KROMANN REUMERT

10 areas of interest for your business in 2021

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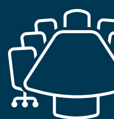

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Set the standard – define the future

2021. A new year awaits. A new beginning.

The year that is now behind us, the first of a new decade, forced all to adapt and adjust and plunged not only businesses but the whole of society into unchartered territory.

But a page has been turned. A beacon has been lit, and hopefully we are heading for, if not a new reality then at least a more familiar world – with cause for renewed optimism.

For although challenges remain and obstacles abound, there is a global restart on the horizon – and with it, for the prepared, comes opportunity.

We have therefore listed 10 focus areas that your business ought to consider in 2021.

Areas that may cause problems if not handled correctly and in time, but which also might just give your business a firm basis from which to seek out opportunities and seize the potential.

We hope this report will give you renewed inspiration and serve as guidance in a still complex (legal) environment.

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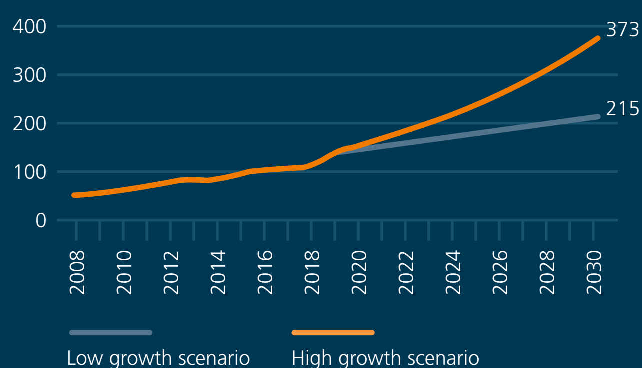
Digital health – a future full of intelligent solutions

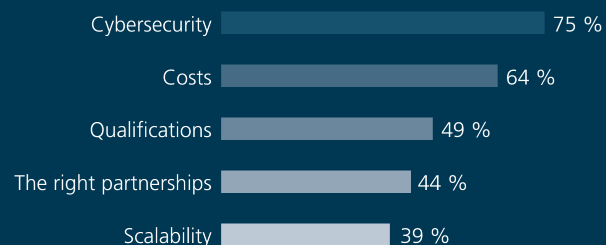
Wearables, health apps, AI, telemedicine, robot surgery, virtual clinical trials, 3D-printing of organs – digital health solutions are fundamentally changing the way we prevent, monitor, diagnose and treat illnesses. Digital health therefore holds immense business prospects, but also legal challenges which businesses need to be mindful of when developing the intelligent solutions of the future.

Life science export potential towards 2030



Source: Damvad Analytics 2020

The greatest barriers to digital strategies in the life science industry



Source: PwC – Executive Survey 2019

Digital health is the umbrella term designating tools and services that apply technology for the prevention, monitoring, diagnosing and treatment of illnesses and to control health-affecting lifestyle habits. The use of digital health solutions is undergoing rapid development these years. The COVID-19 pandemic, with its call for video consultations and other means of digitally exchanging information between doctors and patients, has added further momentum to the area.

Interactions between the life-science and tech industries

Many life science businesses today have digital strategies, but also large tech companies like Amazon and Google have long ago seen the potential of digital health products and services. While this has spawned interesting partnerships, it has also created a competitive situation where tech businesses venture into the health area and launch their own solutions.

We are expecting this trend to continue so that 2021 will bring even more digital partnerships and innovative digital health solutions.

Medical devices

Digital solutions may be subject to the rules on medical devices, in which case businesses may be required to meet a number of requirements that may prove difficult to meet, not least for small companies.

Under the EU Medical Devices Regulation, set to take effect in May 2021, software qualifies as a medical device if specifically intended by the manufacturer to be usable for one or more medical purposes. Software used in a healthcare setting or intended for life-style and well-being purposes, however, is not a medical device.

This is not always an easy distinction to make in practice. Therefore, companies working with digital health should find out what rules apply to their particular digital health solution.

Cyber security and health data

A big survey among American life science businesses ranked cyber security and data protection as the biggest barriers to businesses' digital health strategies. We see those same challenges in a Danish context, too.

Therefore, it is important to know the rules and best practices when it comes to the protection of health data, e.g. in terms of data retention and exchange of data between business partners – especially outside the EU.

Businesses should be especially mindful that the combination of technology dependence, sensitive health data and private use means there is a greater risk that the information may be easily hacked and compromised, not least when it comes to user-oriented solutions, where user-friendliness often seems to take priority over security.

To safeguard the confidentiality and integrity of health data, businesses should be sure to focus on the digital security surrounding them, e.g. by ensuring code reviews and regular data backups.

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Green restart – prepare and prosper

2020 was the year when Denmark for the first time ever put climate objectives into law, despite a worldwide outbreak of COVID-19. But the adverse conditions did not make those objectives less ambitious. On the contrary, lines are currently being drawn for a green restart of the Danish economy, supporting the ambitions of a 70% reduction by 2030 and climate neutrality by 2050. Your business should therefore be prepared, to get off to a good start.

