Implementation of the new Shareholder Rights Directive in Denmark

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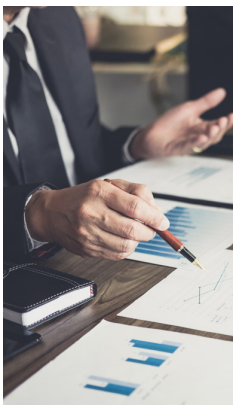

IMPLEMENTATION OF THE NEW SHAREHOLDER RIGHTS DIRECTIVE IN DENMARK

The new EU Shareholder Rights Directive is about to be implemented in Danish law. The new bill has just been introduced in its final form and is now only awaiting political discussions, and we expect that the bill will be adopted in final form reflecting the current content of the bill. The new rules will apply to companies with voting shares listed for trade on Nasdaq Copenhagen A/S.

On 6 February 2019, the bill implementing the new EU Shareholder Rights Directive (No. 2017/828) was introduced in its final form and is now only awaiting political discussions and final adoption in the Danish Parliament. As the bill concerns the implementation of a directive, we expect that the bill will be adopted in final form reflecting the current content of the bill. The new rules are expected to become effective as of 10 June 2019. However, a number of the new rules will be applicable to the Danish companies at a later stage, see also below.

The bill will introduce new rules regarding (i) listed companies' right to obtain identification information of shareholders, (ii) remuneration of the management and (iii) transactions between a company and its related parties. This memorandum focuses only on these changes.

The new rules will apply to companies with voting shares listed for trade on Nasdaq Copenhagen A/S. Listed companies subject to the Danish financial legislation must comply with both the rules in the Danish Companies Act and the rules in the Danish Financial Business Act and in case of conflict between the two sets of rules, the companies must observe the highest standard of applicable requirements in these rules.

REMUNERATION POLICY AND REMUNERATION REPORT

The new rules on remuneration of the management entail most changes compared to the current rules and will thus require the most significant adjustments for the companies. The rules on remuneration policy and remuneration report will in future appear from the new wording of section 139 (the current provision on guidelines on incentive-based remuneration) and the new sections 139a and 139b of the Danish Companies Act.

According to the new rules, the companies must in future prepare a remuneration policy and a remuneration report for the total remuneration of the board of directors and the executive management board. The obligations to prepare a remuneration policy and a remuneration report will replace the current obligation to prepare guidelines for incentive-based remuneration of the management, which will be deleted from the Danish Companies Act. The new rules on remuneration of the management will apply to the listed companies as of their first annual general meeting convened in the financial year starting as of 10 June 2019 and thereafter. This means that the new requirements for the remuneration policy will be applicable to the listed companies as of the annual general meeting in 2020 and that the new requirements for the remuneration report will be applicable on the subsequent annual general meeting in 2021. It should, however, be noted that at this stage it is not completely clear whether companies with a financial year other than the calendar year, for instance, a financial year starting after 10 June 2019 (e.g. 1 July), may wait with implementing the new requirements until the annual general meeting in 2020, or whether these companies are required to observe the new rules already from the annual general meeting in 2019. The Danish Business Authority will expectedly clarify this matter.

FROM SOFT LAW TO HARD LAW

The majority of Danish listed companies comply with the Recommendations on Corporate Governance ("the Recommendations") and therefore already have a remuneration policy today and prepare an annual remuneration report. The new provisions of the Danish Companies Act will imply that the obligation to prepare a remuneration policy and a remuneration report will be a statutory obligation (hard law) in future. So far, a statutory obligation has not existed, but only a recommendation which the companies could follow on a voluntarily basis.

VOTE ON THE REMUNERATION POLICY AT THE GENERAL MEETING

According to the new rules, the companies must ensure that a general meeting is held for the approval of the remuneration policy by the shareholders and also in case of any subsequent significant amendment of the policy. The policy must in any event be up for approval by the general meeting at least every fourth year. According to the explanatory notes to the bill e.g. changes in the ranges for the distribution of fixed and variable remuneration as well as introduction of new remuneration components may be deemed as "significant amendments".

