockchain about to mature?

From Fintech to mainstream? The financial industries are beginning to embrace the blockchain technology, whereas other sectors such as the life science industry are preparing to jump on the train, recognising that the technology is likely to have a huge potential in relation to the pharmaceutical supply chain in the future. What are the opportunities and risks, and how does your business get started?



Financial Services Industry Pioneers: "Respondents whose organizations have already deployed blockchain solutions into production and/or integrated digital assets into their core business acitivites".

The leading barriers to digital assets acceptance



Source: Deloitte's 2021 Global Blockchain Survey

The breakthrough of blockchain technology has been predicted for years. However, although the technology has been continuously improved and propagated, many companies are still reluctant to use it.

But the technology has a great potential and a wide range of applications across business areas and sectors – for the benefit of both businesses and customers.

Technological leap

Blockchain previously suffered from a number of initial weaknesses, many of which have now been rectified. The development of blockchain means that scaling is no longer a challenge. Previously, blockchains could handle approximately 15-20 transactions per second; today some blockchains can handle several thousand transactions per second.

Blockchain has been criticised of its high energy consumption. However, the switch to Proof-of-Stake instead of Proof-of-Work – which Bitcoin uses – has reduced the energy consumption of blockchains by up to 99.95 %. It means that blockchains are no longer an obstacle to the green transition.

The fact that more operators offer Blockchain-as-a-Service (Baas) with the above elements has made the technology attractive to a wider range of businesses. An example is the blockchain service provider Concordium, which focuses on compliance and energy efficiency and low, stable transactions costs.

A maturing industry

As a result of the technological development, many central banks – have also started developing so-called Central Bank Digital Currencies (CBDC), which is a blockchain-based currency issued by a central bank.

The growing interest in blockchain is further illustrated by the European Commission's proposal for a Regulation on Markets in Crypto-Assets ("MiCA"). By regulating crypto-assets, the Regulation contributes to making the existence and use of crypto-assets and the underlying blockchain technology more legitimate.

Previous studies have shown that the two biggest obstacles to the use of blockchain have been regulatory uncertainty and lack of consumer confidence. The issuance of CBDCs and the introduction of a regulatory landscape should be welcomed, as they accommodate these initial obstacles and support the maturing process and the advantages of blockchain.

Applicability in the life science industry

Although blockchain has so far mainly been used by financial undertakings, the life science industry is also showing interest in the possibilities of the new technology. The benefits of blockchain in terms of improved collaboration, trust, traceability and control make the technology particularly useful in connection with e.g. clinical trials, supply chain management, and storage and processing of health data.

As an example, blockchain seems to be a suitable solution in the fight against falsified medicinal products. And since blockchain data cannot be deleted or modified, the technology may make it easier to trace individual packs of medicinal products throughout the supply chain. Recently, the EU has introduced similar traceability requirements for medical devices, and blockchain can also prove relevant in that respect.

However, the use of blockchain in the life science industry gives rise to a number of legal questions that should be considered before implementation, including in relation to GDPR, the regulation of medicines, and the EU Medical Device Regulation.

Blockchain can be used by both private and public entities and always requires cooperation between several players. To facilitate effective cooperation, the parties should enter into an agreement that addresses a number of issues, including liability, security, service levels, and handling of IP rights.

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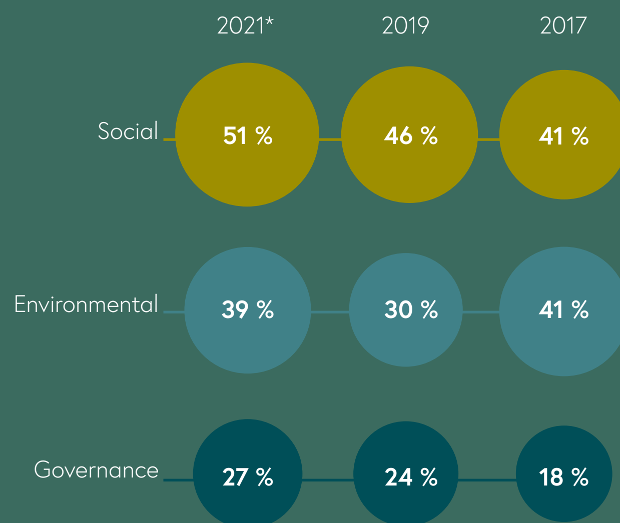
ESG due diligence – is your business ready?