By 2030,
EU's CO2 emissions must be reduced by at least

55 %

compared to 1990

Source: Danish Energy Agency – Energy Statistics 2019

Half of

Denmark's energy supplies in 2019 came from wind and solar energy. That's a new record.

Source: Danish Energy Agency – Energy Statistics 2019

Green foundation

In many ways 2020 has interfered with expectations and ambitions alike. But in terms of EU as well as national objectives of climate neutrality by 2050, both have managed to stay the course.

If we are to meet both the target of a 70% CO2 reduction by 2030 and the ambition for climate neutrality by 2050, the groundwork must be laid now. Shifting the world to green takes time. Therefore, we need the framework to be clear, so that longterm investments can begin now.

Climate objectives require framework conditions

Especially private enterprises have an important part to play in the green transition. They are the ones who will be relied on to realise and deliver the biggest contributions. Both in their own interaction but also, of course, when working together with public authorities.

When it comes to green privatesector investments, the road ahead is still undecided, but 2020 did see the introduction of a number of road maps with pointers for the green transition. In the summer of 2020, for example, a broad political agreement on energy and industry was concluded, and many municipalities have begun to set ambitious climate objectives.

Also, the government's 13 climate partnerships presented in spring their recommendations for how the respective sectors can each best contribute to the green transition.

Other initiatives include:

- a new green government purchase strategy for the DKK 380bn Danish public purchases each year;
- investments in new energy infrastructure (energy islands, off-shore wind farms and other sustainable energy projects) – centrally and decentralised;
- preparations for legislation facilitating Power-to-X.

We are therefore looking forward for 2021 to hopefully be the year when concrete framework conditions for green, longterm investments by private enterprises emerge across sectors.

This will show a clear way forward for the many businesses that are currently poised and ready to make those investments as soon as the required certainty is there.

Preparation is half the job

Careful preparation is key to success in the green transition. If your business is not competing on green initiatives and climate neutrality already, you can be certain that it soon will be. The same is true for supplies to the public sector, where going green is sure to be a pivotal competitive parameter for many public tenders.

Therefore, now is the time for your business to start looking at sustainability requirements in chains of supply, a more climatefriendly solution than your usual one, investing in new technologies and innovative approaches in general, as well as the possibility of forming new partnerships.

If you do, your business will stand well-prepared – and your transition will be well underway.

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Disputes are increasing in number and complexity

When it comes to dispute resolution, the trend is clear in Denmark: disputes seem to increase in terms of scope, value and complexity. At the same time, the COVID-19 pandemic has had adverse micro- and macroeconomic effects, both at national and international level. The number of disputes and dispute resolution activities are therefore expected to grow in the years to come. The higher risk of disputes – and bankruptcies – means that your business should have particular focus on its own and the other party's liability insurance.

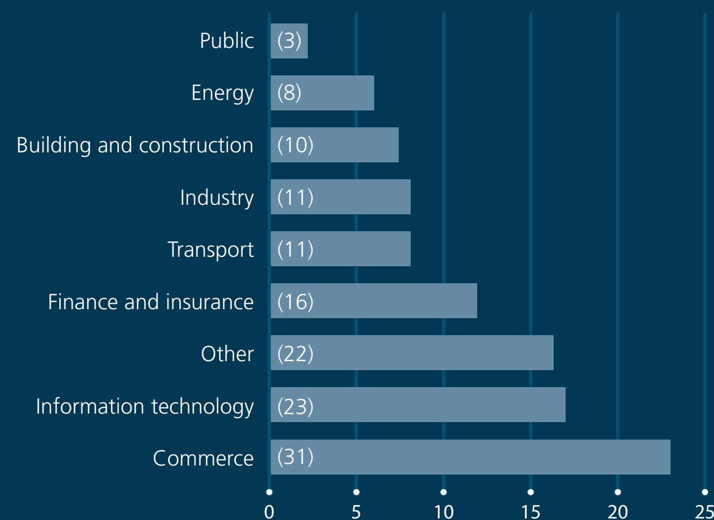
The ICC arbitration institute registered a record-breaking

869

new cases in 2019

Source: International Court of Arbitration (ICC Court)

Arbitration proceedings opened in 2019 by sector



Source: The Danish Institute of Arbitration

Dispute resolution trend

In times of recession, we typically see more disputes, because distressed companies are often less willing to seek a settlement. That is why businesses should consider taking internal precautionary measures, inter alia to reduce the risk of socalled "bet the company" cases, which are disputes threatening the very existence of the business.

Adopt a litigation strategy

All types of businesses are at risk of "bet the company" claims, no matter how wellorganised and structured they are. The first thing to do is to adopt a litigation strategy, addressing i.a. the following:

- Which thirdparty advisers will be needed?
- Does the likely result measure up to the litigation risk?
- Should settlement attempts be made?
- Are there reasons other than economic reasons for choosing litigation?
- Should the dispute be heard by the courts, an arbitration tribunal or any other body?
- Which persons should be involved – internally and externally?
- Should other parties, including insurance companies, be notified or joined?
- How should the other party, insurance company, other stakeholders, authorities, etc. be handled?
- Should the media be involved or not?
- Will any technical aids or digital tools be necessary, e.g. for handling of large data volumes?