If the general meeting does not approve the remuneration policy, the board of directors must submit a new draft remuneration policy for approval at the next annual general meeting at the latest. Until the draft remuneration is approved by the general meeting, the company will not be able to pay remuneration in accordance with the remuneration policy which was rejected by the shareholders. This means that in this period the company will have to pay remuneration in accordance with a previously approved remuneration policy if the company has one. If the company does not have an approved remuneration policy yet, the company must pay remuneration in accordance with the company's previous remuneration practice.

If the general meeting approves the remuneration policy, the company may only enter into, renew or amend specific agreements with members of the management when such agreements are in compliance with the policy.

TEMPORARILY DEVIATION FROM THE REMUNERATION POLICY IN EXCEPTIONAL CIRCUMSTANCES

As something completely new, it will in exceptional circumstances be possible for companies to deviate from the remuneration policy, but only at a temporarily basis It is a condition for the companies to be able to exercise the possibility for deviation that the company's remuneration policy includes a detailed description of the process and procedures to be observed in case of a deviation and also a specification of the parts of the policy, including the remuneration components which may be deviated.

The new rules allowing the companies to deviate from the remuneration policy ensure the companies a certain degree of flexibility in relation to the new requirements to be implemented in the policy where necessary for serving the long term interests of the company.

When it will be considered necessary to serve the longterm interests of the company will depend on the specific circumstances, including the specific company's market and business specific conditions. Therefore, it is difficult to provide for general guidelines on when companies will be entitled to deviate from the remuneration policy.

As the management is responsible for ensuring that deviation may only take place in exceptional circumstances, we recommend that the management refrains from exercising the deviation possibility until the scope and requirements are defined more clearly.

It would be recommendable that the companies, in accordance with requirements above, reflect the possibility for deviation in the first policy implementing the new rules.

It will no longer be a requirement to adopt the remuneration policy in the company's articles of association. When the general meeting approves the remuneration policy, the provision included in the company's articles of association concerning guidelines for incentive-based remuneration will automatically lapse, and the companies may therefore delete the provision from the articles of association without putting it to a vote at the general meeting.

CONTENT OF THE REMUNERATION POLICY

To a large extent, the new minimum content requirements for the remuneration policy are identical with the current requirements in chapter 4 of the Recommendations. However, the new rules will entail a number of additional requirements.

Thus, in order to comply with the new mandatory rules, all companies must make adjustments in their current policy.

The content requirements to the remuneration policy are described immediately below.

Contribution to the company's business strategy and long-term interests and sustainability

The remuneration policy must explain how the policy contributes to the company's business strategy, long-term interests and sustainability.

According to the requirement for contribution to the company's long-term interests the remuneration policy cannot be based only on short-term interests and operating profits.

According to the explanatory notes, sustainability is to be understood as sustainability in relation to the company's interests. However, the explanatory notes include no guidelines as to what is needed for the remuneration policy to contribute to the company's sustainability.

In light of the present uncertainty in relation to the above requirements as well as a number of other additional and new requirements, see below, we recommend that the companies postpone preparing a new remuneration policy complying with the new rules until the annual general meeting in 2020, at which time, we expect that practice and guidelines should have clarified a number of these uncertainties.

Description of remuneration components

The remuneration policy must include a detailed description of all components of the management's remuneration. These components include fixed and variable remuneration, including all kinds of bonuses and certain benefits. This requirement is new compared with the current requirements in the Danish Companies Act, which only include incentive-based remuneration (variable remuneration).

The remuneration policy must also include information about the various remuneration components' relative proportion of the total remuneration. This is also a new requirement, both compared to the current legislative requirements and the Recommendations.

Fixed remuneration includes inter alia cash remuneration, fixed pension and lager staff benefits, such as holiday house only available to certain members. Usual staff benefits such as company-paid telephone and internet are not covered and are not to be described in the remuneration policy.

Variable remuneration covers bonuses awarded according to both financial and non-financial criteria. According to the new rules the company may only apply criteria (the so-called Key Performance Indicators "KPI") that are clear and comprehensive. The remuneration policy must state any deferred periods (lock-up periods) and whether the company may reclaim variable remuneration via the so-called claw-back clauses.