ESG is here to stay. It is increasingly demanded by investors, customers, employees and others. With an ESG due diligence, you can establish if your business meets present ESG standards and identify any ESG opportunities that may improve your business and make it more sustainable.

The social pillar of ESG remains the most difficult to analyse and integrate.



Sources: The ESG Global Survey 2021 | PwC 2021 Global Investor Survey

What is ESG?

ESG is short for "Environment, Social, Governance". The concept was developed for the financial sector in an attempt to define some sustainable investment parameters. Since then, ESG has become mainstream and is now being used to refer to all types of sustainable initiatives and measures.

Today, ESG is important for all businesses and has taken a more definite shape through various regulatory measures. Thus, ESG indicates the impact that a business has on society – "inside out" – i.e. on the climate, on the environment, and on social and regulatory aspects. It also covers society's impact on the business – "outside in" – i.e. the dependence of the business on external factors such as access to raw materials and qualified labour, a well-functioning society free of corruption, etc.

ESG is often used synonymously with climate sustainability, but that is only one aspect of ESG ("Environment"). ESG has a much wider scope, covering also labour and human rights, data protection, diversity, and inclusion ("Social") as well as traditional compliance issues such as anti-money laundering, sanctions and anti-corruption, all of which can be categorised as "Governance" together with recommendations on good and transparent corporate governance.

What are the implications of ESG for Danish businesses?

The fact that ESG has become mainstream means that businesses face increasing reporting and disclosure requirements and must set various targets for their ESG performance. Some of these requirements are a direct consequence of new legislation – including the Sustainable Finance Disclosure Regulation (SFDR) and EU's sustainable taxonomy. Others are made by investors or lenders, employees or customers.

As a consequence, businesses have to take a proactive approach to ESG. Not only to comply with applicable law, but also to stay ahead of developments and attract the best talents and business opportunities, including the most favourable funding.

Cutting corners is not an option – accusations of green washing can be very harmful to one's reputation.

Why ESG due diligence?

ESG due diligence is the process of reviewing the ESG profile of a business – from its products to its manufacturing process, employees and working conditions, data and waste management, suppliers, dealers and customers, management organisation, etc. The purpose is to assess the position of the business in terms of compliance with current and future rules and standards – and to propose improvements by the way of new measures such as policies and procedures, contract terms with third parties, production, operations, and recruitment. As a supplement to their commercial and legal due diligence, investors increasingly request an ESG assessment when selling, purchasing and/or investing in a business to get a clear picture of their risks and opportunities.

An ESG due diligence is also conducted for other reasons and in other contexts, for instance because the management or the owners want to make the business more sustainable and reap the resulting benefits – and maybe even achieve a competitive advantage, not only in relation to sales, but also when recruiting new employees and seeking finance. In this respect, the most effective approach is first to establish the ESG status of the business.

Most businesses have already implemented measures that may be characterised as ESG – such as a whistleblower scheme or a diversity or anti-corruption policy – and this will obviously be a good place to start. From there, the business may proceed to other areas that are deemed relevant. Is your business ready for ESG due diligence?

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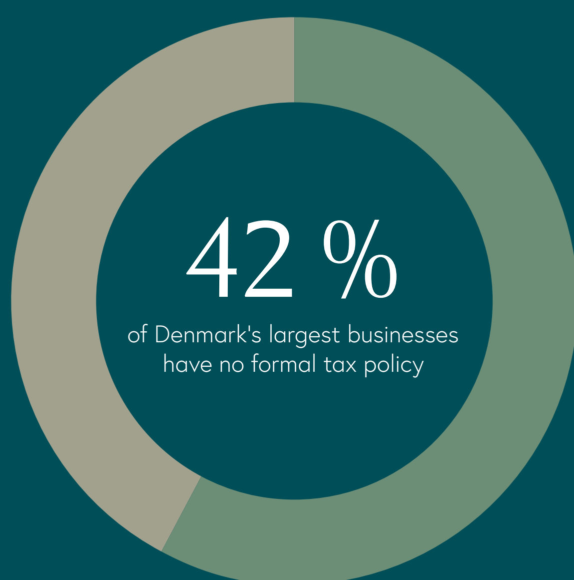
Responsible tax on the agenda

Corporate tax behaviour features prominently in the public debate, and tax governance is a recurring item on board agendas. Investors and interest groups adopt tax codes, and tax is generally the focus of unprecedented attention. But what is "responsible tax", and how do businesses draw up and enforce their tax policy?