Disputes and insurance cover

The higher risk of disputes – and bankruptcies – means that your business should have particular focus on its own and the other party's liability insurance.

If claims are brought against your business

Many businesses have taken out liability insurance, including e.g. professional indemnity or product liability insurance. Such insurance will also cover any legal expenses which you may incur to defend an insured claim.

If a claim is made against your business, it should first of all be established if insurance coverage is available. If so, you must give the insurance company prompt notice of the claim to ensure that the insurance cover is not prejudiced.

If your business incurs a loss

If your business has incurred a loss as a result of acts committed by a contracting party or others, you should make a claim against that party without delay and recommend that that the claim be reported to the insurance company, as applicable.

You should also request details on the tortfeasor's insurance provider, claim number, contact details of the claims processor, etc. You will need this information if the tortfeasor goes bankrupt. Because in that case, your business may be subrogated to the insured's (tortfeasor's) right to contribution and thus claim compensation directly from the insurance company.

However, your business will enjoy no more rights than the insured tortfeasor, and it is therefore important to observe the claims notification deadline in the tortfeasor's policy.

The insurance company's decision

When you have notified the insurance company of your claim, it will start processing it. In some cases, it may be difficult to determine if the claim qualifies for compensation. It may therefore be necessary to challenge the insurance company if it refuses coverage.

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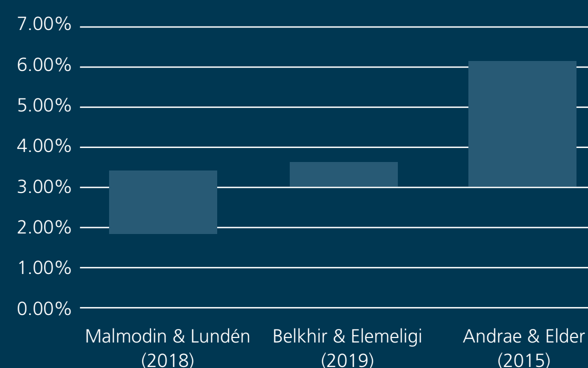
Sustainable sourcing of IT and technology services is good business

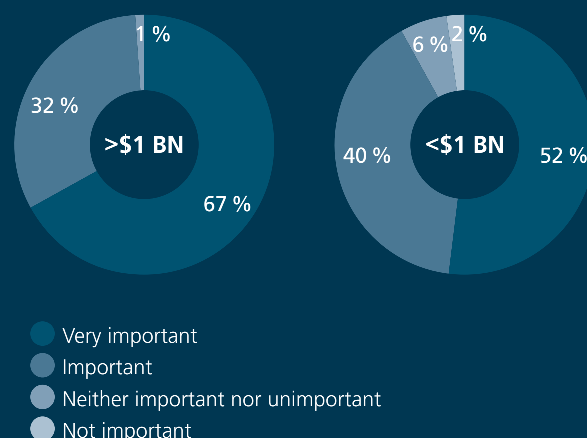
2021 will be a year with focus on sustainable sourcing (procurement) of IT and technology services. The ITC industry already contributes as much CO2 into the atmosphere as the entire aviation industry, and the digitization trend will only accelerate in the future. The potential is therefore great.

The ITC industry's global CO2 emissions



Source: UNEP DTU Partnership

How important is sustainability to the future success of your company?



Source: UNGC – Accenture Strategy CEO Study on Sustainability 2019

In 2020, trade organisations and industry leaders launched a number of sourcing initiatives. Also the Danish government has published a green sourcing strategy for public sector procurement, which represents an annual spend of DKK 380 billion. Until now, the initiatives have mainly involved goods and the manufacturing and construction industries, but sustainable sourcing is just as relevant in relation to IT and technology services.

Sustainable sourcing is good business

Sustainable sourcing not only benefits society as a whole by contributing to reducing greenhouse gases, achieving climate neutrality, and meeting the UN global goals for sustainable development. It also adds value to businesses by

- facilitating compliance with existing and future regulation
- meeting customer, investor and employee expectations
- protecting the company's brands and licenses to operate
- reducing costs, e.g. by focusing on TCO (Total Cost of Ownership), spending, etc.
- stimulating growth in new markets and through innovation

Huge emission reduction potential across industries

According to the World Economic Forum, digital technologies will be capable of reducing global CO2 emissions by 15%. Although the ITC industry is today a large carbon dioxide emitter, slowing down the digital transformation will not solve the problem. On the contrary. But sustainable sourcing of IT and technology services will be essential in the process.

Getting started

For sustainable sourcing to become an asset to your business, it is important to use a strategic approach by balancing risks, effects, finances, and actual business opportunities. The sustainable sourcing efforts must be supported by the management and should further the company's general business strategy. Sustainability must be incorporated in procurement policies and processes, and it may be advisable to enter into a dialogue with customers about sustainable and innovative solutions.

