GETTING THE DEAL THROUGH

Corporate Governance

Board structures and directors' duties in 38 jurisdictions worldwide

Contributing editors: Ira Millstein and Holly Gregory

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Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance?

The scope of the corporate governance obligations in law, regulation and practice differs depending on the form of incorporation and on whether or not the company is listed. We will limit our response to private and public limited companies, both listed and unlisted.

The primary sources of law relating to corporate governance are the Private Limited Companies Act, the Public Limited Companies Act and the Securities Trading Act. The Financial Supervisory Authority (Finanstilsynet) has issued further regulations under the Securities Trading Act. Furthermore, the Stock Exchange Rules set by Oslo Stock Exchange (Oslo Børs ASA) apply to listed companies. The Stock Exchange Rules encompass Listing Rules (rules for admission to listing) and Continuing Obligations (continuing obligations of listed companies).

The Norwegian Code of Practice for Corporate Governance issued by the Norwegian Corporate Governance Board is based on a 'comply or explain' principle. The guidelines only apply to listed companies (according to the Continuing Obligations), but larger companies with dispersed ownership seem to take more and more interest in them as well.

As Norway is a member of the European Economic Area (EEA), Norwegian law and regulation within corporate governance may originate from EU directives and thus legislation and practice from the EU is of interest as well.

There are two regulated stock exchanges in Norway; Oslo Børs ASA and Oslo Børs Axess ASA. Only Oslo Børs ASA is an authorised stock exchange under the EEA rules. Oslo Børs Axess ASA accepts younger, smaller and pre-commercial companies and hence the listing requirements with respect to turnover, results and years of operation compared to the listing requirements set by Oslo Børs ASA are not as strict. The Continuing Obligations for Oslo Børs ASA apply also to Oslo Børs Axess ASA.

There is also a trade support system for the over-the-counter (OTC) market, where companies may apply for listing on the Norwegian OTC list subject to being recommended by a broker. The OTC list is administered by the Norwegian Securities Dealers Association. Companies listed on the OTC list are considered unlisted in our response to the questions below as the OTC regulation is very limited.

2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder activist groups or proxy advisory firms whose views are often considered?

All Norwegian acts are passed by the Norwegian Parliament. Most acts are supplemented by regulations issued by the relevant ministry. As for the Companies Acts (Private and Public), the Ministry of Justice is responsible for further regulations, whereas the Ministry of Finance is responsible for issuing regulations to the Securities Trading Act. The ministries may delegate the authority to issue further regulations.

The two authorised stock exchanges, Oslo Børs ASA and Oslo Axess ASA, issue and update the Continuing Obligations. Furthermore, the Norwegian Corporate Governance Board issues the Norwegian Code of Practice for Corporate Governance and monitors the need for adjustments. The latest edition was issued on 21 October 2009. According to the Continuing Obligations, listed companies shall comply with the Norwegian Code of Practice or explain their deviation from it.

The Companies Acts may be enforced by private parties through the courts.

The Financial Supervisory Authority and Oslo Børs ASA are the primary enforcers of corporate governance rules particularly for listed companies. Furthermore, the Norwegian Register of Business Enterprises will to some extent act as an enforcer as the Register controls the documentation submitted for registration of an amendment of the articles of association.

There are some shareholder activist groups, of which the best known is Aksjonærforeningen (the Shareholders Association), which primarily promotes the interests of minority shareholders. The Shareholders Association is from time to time invited to comment on propositions for new legislation. The Shareholders Association is also a member of the Norwegian Corporate Governance Board. Additionally, there are specialised associations such as the Norwegian Association for Pension Funds and the Norwegian Association for Mutual Funds.

The rights and equitable treatment of shareholders

3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action?

Formally, the shareholders can only exercise ownership power through the general assembly. The general assembly appoints and removes the directors of the board, save for the directors that are appointed by the employees (see below). In the general meeting, the board members are elected by general majority. If the company has a corporate assembly, the corporate assembly has the sole power to appoint and remove the directors. The members of the corporate assembly are appointed by the general assembly, save for the members that are appointed by the employees (see below).

