



MAQS LAW FIRM

NEWSLETTER COMPANY LAW

NEWSLETTER – March 2010

NEW

DANISH

COMPANY

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This newsletter is addressed to our foreign clients and collaborators, who own Danish subsidiary companies, assist Danish subsidiary companies or carry out other activities in Denmark.

A new company act has been adopted and parts of it are already effective on 1 March 2010.

The Danish Companies Act, uniting the Public Companies Act and the Private Companies Act, implies amendments to existing companies as well as in connection with the foundation of companies.

This newsletter briefly describes the essential amendments and new possibilities and in conclusion sums up the points to be taken into consideration by all existing companies at the coming ordinary general meetings in the spring of 2010.

Changes per 1 March 2010

New deadlines for the general meeting

The new company act introduces a number of deadlines that differ from the current legislation. As an example it introduces deadlines for proposals at the general

meeting, notices convening a meeting, inspections of material prior to the general meeting, registration deadlines, and changes to and expansion of the rules regarding attendance by power of attorney.

If the articles of association are not in compliance with the new company law, the general assembly may not be legal and decision made on this general assembly may not be legal.

Shareholder's agreements

The new act establishes that shareholder's agreements are no longer binding for the company.

It means that a shareholder, whose rights according to a shareholder's agreement has been violated at the general meeting, will not be able to contest the validity of the decision.

As an example, the chairman of a general meeting has no right or obligation to follow any rules which do not appear from the articles of association and consequently, any particular rules - that may have previously secured a certain division of power or certain rights - will suddenly become impossible to enforce.

As this may have an adverse effect on the circle of shareholders, the consequences of this amendment are obviously quite far-reaching.

It is therefore essential to consider which stipulations from an existing shareholder's agreement can be most advantageously transferred to the articles of association. Further, it ought to be considered whether to add any specific revised non-fulfilment stipulations to existing agreements.

New capital requirements

One of the more conspicuous amendments introduced by the new company act is that the capital requirement in connection with the foundation of a private company is reduced from the present DKK 125,000 to DKK 80,000. With regard to public companies the present minimum capital requirement of DKK 500,000 is maintained.

The new company act also introduces a possibility of paying up only part of the share capital upon foundation and actually of paying up no more than 25 per cent of the capital upon foundation. This will however not be effective before expected 1 May 2010.

Shareholders' rights

The new company act introduces a possibility of allowing non-voting shares in a public company, a possibility which has previously been allowed only with regard to private companies.

In addition, it will become easier for companies to differentiate the voting rights attached to the shares. Whereas previously it has been prohibited to differentiate the voting rights attached to the shares of more than 1:10, the differentiation will now be free.

Flexible management structure

Generally, the new company act grants the companies more freedom in establishing the management structure. According to present legislation, a public company requires a board of directors as well as a board of management; whereas a private company may choose to have both or just one of the mentioned decision-making bodies.

To facilitate a flexible composition, which may be customised to the needs of any individual company, the new company act regulations are somewhat less tight.

Instead of a board of directors, a public company may choose to have a supervisory board, supervising the board of management.

A private company may choose to have only one decision-making body, which, however, shall be a board of management.

Management's liability does not change under the new company act. However, it should be kept in mind that the new act implies several examples of how Management may become liable for transactions which were previously impossible to carry out.

For example, self-financing will – to a certain extent – become possible according to the new act. This is expected to come into force on 1 May 2010.

Thus, the borderline between legal and illegal self-financing may become a new balancing act within boards of directors/managers.

Accordingly, there is every reason to exercise caution when using the new possibilities and, if necessary, to seek professional advice before making any decisions.

Purchase of own shares

Previously, the purchase limit has been 10 per cent of the total share capital. This limitation has been abolished and it will be easier for companies to purchase own shares. However, any purchase and holding of own shares is conditioned and as a main rule the holding of own shares may not exceed three years.

Changes expected per 1 May 2010

Shareholders' register and shareholders' book

The new company act introduces a shareholders' register with the purpose of registering shareholders of more than 5 per cent of a share capital. The shareholders' register will be open to the public and administered by the Danish Commerce and Companies Agency.

Also a shareholders' book is introduced, replacing the present register of shareholders. A number of deadlines are attached to the registration and updating of the new systems, and any violation of the deadlines can be sanctioned by fines.

It is therefore important to decide how to update the shareholder's book and register and to establish in-house procedures in order to ensure the correct updating and registration.

The regulations regarding the shareholders' book and register will, however, not become effective until at some future, yet unknown, date as this implies the establishment of a specific IT-system for processing of the registers at the Danish Commerce and Companies Agency.

Self-financing and economic contribution

The new company act allows companies to participate in self-financing up to a certain extent, which has not previously been permitted in Denmark. Self-financing, however, is a flexible solution in several other countries, e.g. in connection with transfer of business or succession where a company may assist a buyer with the financing by making use of its free reserves.

The access to self-financing will not be free, though, as a number of requirements has to be fulfilled. For one thing the financing shall be based on market terms and in due consideration of the company's financial position.

Moreover, the new rules will make it possible to contribute financially to a parent company outside the EU or the EEA, such as the USA. However, these rules will not enter into force to begin with, but at a future, yet unknown, date.

Updating of articles of association

Many articles of association have been drawn up according to the present regulations, soon to become historic. Thus, the articles of association will most likely not be in accordance with a number of provisions stipulated in the new company act, and this is why the articles of association need to be updated.

Further, the Danish Commerce and Companies Agency is expected to decide that the requisite amendments be made at the next general meeting, i.e. in most cases in the spring of 2010.

Thus, it is essential to have your articles of association updated now.

ESSENTIAL CHANGES WITH REGARD TO THE FOUNDATION OF PUBLIC OR PRIVATE COMPANIES

- The capital requirement is reduced from DKK 125,000 to DKK 80,000.
- Documentation in connection with the foundation may also be in Norwegian, Swedish or English.

Regulations which will become effective at some future, yet unknown, date:

- Possibility of paying up no more than 25 per cent of the capital (however, minimum DKK 80,000) at the foundation.
- Possibility of founding ahead.
- Possibility of investing capital without an evaluation report.

ESSENTIAL CHANGES WITH REGARD TO EXISTING PUBLIC AND PRIVATE COMPANIES

- Shareholders' agreements are no longer binding for the companies or the decisions made by the general assembly.

The shareholders ought to consider which stipulations to transfer from the shareholders' agreement to the articles of association in order to ensure that the company, the general assembly and the chairman continue to be bound by these stipulations.

- Private companies may not establish adoption requirements less restrictive than those introduced by the new company act.

The management ought to consider whether the present articles of association contain stipulations conflicting with the company act.

- Changes to deadlines for proposals at the general meeting, notices convening a meeting, inspections of material prior to the general meeting and registration, as well as changes to and expansion of the rules regarding attendance by power of attorney.

The management ought to consider whether the articles of association contain deadlines shorter than those stipulated by the company act. In the affirmative, the articles of association shall be amended at the next ordinary general meeting.



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Challenging the laws of convention

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