The possibilities of including green and social considerations when sourcing IT and technology services are numerous and may e.g. include requirements:

- that data centres are as far as possible supplied with electricity from renewable energy sources
- that waste heat from data centres is recovered to the greatest possible extent
- that suppliers focus on low-energy solutions when designing new infrastructure
- that suppliers adhere to data minimisation principles (which is already a statutory requirement in relation to personal data)
- that discarded hardware is as far as possible recycled by the supplier
- that suppliers comply with labour clauses and working environment standards
- that suppliers have adopted a sustainability policy

Sustainable sourcing is also about sharing experience, knowledge and results with others. That is good business.

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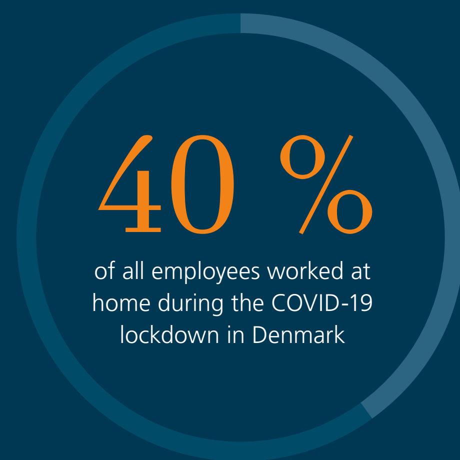
Working environment, home working and #metoo in a time of corona

Working environment remained high on Danish employers' agenda in 2020. First, the COVID-19 pandemic required a number of measures, and then the #metoo and sexism debate put focus on inappropriate behaviour and mental working environment. Two very different working environment aspects, which nevertheless both affect employee satisfaction and productivity and deserve attention by the management. In 2021, focus will continue to be on working environment, and many issues remain relevant as a result of the difficult situation caused by the pandemic.



40 %

of all employees worked at home during the COVID-19 lockdown in Denmark

Source: Statistics Denmark (dst.dk)

'Sexual harassment is any kind of unwanted verbal, non-verbal or physical conduct with sexual connotations, the purpose or effect of which is to offend another person or to create an intimidating, hostile, offensive or disturbing environment.'

Source: The Danish Act on Equal Treatment

The working environment aspects of COVID-19 and the renewed focus on #metoo have brought about many complex issues that had to be handled by Danish employers in 2020. Below, we summarise some of the points that will also be relevant in 2021.

Turn short-term measures into long-term initiatives

Danish employers are responsible for the health and safety of their employees in the work-place. At the outbreak of the COVID-19 pandemic, this obligation manifested itself in crisis management and immediate furloughing of all those employees who were able to work from home. But as it has become clear that the COVID-19 pandemic will be protracted, employers should use the experience gained by now and consider the long-term effects of flexible working arrangements on business operations and employee satisfaction, for instance by asking the following questions:

- Should home working be made a permanent solution independently of COVID-19 and, if so, how can employers then arrange for a safe and healthy workplace?
- How can employee satisfaction and performance be maintained and monitored in a situation where the employees work (permanently) from home, and how can management follow up on performance or behavioural issues?
- How should the employer respond to any adverse effects of home working on the employees' mental health (loneliness or depression) and the related consequences for the company's performance?
- What can be done by the employer or the manager to avoid a situation where the home working day has no end, and where the employee does not take the necessary breaks and/or has no contact to colleagues?
- How can employers and managers benefit from global organisations' long experience with distance working and virtual matrix organisations?

These are only some of the questions that all employers should ask themselves in 2021. Both for purposes of management follow-up, workplace assessment and ongoing dialogue in relevant working environment fora.

Pay attention to the mental working environment

The intense media attention given to sexual harassment in 2020 made many businesses check their systems and procedures for prevention and handling of inappropriate behaviour.

Employers should expect to deal with these issues also in 2021, making sure that all necessary measures have been taken and still reflect the company's needs and environment. Focus should be on clear zero-tolerance policies that support a "speak up" culture, if applicable in combination with a whistleblower arrangement to supplement other established fora and reporting channels. Reference is also made to the implementation of the Government's 14 initiatives against sexual harassment, which will be very relevant to follow closely in 2021.

Companies which have already implemented a whistleblower scheme – or which will be required to do so in November 2021 – as a result of the new EU Whistleblower Directive should consider if the scheme also covers inappropriate behaviour and should watch out for any new legislation that may impose obligations in this respect.

Finally, the new Danish Executive Order on Mental Working Environment is expected to draw continued attention to this issue, just as the Danish Working Environment Authority is likely to intensify its control in 2021.

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Time to adjust your financial covenants?

It is hard to say what 2021 will bring. Certain types of businesses will without a doubt see a decrease in their earnings in the aftermath of the COVID-19 pandemic. Others will experience strong growth and increased M&A activity. Whatever the circumstances, it is worth considering if your business would benefit from making adjustments to the financial covenants in your financing agreements.

Expected growth rate 2021:

Region	Rate
World:	4,2 %
Euro area:	3,6 %
OECD:	3,3 %
Denmark:	1,8 %

Source: OECD

It is expected that Danish enterprises lost operating profits (EBITDA) of approx.