Share-based remuneration covers all kinds of share-based bonuses, including options, warrants etc. The remuneration policy must include guidelines for vesting periods and, where applicable, retention of shares after vesting.

As something new compared to the Recommendations, it will be a requirement to describe in which way the criteria for awarding the variable remuneration (KPIs) and the share-based remuneration contribute to the company's business strategy, long-term interests and sustainability.

At present, the level of required description of the individual remuneration components and distribution ratio between the components is not clear. The new rules do, however, still allow for description of the ratio between distribution of the fixed and variable remuneration in terms of general frames, e.g. requiring the distribution to be within certain appropriate ranges (frame values). It will also be possible to describe KPIs as general and overall principles as there is no requirement for description of the individual criteria in the management

members' contracts.

Inclusion of pay and employment conditions of employees

There will be introduced a new requirement for the remuneration policy to explain how the pay and employment conditions of other employees than members of the management have been taken into consideration under the determination of the remuneration policy.

This requirement has not been included in the Recommendations, and the aim with this requirement is to avoid a lack of proportion between the management's remuneration and the pay for ordinary employees in the company.

Guidelines for contracts and arrangements with management members

The remuneration policy must describe the general and overall guidelines for certain parts of the content of the company's contracts with the members of the management.

The Recommendations does not mention the content of the contracts with the management members as a topic to be included in the remuneration policy. Therefore, the companies must in future ensure that the remuneration policy describes the guidelines for the following:

i. the duration of contracts with the members of the management;
ii. the main characteristics of supplementary pension or early retirement schemes; and
iii. notice periods and terms of termination, including termination benefits.

The terms of termination of contracts and notice periods may be stated in the form of maximum and minimum frames.

Decision-making process for the determination, review and implementation of the remuneration policy etc.

The remuneration policy must explain the process for the determination, review and implementation of the remuneration policy, including procedures to manage conflicts of interests.

As most listed companies have appointed a remuneration committee, consequently the description must include the committee's role in connection with the preparation of the remuneration policy.

As the internal procedures for the remuneration policy are laid down in a number of the company's internal documents, it will be necessary to review the internal guidelines and rules of procedure of the company to ensure that these documents are also in compliance with the new rules.

Amendment of the remuneration policy

All significant amendments to the remuneration policy must be explained, including why the amendment is considered to be significant. In addition, the remuneration policy must explain how the shareholders' vote on and opinion on the remuneration policy and the remuneration reports have been taken into account since the last vote on the remuneration policy.

THE REMUNERATION REPORT

As a new requirement the board of directors must prepare a remuneration report.

To a large extent, the new requirements for the remuneration report are identical with the current requirement in item 4.2.3 of the Recommendations. However, the new rules will entail a number of additional requirements.

As something new compared to the Recommendations, the remuneration report must describe the total remuneration from the company and/or companies in the same group of companies to each member of the management in the most recent financial year.

ADVISORY VOTE ON THE REMUNERATION REPORT AT THE ANNUAL GENERAL MEETING

The most important change in relation to the remuneration report introduced is that listed companies must hold an advisory vote (in Danish "vejledende afstemning") on the remuneration report at the annual general meeting (i.e. on an annual basis) and this must be a separate item on the agenda.

However, for small and medium-sized companies it will be sufficient that the report is only submitted for discussion as a separate item on the agenda for the annual general meeting.

The vote on the remuneration report is an advisory vote but thus binding upon the company. The shareholders are given the possibility to assess whether they are satisfied with the remuneration policy of the company and whether the remuneration policy approved by the general meeting is in fact observed in the report. If the shareholders reject the remuneration report, the board of directors must take note of the result of the vote and this must be

explained in the next remuneration report.

CONTENT OF THE REMUNERATION REPORT

As something new the remuneration report shall disclose not only the remuneration to the existing members of the management but also the remuneration for resigned management members. In the future the remuneration report will also include information concerning any termination benefits paid to resigned management members and the shareholders of the company will receive this information as part of the annual general meeting.

Clear and understandable description of the total remuneration

The description in the remuneration report of the total remuneration for the individual management member must be clear and understandable.