Attitudes to corporation taxation

Sources: Økonomisk ugebrev | Oxfam IBIS – Tax Dialoge Report 2020

Increased attention

The current focus on responsible tax follows in the wake of greater public interest in corporate tax payments.

Most recently, the media have taken an offensive approach in their coverage of the corona relief programmes and the recipients' affiliations to owners in tax havens.

Investors and purchasers increasingly demand corporate tax responsibility. A number of *pension funds* have signed a tax code, laying down principles on i.a. tax planning and transparency. And some *municipalities* have signed a charter on their status as "tax haven free municipality", making an active effort to avoid trading with business partners that use tax havens. Recently, *Active Owners Denmark*, a trade association, has launched a tax code for its members.

What does responsible tax imply?

There is no exact definition of "responsible tax". There is consensus, however, that for a business to be regarded as responsible for tax purposes, it must adopt and publish a tax policy and be transparent about its tax issues – for instance by using transparent company structures.

Responsible tax is generally a move away from tax avoidance and aggressive tax planning, requiring businesses not only to stay within the limits of the law but also to recognise the moral dimension of tax and to make a reasonable contribution to our society.

There are no "rules" to be observed when adopting a tax policy, but based on a review of the tax policy of the largest Danish companies, the following is often addressed:

- Compliance and transparency
- Tax incentives and tax planning
- Cooperation with tax authorities across jurisdictions
- Creation of shareholder value

But drawing up a tax policy is not enough; it must also be implemented in the day-to-day work. For this purpose, we recommend that the business adopts procedures for integration of its tax policy in practice with regular follow-up and compliance checks. As an example, the business may lay down procedures for handling of tax disputes if the authorities initiate a tax audit that gives rise to adverse publicity.

Getting started

The Danish Committee on Corporate Governance recommends that the board of directors adopts a tax policy. The specific contents of the tax policy are not decided by the Committee but may be decided by the business itself. Once a formal tax policy has been drawn up, it must be implemented, communicated and followed by the business, so that it is clear to its stakeholders that it makes an actual difference.

In a report from September 2020, Oxfam IBIS (an organisation that, among other things, seeks to promote responsible tax) pointed to the following advantages of having a tax policy:

- It ensures transparency about tax issues within the organisation and across business units.
- It aligns expectations across tax departments in the organisation.
- It specifies what is expected from the employees.
- It lowers the risk of harm to one's business reputation due tax issues.
- It provides greater bargaining power in tax disputes.

There is no doubt that responsible tax should be a fixed item on the annual agenda of the board of directors and the management in general in large enterprises.

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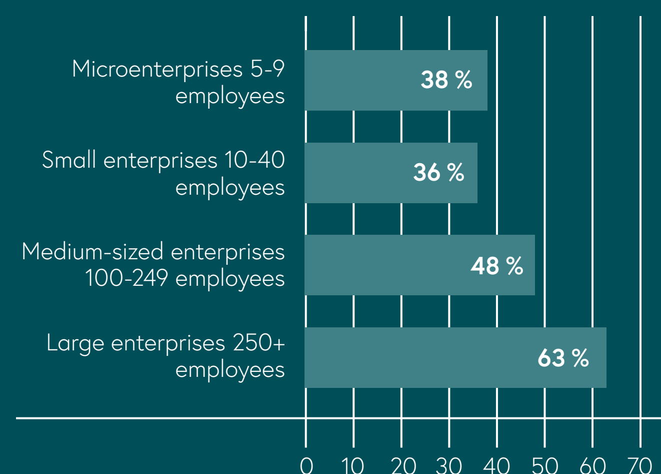
E-commerce and platform regulation – increased focus and new rules

In 2021, e-commerce and regulation of the increasingly popular trading platforms attracted attention in both Denmark and the EU. the area will also be in focus in 2022, where the Danish Sale of Goods Act is updated with new rules on consumer transactions and purchase of digital content. The EU is still negotiating for a new legislative package which includes i.a. a Digital Services Act and a Digital Markets Act intended to create a safe digital universe and ensure fair trading on the digital internal market. So if your business is engaged in e-commerce or platforms, there is good reason to keep an eye on the regulatory development in Denmark.