DKK 120bn

from 9 March to 8 July 2020.

Source: PwC & Axcelfuture

In times when earnings are under pressure, many businesses may have issues complying with their financial covenants. Breach of these covenants will typically lead to a default under the terms of the financing and the business risks losing its funding, as the bank may be entitled to change the terms of the financing or demand repayment.

One option for the business is to try and negotiate more lenient financial covenants with its bank, but another solution might be to see if the terms of the financing agreements allow for adjustments to the financial covenants.

Committed financing agreements will often contain EBITDA-based covenants and in particular the so-called leverage covenants, in which case adjustment to EBITDA could be very relevant.

EBITDA
- Earnings Before Interest, Taxes, Depreciation and Amortization

Leverage Covenants
- The interest-bearing debt to EBITDA ratio

Adjustments to EBITDA

Adjustments to EBITDA typically fall within the following categories:

- **Extraordinary costs:** Often, it will be possible to disregard ‘extraordinary’ costs to give a normalised view of earnings. These could be, for example, exceptional or non-recurring costs already paid. Lenders will often seek to restrict such adjustments by a cap based on a percentage or a fixed amount.

- **Synergies:** It might be possible to factor in expected future synergies in EBITDA. This will especially be relevant in acquisitions of businesses where synergies are budgeted in when making the acquisition. While adjustments of this kind are frequent in the international loan market, Scandinavian lenders are often reluctant to accept them, especially if the adjustment can be made on revenue (and not just based on cost synergies).

- **Reorganisation initiatives:** It might also be possible to factor in the effects of internal reorganisation or efficiency enhancement projects in EBITDA. This possibility is increasingly in demand among borrowers – both generally and in connection with concrete initiatives.

- **Equity contribution:** Another option could be to contribute additional equity into the company and have the equity included in financial covenants retrospectively. The effect of this will typically be a reduction of debt and interest costs in the calculations, but the amount of such contribution will most often not increase EBITDA pro forma (as most lenders resist such adjustment).

If your business is in discussions or negotiations with your bank on financial covenants, it is important to remember that the definitions and calculations of financial covenants are typically based on the financing agreement and not your financial statements. Be mindful that the calculation of financial covenants in your financing agreements may not mirror definitions in your financial statements, but will often depend on the wording and interpretation of your financing agreement.

Effects of COVID-19

COVID-19 will affect most borrowers' financial covenants, but the knock-on effects of COVID-19 remain to be seen – e.g. whether the effects of COVID-related restrictions and relief packages may qualify as extraordinary items.

Under certain circumstances, losses and costs in relation to COVID-19 may be considered "extraordinary costs", however it may be hard to convince your bank that a decline in revenue due to COVID-19 should be considered an item which can be adjusted for in EBITDA. Similarly, it could be relevant to consider how funds received from relief packages should be reflected in EBITDA.

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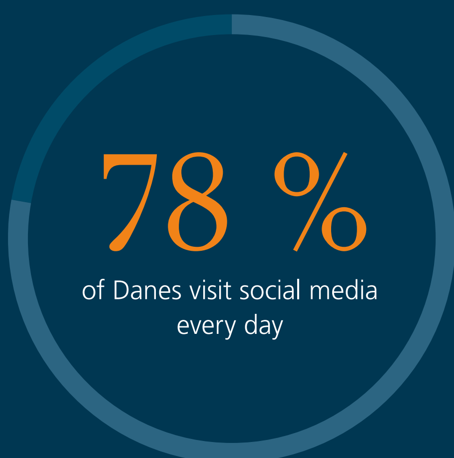
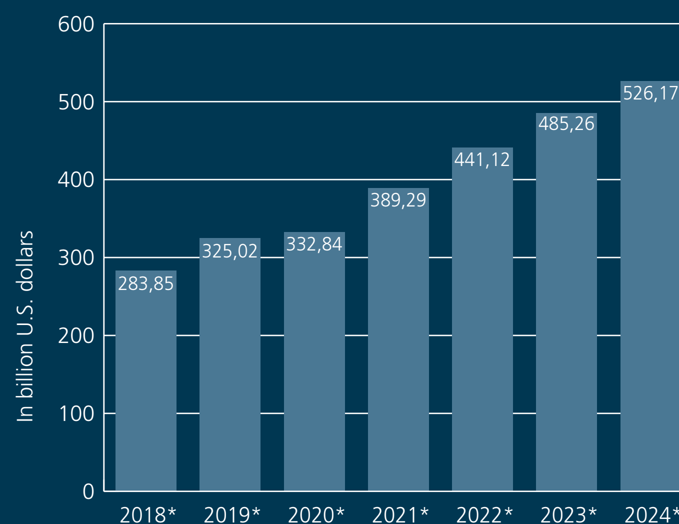
Is your business up to date on the digital marketing rules?

Marketing is not only a matter of choosing message and medium. On the contrary. Marketing is about communicating the message to a relevant target group and make it respond in the desired manner. Maybe you want the target group to buy something? Maybe you want it to speak about your business? No matter what, your marketing activities are regulated by a vast number of rules that you should know. So be sure to enter 2021 with updated knowledge on the digital marketing rules and exploit your full digital potential.