The description must also include remuneration forms and benefits not mentioned in the remuneration policy. The explanatory notes mention "child allowance" and "family allowance" as examples of such benefits. However, due to the personal data protection rules, the basis for these allowances is not to be disclosed.

The rules do not include any formal requirements for the remuneration report, and consequently it is not specified which requirements to be fulfilled for the description to be deemed clear and understandable. The European Commission is preparing a standard form for remuneration report which the companies will be able to use as a basis for preparation the remuneration report. We recommend that the companies should as far as possible use this standard from for report as basis to ensure that the remuneration report meets the requirement for a clear and understandable description. This will also ensure a certain degree of consistency between the companies. The European Commission has not provided any information as to when the standard form for report is expected to be available.

Description of the remuneration of the individual management member

A number of matters must be described in the remuneration report for the individual member of the management. A number of these matters are similar to those in the current Recommendations. However, the required detail level is higher compared to the present requirements. It will also be required that the auditor must ensure that the remuneration report fulfils the mandatory requirements.

The remuneration report must describe the individual management member's total remuneration split out by component and describe the relative proportion of fixed and variable remuneration. Compared with the Recommendations, it is a new requirement that the remuneration report must disclose the relative proportion of the management member's remuneration consisting of fixed and variable remuneration.

If the management member has received variable remuneration, it must be described, how the performance criteria (KPIs) have been applied.

If the management member has received share-based remuneration, the remuneration report must include information on the number of shares and granted or offered share options and also the main conditions for the exercise of the share options, e.g. the price at the time of granting and the date for exercise of the option.

In addition, the remuneration report must explain how the specific remuneration of the individual management member is in compliance with the remuneration policy, and how the specific remuneration of the individual management member contributes to the long-term performance of the company. Consequently the company must describe, how the remuneration of each individual member of the management contributes to the company's business strategy, long-term interests and sustainability.

The description must enable comparison

As something new, the remuneration report must include information, which enable comparison of the individual management member's remuneration with a number of company figures over a five-year period. The individual company may choose, whether this comparison shall take place on a company level or on a consolidated level.

It must be possible to compare the individual management member's remuneration for a five-year period with the following:

i. the annual change in the management member's remuneration;
ii. the annual change in the company's performance; and
iii. the average pay for the company's full-time employees.

Other information in the remuneration report

The remuneration report must disclose whether the company has used a possibility of reclaiming variable remuneration (claw-back clauses) and/or the possibility of temporarily deviation from the remuneration policy in exceptional circumstances.

PUBLICATION OF THE REMUNERATION POLICY AND THE REMUNERATION REPORT

Both the remuneration policy and the remuneration report must be made publicly available on the company's website.

The remuneration policy must be published as soon as possible after approval of the general meeting and it must remain free of charge and available on the company's website for as long as the remuneration policy is applicable.

The remuneration report must be published as soon as possible after the annual general meeting at which it was presented. The remuneration report must remain publicly available for ten years. As a consequence of personal data protection rules, the remuneration report cannot be available for a longer period of time if it includes personal data.

In relation to publication, the most important change is that the shareholders in future will have a right to request the company to provide a complete account of the result of the vote on the remuneration policy at the general meeting. A full account includes i.a. information on votes in favour of and against, the number of shares for which votes have been validly cast, the proportion of the share capital represented by those votes and certain other information. A full account requires considerable work, and the company is obliged to provide a full account if requested by even a single shareholder.

RIGHT TO IDENTIFICATION OF SHAREHOLDERS

As part of the new Shareholder Rights Directive, the listed companies have been authorised to request certain information concerning the shareholders of the company from intermediaries in order to be able to identify the shareholders. Intermediaries are central securities depositories and certain companies, e.g. credit institutions, investment managers and investment companies that provide services of safekeeping of shares in listed companies.

The companies are not obligated to identify their shareholders, but as something new the companies have a right to request an intermediary to provide i.a.:

i. the shareholder's full name, e-mail address, postal address, central business registration (CVR) number or other registration number; and
ii. information about the number of shares, including information about class of shares (if any) and date of acquisition of the shares.