E-sales in enterprises by enterprise size 2021



E-sales across webshops, online marketplaces and EDI (Electronic Data Interchange)

Digital platform

"...a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the internet".

Sources: Danmarks Statistik | OECD

E-commerce is a vital area of growth, and the way we act in the digital universe is therefore more important than ever. From the policymakers' perspective, focus is on ensuring fair trading practices for all players on the digital market.

In recent years, these efforts have resulted in several EU directives aimed at digital content and the digital market. Some of these directives have now been implemented into Danish law, and further regulation is coming up.

Digital content has found its way into the Danish Sale of Goods Act

An example of the stronger digital focus is found in the amendment to the Sale of Goods Act that took effect on 1 January 2022. The new rules, which are based on an EU directive, deal mainly with the sale of consumer goods.

As a new feature, the rules introduce specific regulation of digital content and digital services.

Companies selling digital content or services should note that, from now on, the Act also applies to the sale of digital content (such as e-books) and digital services (such as apps) to consumers. The rules apply both where the consumer pays a price (money) for the goods, and where the consumer instead provides the seller with his/her personal data as "payment" for the goods.

Along with the introduction of digital content in the Act and its impact on well-known rules on consumer sales, some of the other provisions have also been updated to reflect the digital reality that we live in today.

Further EU regulation with digital focus

In addition to the new rules in the Sale of Goods Act, negotiations are also being conducted at EU level, indicating that more digital content regulation is on its way.

As part of an overall strategy to renew and upgrade its digital markets regulation, the EU Commission has introduced a legislative package, which includes i.a. a Digital Services Act and a Digital Markets Act. The purpose is to provide a safe digital universe and ensure fair trading and competition on the digital market.

The Digital Services Act, which will supplement and update the existing E-Commerce Directive (implemented in the Danish E-Commerce Act), will apply to all companies carrying on business with e-commerce and digital services. The new rules will focus primarily on consumer protection, increased transparency, and protection of rights holders. The Directive is expected to impose new obligations on digital service providers, requiring them e.g. to remove illegal content and to give access to file complaints.

Digital platform providers may expect the Digital Markets Act to be adopted as a separate regulation focusing on the regulation of platforms that have an entrenched and durable effect on the internal market - so-called "gatekeepers". In the regulation, "fairness" and "transparency" are also likely to be key words.

The legislative package is still only a proposal and will probably not be finally adopted until 2023. There is hardly any doubt, however, that the proposal indicates a strong desire for stricter regulation in the digital area.

Digital platform providers should therefore start considering in 2022, how the proposed measures can specifically be implemented in their business.

If the proposals are adopted in the existing form, they will result in a detailed and quite complex regulation of digital markets. Digital platform providers, distributors and users are therefore advised to keep an eye on the legislative package and how it is implemented into Danish law.