Source: DR Audience Research Department 2019

Expected amount spent on digital marketing worldwide 2018-2024



Source: Statista

How does your business handle spam and cookies?

If you use digital marketing, it is important that you know the rules about consent.

You have probably heard about the prohibition of spam and therefore refrain from sending emails to potential customers who have not given their consent. Maybe you have also considered whether to buy marketing consents from consumers in 2021? If you do that, the third-party seller must document that the consents are valid. With this documentation, you will avoid complaints, fines or – at worst – being reported to the police by the Consumer Ombudsman.

You should also know the rules governing consent to cookies on your website and allow users to tick off "yes" or "no". Preticked consent boxes are not sufficient.

If the user consents to the use of cookies, you should obviously comply with the GDPR rules and be sure to have a valid basis for the processing of the user's personal data.

What other consequences does the GDPR have for your digital marketing?

In 2020, the European Data Protection Board issued guidelines on the targeting of social media users. It follows from the cases mentioned in the guidelines that businesses must often obtain a privacy law consent if they want to use personal data to target their marketing on social media – even if such consent is not required under the Danish Marketing Practices Act.

If your business uses advertising tools on social and other digital media platforms, you should therefore consider which personal data are used to select the recipients of the marketing and how transparent the process is. You should also consider if the marketing involves e.g. profiling or behavioural advertising that requires consent by the recipient.

Finally, the contract with the supplier of the tool must be in place. If the supplier is based in – or is able (on a permanent basis) to access personal data from – a non-EU/EEA country, the rules on transfer of data to third countries must be observed.

Obviously, you should also establish if the cooperation with the supplier implies joint data control in respect of some of the activities. In that case, you will have to enter into a specific agreement.

Be cautious when making marketing statements relating to climate or environment

An increasing number of consumers prefer eco-friendly or sustainable products and support businesses with a climate-friendly and/or ethical profile. Green marketing is therefore popular as ever before.

For that reason, it is important to pay attention to the rules governing the use of environmental and ethical marketing claims.

Such claims must be capable of being proved and appear balanced. If the message is misleading, it conflicts with the Danish Marketing Practices Act and may cause the Consumer Ombudsman, who has such claims as a priority area in 2020, to issue a reprimand. According to the Consumer Ombudsman, the area will continue to be in focus in 2021.

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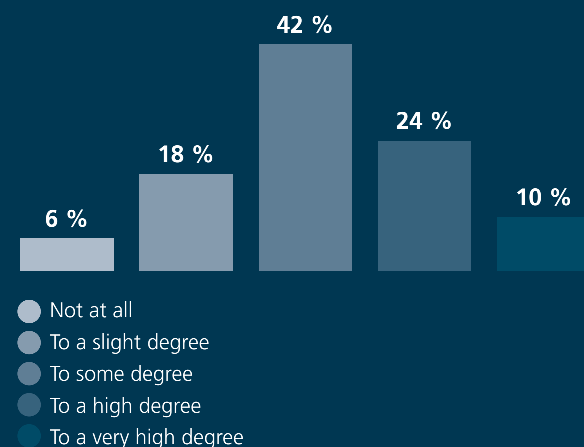
Good corporate governance includes social responsibility

Increasingly, businesses are expected – by the public and shareholders alike – to be transparent and to play an active role in society. Long-term value-adding, sustainability and social responsibility are key concepts to the perception of businesses. In that light, the Committee on Corporate Governance has revised its Recommendations on Corporate Governance, which therefore now contain an increased focus on social responsibility, introducing concepts such as sustainability and purpose. Boards of directors should therefore already now consider how to incorporate the recommendations into their work.

Source: EY Investor Survey 2020

Sustainable business opportunities
How focused is your business on pursuing new business opportunities that will improve your business' social and/or environmental impact on society?



Kilde: Danish Industry

The Committee on Corporate Governance updated its Recommendations on Corporate Governance in December 2020. The new recommendations became effective for financial years starting 1 January 2021 or later. The first time companies will be required to report in accordance with the recommendations will therefore be in 2022, for the 2021 financial reporting.

The recommendations may be seen as a best-practice tool box to enhance transparency and improve work by the individual boards of directors. In that sense, the recommendations may support the companies' value-adding performance. At the end of the day, it is all about common sense, morality, ethics, and decency.

Focus on sustainability and social responsibility

One of the concepts that the Committee introduces and highlights in its recommendations is 'sustainability'. The term covers not only economic, financial and innovation-related sustainability but also environmental, employee and social responsibility (CSR (Corporate Social Responsibility) and ESG (Environment, Social, Governance)). At the heart of the concept lies the role of the enterprise as a positive contributor to society as a whole.

Until now, the Committee merely recommended that each board of directors adopt CSR policies. Now, it specifically recommends that the board ensures compliance with those policies, including social responsibility and sustainability. Businesses are also recommended to ensure transparency about the policy by incorporating it into the management's review or publishing it on the company website.

Also, companies should have a tax policy and should be transparent about this policy, too. Most boards of directors should find the recommendations easy to work with.