To ensure compliance with personal data protection rules, the company may only keep the data for up to twelve months after the company was notified that the person in question is no longer a shareholder, unless otherwise provided by other legislation.

As listed companies are not required to disclose information about their shareholders in the register of shareholders, listed companies have so far only been able to identify shareholders with an ownership of more than 5 per cent of the share capital or the votes due to the rules on identification of so-called "major shareholders".

OBLIGATION TO PROVIDE INFORMATION IN CONNECTION WITH ELECTRONIC VOTING

The bill also introduces obligations for listed companies towards their shareholders with the purpose of facilitating the shareholders' exercise of their rights as shareholders in connection with electronic votes at the general meeting.

As something new, the companies must provide the shareholders certain information, when the shareholders cast their votes electronically.

When a shareholder casts a vote electronically, the company must send an electronic confirmation of receipt of the vote to the shareholder or the third party who casts the vote on the shareholder's behalf, e.g. if the shareholder uses a nominee arrangement.

In addition, the company must confirm that the vote has been validly recorded and counted in the vote if the shareholder or a third party requests such confirmation within four weeks after holding the electronic general meeting. This does, however, not apply if the information is already publicly available, e.g. on the company's website.

The companies must comply with the obligations to provide information in connection with electronic voting at the general meeting as from 3 September 2020.

TRANSACTIONS BETWEEN THE COMPANY AND RELATED PARTIES

Another change introduced with the implementation of the new Shareholder Rights Directive concerns transactions between the company and its related parties.

As something new the board of directors of a company must pre-approve material transactions between the company and a related party. If a transaction is considered to be "very material" the transaction must also be announced publicly.

Consequently, the companies will need to update and adjust their internal procedures, and it should be noted that this part of the new rules will become effective already on 10 June 2019.

The requirements do not apply to usual business transactions. Usual business transactions are defined as transactions which are usual for the company and other companies with the same activities as the company in question. These transactions must also be concluded on market conditions.

For such exempted transactions, the board of directors is obliged to prepare an internal procedure ensuring that periodic assessments are made of whether such transactions may be deemed as usual business transactions.

Agreements between the company and its subsidiaries as well as transactions between the company and members of the management concerning remuneration are not covered by the above mentioned requirements.

APPROVAL OF MATERIAL RELATED PARTY TRANSACTIONS

In future, the board of directors must approve material transactions between the company and its related parties in advance.

The concept "related parties" is understood in the same way as the transactions with related parties which the company must disclose in the annual report.

It is the executive management board's responsibility to assess whether a transaction with a related party is "material" or not. The executive management board must make the assessment of whether a transaction is material in the same way as the board assesses whether a transaction is material and required to be disclosed in the annual report. The executive management board must note that the materiality assessment must be made on the basis of all transactions with the related party in the financial year in question.

The board of directors must carry out the approval of a material related party transaction based on the general rules on personal interests.

The rules of procedure of the board of directors should be updated to include procedures and guidelines for handling the new obligation to approve material related party transactions.

DISCLOSURE OF CERTAIN RELATED PARTY TRANSACTIONS

As something new "very material" related party transactions must - beside being approved by the board of directors - also be disclosed. Such a transaction cannot await publication until the general publication in the annual report. Such a transaction between the company and

the related party must – following approval by the board of directors – be published on the company's website where it must remain available for five years. Publication must be made as soon as possible after the conclusion of the transaction.

A transaction is considered to be "very material" if the fair value of the transaction amounts to ten per cent or more of the company's total assets or 25 per cent or more of the operating profit disclosed in the most recently published financial statements.

If the company is part of a group, the fair value calculation will be based on the entire group. If the company concludes several transactions with the same related party in a given financial year, the fair value calculation must be based on the total of all transactions.

The publication must include certain information which enables the shareholders and other parties to assess whether the transaction was carried out on market conditions. Such information includes the nature of the related party relationship, the name of the related party and the fair value and date of conclusion of the agreement regarding the transaction.

The rules of procedure of the board of directors should be updated to include the above requirements and establish procedures in order to ensure that the company complies with the new rules.

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If you have any questions please do not hesitate to contact us.

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