

THE NEW DANISH COMPANIES ACT

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As of 1 March 2010 the main part of a new Companies Act entered into force in Denmark. The remaining parts of the Act will - stepwise - come into effect in the course of 2010.

The reason for the stepwise commencement is that the remaining parts of the Act require some customization of the Danish Commerce and Companies Agency's IT systems, including development of new features.

The new Companies Act replaces the Danish Public Companies Act and the Danish Private Companies Act from 1973. It changes the current regulation of limited liability companies significantly. In particular the Act:

- modernises and simplifies statutory content and language;
- creates enhanced flexibility for the individual companies;
- eases 'superfluous' requirements for Danish companies; and
- creates greater openness in respect of Danish companies.

Background

Increased globalisation and internationalisation have sharpened the demand for competitive framework conditions for corporate Denmark. In 2006, this demand spurred the setting up of a Company Law Reform Committee with the task of proposing a simplification of the overall regulatory framework for public limited companies (in Danish: *aktieselskaber*) and private limited companies (in Danish: *anpartsselskaber*) in Denmark. The author of this article, Monica Reib, was appointed by the Danish Bar Association as their representative on the Committee.

For inspiration the Company Law Reform Committee looked to an international, country-based survey conducted by Bech-Bruun on behalf of the Danish Commerce and Companies Agency. The survey comprised an extensive analysis of company law in 11 selected countries.

In November 2008 the Company Law Reform Committee presented a report (and a draft new Danish Companies Act. The new Danish Companies Act was passed by the Danish Parliament in May 2009.

Modernisation and simplification

The new Companies Act compiles the Danish Public Companies Act and the Danish Private Companies Act into one, establishing more uniform rules for public and private limited companies and accentuating the differences.

Each part of the Act starts by setting out the provisions applicable to any type of limited liability company. These provisions are then followed by the provisions solely applicable to public or private limited companies, and, finally, any additional requirements for public limited companies with shares admitted for trading on a regulated market, or for state-owned public limited companies.

Consequently, although the Companies Act comprises a total of 375 sections, the Act is significantly easier to read and navigate in. Also the language has been modernised.

Moreover, the Act codifies administrative practice developed by the Danish Commerce and Companies Agency over the years and thereby protects and enhances legal certainty.

Flexibility

The Companies Act entails a significant liberalisation on a number of areas, including in relation to capital structure, financial assistance and management structure, language and employee representation - creating enhanced flexibility for the individual companies.

Capital structure

The minimum capital requirement is DKK 500,000 (approx. EUR 67,000) for public limited companies and DKK 80,000 (approx. EUR 10,700) for private limited companies.

One of the more significant and innovative changes in relation to the capital structure is that only 25% of the share capital must be paid up on formation and in connection with capital increases, however, not less than DKK 80,000 (the minimum share capital of private limited companies). This only applies in case the contribution is made exclusively in cash and any share premium will have to be paid up in full.

It is also new that it is possible to issue non-voting shares and that there are no restrictions on voting differentiation.

Moreover, the Companies Act introduces the possibility of forming limited liability companies *prospectively*. In case of non-cash contribution, the date of formation may, however, not be later than the date on which the application for registration is filed with the Danish Commerce and Companies Agency. The possibility of formation with *retrospective* effect for accounting purposes by contribution of an existing business now also includes contribution of a controlling equity interest.

Finally, as a more technical novelty, the Companies Act allows for the issue of shares without a nominal value (no par value shares). The share capital of the limited liability company may thus be divided into no par value shares which must all have the same value, e.g. a share capital of DKK 1m divided into 100,000 no par value shares as opposed to a share capital of DKK 1m divided into shares of DKK 10 each.

Financial assistance

The Companies Act relaxes the formal requirements to make interim dividend payments and capital reductions, e.g. in relation to preparation of (audited) interim balance sheets and valuation reports.

Moreover, the Act implements the option for limited liability companies to purchase own shares in excess of the existing threshold of 10% of the share capital. The purchase of shares may take place within the amount of the company's distributable reserves. Only fully paid-up shares may be purchased.

The Companies Act renders legal self-financing on certain terms and conditions, opening up a lot of new opportunities, not least in connection with generational shifts and acquisitions. Companies will be entitled to participate in the buyer's financing of the acquisition of shares in the company, meaning that companies are allowed to participate in their own takeovers, e.g. by granting a loan to the buyer for the acquisition or by providing security backed by the company's assets for loans taken out by the buyer. Only the company's distributable reserves may be used as financing.

As a general rule, shareholder loans which do not qualify as self-financing are still prohibited. However, the exception applicable to loans granted to parent companies is extended to certain parent companies in countries outside the EU and EEC area (the limitation up to now).

Management structure

The Companies Act increases the companies' freedom of choice between various management models applied today in Denmark's peer countries. Limited liability companies are free to choose between the following management models:

- Board of directors and management board (previous Danish management model)
- Supervisory board and management board (known as Aufsichtsrat and Vorstand in Germany)
- Management board (applicable to *private* limited companies only which are not subject to rules on employee representation. This one-tier management model is also available today)

As was also the case before, the Companies Act prescribes that the liability of the management is fault-based, and it is not the intention to promote increased managerial liability. In a number of areas, management will enjoy enhanced freedom of action, e.g. the possibility of refraining from engaging an auditor in a number of situations as well as the possibility of using self-financing and purchasing own shares within the amount of the company's distributable reserves. Hence, management may to a wider extent than before deal with for example the company's distributable reserves, implying a corresponding enhancement of management's field of responsibility, yet management must be judged on the basis of the existing fault standard.

Language

The Companies Act introduces provisions on choice of language. As a general rule, general meetings and board meetings are still to be conducted in Danish. However, provided that this is decided by the general meeting or the board of directors, respectively, such meetings may be conducted in other languages than Danish. Further, in future it may be stated in the articles of association of a company that the corporate language is English and thus board meetings may be conducted in English (including the material presented to the board) without offering simultaneous interpretation.

Employee representation

The Companies Act makes it possible for a company to derogate from a number of the Act's rules on employee representation - e.g. the procedural rules - by agreement between the management and the employees.

Easing ‘superfluous’ requirements

The Companies Act eases a number of ‘superfluous’ requirements resulting, among other things, from over-implementation of EU-directives. This means that a large number of corporate decisions and actions are made simpler and less formalistic, i.e. relaxing the administrative requirements in relation to formal procedures, documents and auditor participation. For example, the requirements in relation to minimum share capital, payment of share capital, reduction of share capital, financial assistance, mergers and demergers, etc. have also been significantly relaxed.

As a contrast to the abovementioned deregulation the implementation of the Directive on the Exercise of Certain Rights of Shareholders in Listed Companies (in Danish: "Aktionærrettighedsdirektivet") has resulted in more detailed regulation on shareholders’ rights in relation to the general meeting, mainly relevant for listed companies.

Greater openness

One of the aims of the Companies Act was to create an atmosphere of greater openness in Danish limited liability companies. One of the measures in this respect is the introduction of a public register of all shareholders holding 5% or more of the voting rights or the share capital in a company. So far, information on shareholders in non-listed companies has not been available to the public.

Another measure taken to create openness about the companies is that the Companies Act specifically states that shareholders’ agreements cannot be binding on the company. This ensures that rules which are meant to bind the company or the general meeting of the company will more frequently be stated in the company’s publicly available articles of association.

Moreover, the time limit for registration of changes in a company’s management, capital structure, articles of association, etc. has generally been reduced to two weeks, ensuring that the publicly available corporate information is up-to-date and gives a true and fair view of the company.