ESG investments

Sustainability in relation to the financing of companies is also increasingly in focus. If we look to the stock markets, a recent Epinion study for Finance Denmark showed that the COVID-19 pandemic has prompted investors to focus more on sustainability. Particularly young investors and investors in the Greater Copenhagen Area have revised their views on sustainability and will be investing sustainably. If we compare the last five years' return on global shares against that of global shares focusing on ESG (Environment, Social, and Governance), it is clear to see that sustainable investments in the past five years have performed better than investments with no ESG focus.

Thus, it is important for the company's value-adding capabilities that the board of directors views sustainability in a broad perspective.

It will be interesting to see the boards' continued and intensified work with sustainability and, not least, how it will be implemented in practice.

The board of directors' work with the new recommendations

Each board of directors should focus on and discuss what value the recommendations could have. This goes both in relation to the recommendation for social responsibility (sustainability) and the other recommendations.

Thus, when discussing the company's strategy and business model and deciding how to best safeguard the company's interests and value-adding capabilities, the board should incorporate CSR considerations. If it does not, the company risks jeopardizing their value-adding capabilities – there have been examples of this happening during the COVID-19 pandemic.

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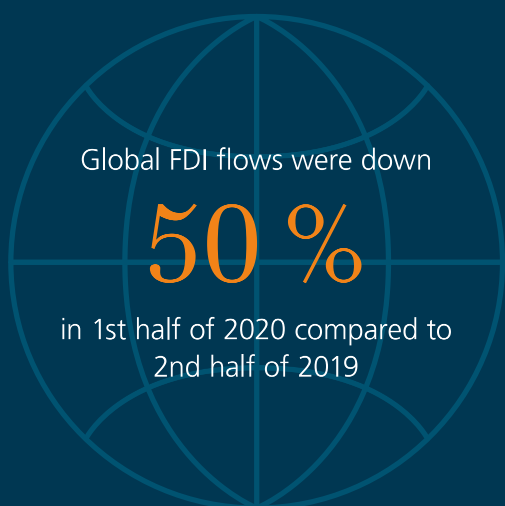
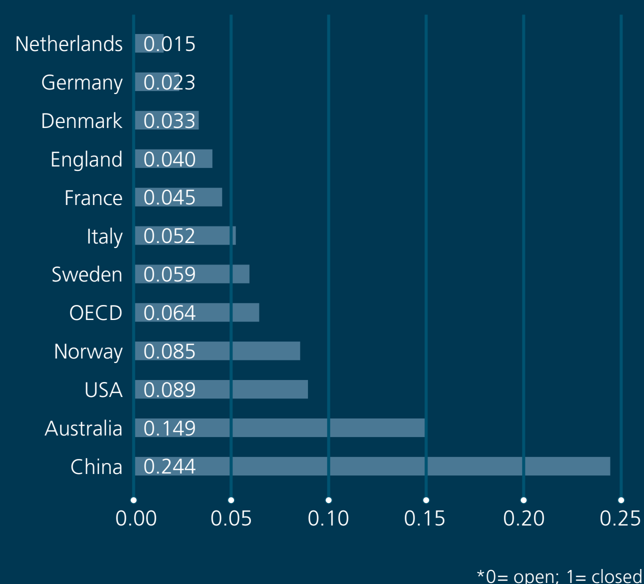
Increased focus and tightening of FDI rules

Screening of foreign direct investments (FDIs) is becoming increasingly important to M&A and other international trade. With the entry into force of the EU's FDI Regulation and the increased need to protect national health industries and other critical sectors as a result of the COVID-19 pandemic, many countries are implementing new screening mechanisms. Denmark is no exception. A new screening system is expected before long. The increased focus and screening of FDIs makes FDI an area on which businesses should keep a watchful eye in 2021.



Source: FDI In Figures – OECD

Assessment of countries' level of FDI restrictions



*0= open; 1= closed

Source: OECD Data

New national rules

In the course of 2021, we expect to see i.a. Denmark, the UK, Sweden and the Netherlands implementing completely new and general screening programmes allowing for the screening of investments from a national security point of view.

So far only the UK bill has been published. It proposes that all investments – whatever the size of the target company's revenue – will be subject to scrutiny if the investor acquires more than 25 per cent of the shares or votes or otherwise acquires a significant influence over the company. The bill also calls for mandatory notification requirement in particular sectors for purchases of more than 15 per cent of the target's shares or votes.

The FDI Regulation has come into effect

Besides the expected national changes, the EU's FDI Regulation came into effect on 11 October 2020. While it does not require Member States to implement FDI rules, it does require them to inform about the national investments they are screening. This duty of information also applies to national investments which are not screened, if so requested by other Member States or by the European Commission. That way Member States and the Commission will be able to submit comments, which the particular Member State then must take into 'due consideration'.

Tightened rules under COVID-19

In addition to the general trend of introducing FDI rules the COVID-19-pandemic has also caused many countries to tighten their existing rules. In France, for example, the threshold for reporting certain investments has been reduced from 33% to first 25% and then as low as 10 %.