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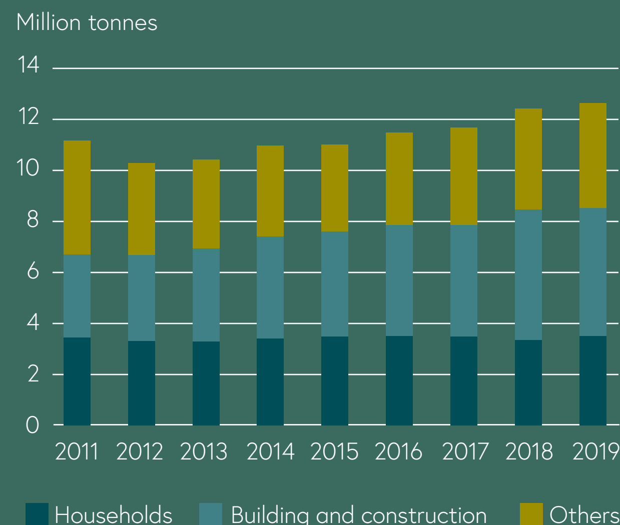
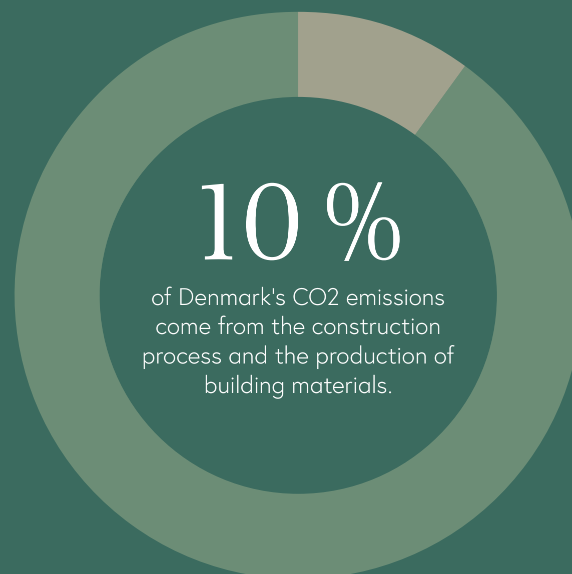
Sustainability in the construction industry – bad or brilliant?

In March 2021, a broad political majority reached an agreement on sustainable building and construction, in line with today's spirit of sustainability. In the building and construction industry, the core buzzwords are green, reuse and recycling. But there is another side to the medal: It is a new area, which involves significant legal challenges to the various phases of building and construction – from the competitive procurement to the assessment of defects. Sustainable and circular building and construction have come to stay – we just need to adapt the law.

Total waste volume by source of waste





Sources: Danmarks Statistik | Klimapartnerskabet for bygge- og anlægssektoren

The changing focus of sustainability
Environmental awareness and sustainability are buzzwords – also in the building and construction industry. Previous focus has been on operationally sustainable buildings; from optimisation of energy consumption to self-regulating ventilation in intelligent buildings. There has been minor focus on the fact that building and construction waste accounts for 40% of the country's aggregate annual waste, corresponding to 5 million tonnes.[1]

This has served as a springboard for the two r's: recycling and reuse. We can therefore see an increase in contractors' reuse or recycling of building material and use of life cycle analyses. Such measures may contribute to assuming responsibility for the climate – and may even also be economically beneficial. But there is another side to the medal.

Recycling or reuse
It is necessary to distinguish between reuse and recycling.

In case of recycling, the material is included as a sub-element in a new product. An example is concrete that is crushed and remixed with new concrete. Recycling results in a new product which is generally subject to production quality requirements. This means that the new product obtains proof of suitability in connection with the production. Recycling in building and construction works is therefore often unproblematic.

In case of reuse, second-hand materials such as old windows or cleaned bricks are reused in a new building. In contrast to recycling, proof of suitability will therefore rarely be available in cases of reuse. However, as reusable materials must generally meet the same requirements as new building materials, the contractor runs a considerable risk of being faced with a liability claim for defects.

Reuse is the new black – but is it too risky?
Reuse has come to stay, but it presents a number of legal challenges. By way of example: An old building is demolished, the bricks are cleaned and are now used in a new building. It is quite likely that old bricks do not have the same durability as newly produced bricks. How can you assess whether the reused bricks suffer from defects? How does reuse correlate with the contractor's liability for defects under the general conditions for building and construction works and supplies? The contractor therefore undertakes a larger risk of defects when reusing bricks. From another perspective: does an employer dare to reuse material if the employer is to carry the risk? Therefore, the legal questions when drafting the construction contract is slightly different. Likewise, consequences of focusing on sustainability must be considered in all phases of the construction, starting with the tender documents and the construction contract.

New national strategy for sustainable building and construction
Sustainability is not solely reuse. The CO2 load is a decisive factor. There is therefore also a need to find the right balance between climate impact, economy and quality.

There are many advantages of supporting circular building and construction at a political level. For example, it promotes the use of durable materials, which also results in lower resource consumption. Despite this, neither building nor procurement legislation encourages sustainable building and construction; however, it also does not prevent sustainable building and construction, and in the public construction works tendered under the Danish Public Procurement Act, it is increasingly seen that the competition element also focuses on sustainability. In addition, there are a number of certification schemes that take into account circular building and construction, for example DGNB and C2C.

On 5 March 2021, a broad political majority agreed on the national strategy for sustainable building and construction. Therefore, already from 2023, life cycle analyses (LCA) will be required for new building and construction works, and phasing-in of CO2 emission limits will be initiated. In addition, the agreement promotes environmental product declarations in tendering processes and increases focus on developing knowledge about when and how it makes environmental and economic sense to recycle and reuse materials in building and construction works. Sustainability – and the related law – is therefore something your business already should be focused on.

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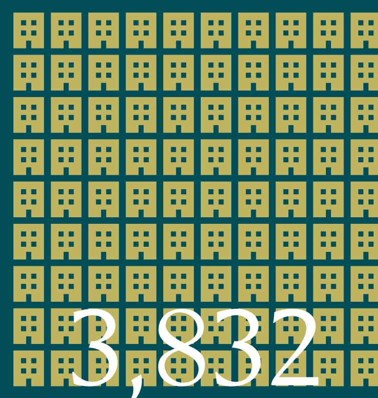
[1] NEW: We continue to sort more waste for recycling – Statistics Denmark (dst.dk)

Mental working environment, investigations and whistleblower schemes

2021 saw an increase in the number of accusations against employers for failure to safeguard the mental well-being of their employees and take steps to prevent inappropriate behaviour. It has become apparent that focusing on precautionary measures is not enough; businesses should also have in place a communication emergency plan and consider the framework of possible investigations that may be initiated against them. In December 2021 new rules were introduced that made it a legal requirement for many businesses to establish and operate a whistleblower scheme, and the area is expected be high on the agenda in 2022.

Investigation process



private enterprises have 50-249 employees and therefore must implement a whistleblower scheme by 17 December 2023.

Source: Danmarks Statistik

Healthy mental working environment

In 2021, the media reported several cases of employers being criticised of not addressing inappropriate behaviour in the workplace.

The criticism concerned both employers' failure to prevent inappropriate behaviour (and provide a healthy mental working environment) or failure to change/act on inappropriate behaviour already established and management's response to such behaviour.

Allegations of sexual and other types of harassment in the workplace are difficult to handle. Many cases involve different categories of employees (who may be at different hierarchial levels) and inquiries into an individual's personal affairs of a highly sensitive nature. The process can be complicated by a number of factors such as cultural differences, virtual work environments, and timing aspects, etc. and will typically involve a heavy burden of proof.

Investigations

There are several reasons why it may be advisable to investigate allegations of inappropriate behaviour. Before starting an investigation, it is important, however, that the employer understands the process, spelling out who is to be in charge of the investigation, whether those making the allegations should be accompanied by advisers, the specific purpose of the investigation, and who has authority to take the consequences or implement relevant measures based on the findings. Out of consideration for those involved, the employer should make the likely consequences of the process clear in a transparent manner, for instance in a policy.

Some useful tips

In 2022, employers should focus on the following as a means of promoting a healthy working environment and facilitating investigations:

- Prevention of inappropriate behaviour through policies, in-house training and management support.
- Establishment of minimum procedures for handling reported allegations/conducting inquiries/ investigations.
- Implementation of an emergency plan in relation to communication/the press etc.

The board of directors should also consider how allegations involving the senior management should be handled.

Mandatory whistleblower scheme

The Danish Whistleblower Act, which came into force on 17 December 2021, requires public employers with 50 or more employees and private employers with more than 249 employees to establish a whistleblower scheme. The scheme must i.a. allow reporting of sexual harassment or other serious conflicts in the workplace involving individuals, for instance gross misconduct.

From 17 December 2023, private undertakings with more than 50 employees will also be subject to the statutory obligations. However, while not legally required to do so, many businesses have already established whistleblower schemes.

The establishment of such schemes gives rise to a number of questions, including who should be able file a report, which conduct beyond the statutory minimum requirements should be reportable, group matters, operation of the scheme, data protection issues, etc.