Moreover, the European Commission has urged EU Member States to use their national rules and, if relevant, to introduce new ones to protect the EU from acquisitions, especially in the health industry.

New Danish FDI rules in 2021

In December 2020, the Danish government submitted its bill proposing an investment screening act for consultation. The bill is expected to be presented to Parliament in February 2021 and to take effect in July 2021.

The bill proposes a mandatory approval requirement for transactions by which a foreign investor gains control of more than 10 per cent of a Danish enterprise active in a particularly sensitive sector and a general, voluntary notification option across sectors in cases where an investor outside of the EU gains control of more than 25 per cent of a Danish enterprise.

It is crucial that the coming Danish rules clearly specify which sectors will be subject to the mandatory notification requirement and exactly what it takes to acquire control equivalent to 10 per cent of the enterprise.

It pays to be proactive

If your business invests or receives investments across borders, it is important that you consider whether your investments will be comprised by the many new FDI screening mechanisms. By incorporating FDI into your other due diligence procedures you can avoid unnecessary delays in transaction processes and, worst case, sanctions from the authorities potentially leading to roll-back of the investment and fines.

Our website is continuously updated with the latest FDI news. It offers i.a. an overview of the rules in Denmark and insight into global trends.

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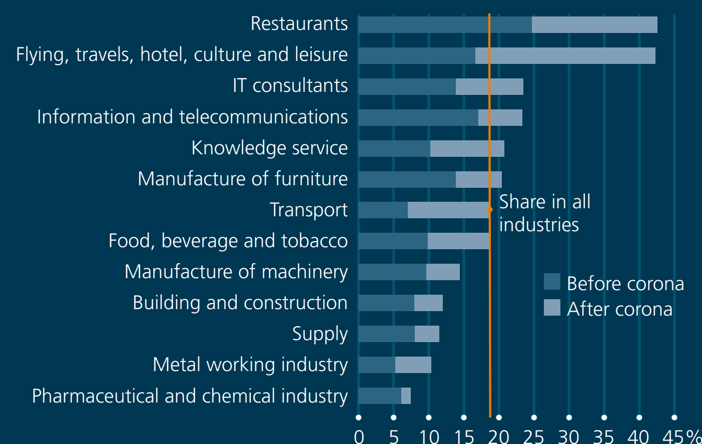
Risks and management liability in times of uncertainty

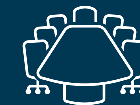
The COVID-19 pandemic has made the environment that business managers have to navigate more volatile and uncertain. A difficult task that should make businesses consider how their business is affected. During times of uncertainty, many firms will have increased attention on management liability – and a greater need for protection against losses from insolvent customers and business partners.

Source: DI, Bisnode og Statistics Denmark

Enterprises across industries to have exhausted their equity in 2020, pct.



Source: DI, Bisnode



Management liability in businesses under threat of closure

If a business is facing a threat of closure, the standard to be used when assessing the liability of the management is aggravated. The reason is i.a. that when a bankruptcy is threatening, the management will have to safeguard the creditors' interests instead of the shareholders' interests.

The management must ensure that the company's financial resources are at all times adequate. The management will also be required to close the company if it is clear that it cannot be carried on without the creditors incurring losses – that it has reached the socalled "point of no return". If operations are nevertheless continued, the management may be held liable for any loss suffered by the creditors.

Assessment of the point of no return

When assessing whether the point of no return has occurred, the management may retain a reasonably optimistic outlook. If, for instance, negotiations are being conducted for further funding or sale of the business whereby the creditors will be paid in full, the management will not incur liability.

Based on case law, the liability standard will also be less rigorous if the management has obtained – and acts according to – external advice.

If is often difficult to determine if the point of no return has been reached – notably during the COVID-19 pandemic, where circumstances change on a daily basis.

If the company is at risk of closure, the management should, nevertheless, pay particular attention if the company is considering:

- to assume new obligations or incur new debts (also through credits)
- repay old or significant debts
- provide security to existing or new creditors
- reduce or increase intercompany balances to any significant extent

It is also important to protect the company against losses from customers and business partners that become insolvent. Provision of security, bank guarantees, cash payments or prepayments are classic tools, but monitoring of trade and payment patterns is also a useful lossprevention technique.

More flexible rules on corporate restructuring

In response to the outbreak of the COVID-19 pandemic, the Danish government introduced a Bill on 21 October 2020 aimed at helping businesses which, although viable, are facing temporary financial difficulties to continue trading without having to file for bankruptcy.

The most important changes proposed in the new act are as follows:

- no need for the court to appoint an accountant
- introduction of a fasttrack business transfer procedure without adoption of a restructuring proposal
- better access to payment from the Employees' Guarantee Fund with the result that the buyer of a company which is in the process of restructuring assumes only obligations incurred after commencement of the restructuring proceedings.

If the Bill is passed, the result may be an increasing number of applications for restructuring, and a restructuring scenario will affect the terms of business in the restructuring period. As an example, the company may terminate ongoing contracts at the usual or at a reasonable notice notwithstanding that the parties have agreed a longer notice period or have agreed nonterminability.

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