In view of this, whistleblower schemes are expected to remain high on the agenda in many businesses in 2022. But businesses should remember that the whistleblower scheme cannot stand alone; it should be accompanied by preventive measures (policies, proactive working environment efforts, training, etc.), and the investigation procedure/process should be in place.

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Goodbye LIBOR. Hello RFRs.

The beginning of 2022 marks the end of a long "goodbye" to various LIBOR rates with the introduction of new RFRs (risk-free interest rates). LIBOR is no longer considered to reflect the true cost of funding and will cease to be published in relation to a number of currencies and interest periods from 31 December 2021. The cessation of LIBOR, whilst not intended to materially alter the amount of interest payable, has and will continue to cause practical challenges for market participants.

LIBOR Phase-out overview

Currency	Current rate	RFR	Cessation date
GBP	LIBOR	SONIA	31 Dec. 2021
USD (all tenors save for 1 week and 2 month)	LIBOR	SOFR	30 June 2023
USD (1 week and 2 month)	LIBOR	SOFR	31 Dec. 2021
CHF	LIBOR	SARON	31 Dec. 2021
JPY	LIBOR	TONAR	31 Dec. 2021
EUR	EURIBOR		Remains
SEK	STIBOR		Remains
DKK	CIBOR		Remains
NOK	NIBOR		Remains

Sources: Nordea Markets | Structured Finance Association

Currencies affected
In light of the shift of sources of funding across the financial markets away from traditional models as well as a number of abuse scandals, various authorities, including the UK FCA, have announced that the interest rate benchmark LIBOR (London Inter-Bank Offered Rate) will no longer be published for GBP, USD, CHF, and JPY, and will be replaced by new RFRs (risk-free interest rates). Businesses should be aware that the change materially affects financial markets as LIBOR determines the floating element of floating interest rates. RFRs are considered more robust and less susceptible to manipulation than LIBORs (interbank offered rates).

The publication of LIBOR in respect of GBP, USD (1 week and 2 months), CHF and JPY ended on 31 December 2021, and will end on 30 June 2023 in respect of all other tenors of USD.

You should be aware that EURIBOR (relevant for EUR borrowings) and CIBOR (relevant for DKK borrowings) are not being phased out, with EURIBOR having been adapted to be compliant with new methodologies.

Differences between LIBOR and RFRs
The transition to RFRs has certain key differences that your businesses should be aware of:

Backward-looking rate
Whereas LIBOR is a term interest rate (it is forward-looking for a certain period, for example 3 months), RFRs are compounding overnight daily rates providing a backward-looking cost of funding based on actual transaction data. The methodology of RFRs is such that the actual interest amount payable for a given interest period will not be known before the end of the given interest period.

Timing
Due to the backward-looking nature of RFRs, there is an inherent level of uncertainty associated with the actual interest amount due for a given interest period. The market's solution is the introduction of a 5-day lookback period in RFR fixing, meaning that the final interest rate is known 5 days before the end of each interest period.

Economic neutrality
In contrast to LIBOR, RFRs offer a rate of return of investment with close to zero risk of financial loss, i.e. no credit risk or term premium is taken into consideration. As a consequence, the relevant RFR is likely to be a lower rate than LIBOR.

On the basis that the transition is intended to be economically neutral, the market's solution to counteract the economic impact of this lower rate is the addition of a spread adjustment intended to reflect the difference between LIBOR and the relevant RFR (consequently, your business should be aware that interest amounts going forward will be calculated as the sum of the relevant RFR, the margin and the spread adjustment).

Documentation
In terms of documentation, the markets have responded to reference rate changes by arguably taking a "more is more" approach. Though the majority of the amendments should be standard and generally not negotiated, differences in implementation exist and the volume of changes (loan documents may now be longer by 20 or so pages) has meant a steep learning curve for participants.

Predictions
It would seem likely that given the added complexity that RFRs bring to financial contracts, market participants may seek to simplify the operational and documentary challenges of using RFRs.

In this respect, one area you may want to follow in the future relates to the USD market's adoption of a term RFR in order to remove some of the complexity and uncertainly surrounding RFRs. This is in contrast to the current approach in the GBP market of using daily backward-looking RFRs only. It is to be seen whether the GBP market will similarly follow suit given the practical benefits of a term-based RFRs.

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