In companies or company groups with more than 30 employees, the employees are entitled by statute to appoint and remove a certain number of directors of the board or members of the corporate assembly. The number of employee-appointed representatives to the board or corporate assembly depends on the total number of employees in the company or company group. In general, the employees may elect

about one-third of the board members, and the employees are never entitled to elect a majority of the members. If the company has a corporate assembly, the employees are entitled to appoint one-third of the members of the corporate assembly.

The general assembly may resolve that the company shall pursue a particular course of action and the board is obliged to carry out the general assembly's decision. Some decisions are, however, reserved solely for the board or the corporate assembly by statute. The general assembly cannot instruct the board or the corporate assembly in such matters. If the board does not carry out the general assembly's decisions or the general assembly for other reasons is discontented with work of the board, the resolution for the general assembly is to appoint new directors of the board (see question 36).

4 Shareholder decisions

What decisions must be reserved to the shareholders?

Any decision amending the share capital or the articles of association is the prerogative of the general assembly. This includes amendments of the company name, the object of the company and the share capital, as well as decisions regarding merger, demerger, issue of financial instruments related to the share capital, annual accounts, dividends, authorisations to the board for issuing shares, remuneration of the board of directors, purchase of own shares or issue of financial instruments, conversion of a public limited company to a private limited company or vice versa and agreements between the company and shareholders outside the ordinary course of business. Furthermore, any business decision contrary to the articles of association must be resolved by the general assembly through an amendment of the articles of association.

Furthermore, the election and remuneration of board directors is the general assembly's prerogative, except for when the company has a corporate assembly. The articles of association may provide for a transfer of the right to elect board members to another company body, but never to the board of directors or to a single director. Also, the articles of association may provide for a transfer of the right to elect less than half of the directors of the board to others (for example a bond trustee).

If the company has a corporate assembly, the general assembly shall elect the shareholder appointed members of the corporate assembly. Similar to the right to elect directors, the articles of association may provide for a transfer of the right to elect members of the corporate assembly.

For public limited companies, the general assembly shall approve the guidelines for remuneration of the management.

5 Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

Both public and private limited companies have a considerable freedom to provide for various voting rights limitations and disproportional voting rights in their articles of association. For example the company may create different share classes with different voting rights or provide that no single shareholder can cast more than a certain percentage of the votes. However, according to the statute, certain resolutions require a qualified majority of both the votes and the share capital represented at the general assembly. Certain resolutions require unanimity. For instance, changing the articles of association requires a majority of two-thirds of the votes and share capital represented at the general meeting.

The Norwegian Code of Practice for Corporate Governance recommends that companies have only one share class.

For listed companies, voting right limitations are uncommon.

6 Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote?

Equal treatment of the shareholders is considered paramount. All shareholders have an unrestricted right to attend and vote at the general meetings of both private and public limited companies. This right cannot be restricted or limited in the articles of association. The shareholders are also entitled to bring advisers and may allow one adviser to speak at the general meeting.

The articles of association in both private and public limited companies may require the shareholders to submit a notice of attendance in advance of the general assembly to be able to attend. Such provisions have been criticised by the Shareholders Association and are uncommon. Most listed companies will still ask for a non-binding notice of attendance for the sake of planning.

Unless otherwise follows from the articles of association, the board of directors may decide that the shareholders may attend a general assembly, and exercise their shareholder rights, by use of electronic devices. Furthermore, the shareholders have an unrestricted right to appoint a proxy holder to attend on their behalf.

7 Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions to be put to shareholders against the wishes of the board or the board to circulate statements by dissident shareholders?

In public limited companies, shareholders representing at least 5 per cent of the share capital may demand that the board convene a general assembly. In private limited companies 10 per cent is required. The board is obliged to comply with that request without delay. If the board fails to convene the general assembly, the courts may enforce a convening of the general assembly. Moreover, the general assembly may resolve to convene a new general assembly to deal with any proposals which were submitted by the shareholders during one general assembly and which could not or for some reason were not dealt with during that general assembly.

Shareholders can require issues to be considered and decided by the general assembly. The shareholder must notify the board of directors in writing far enough in advance for the issues to be included in the notice convening the general assembly.

Dissident shareholders are not entitled to demand that the company circulate their statements to the other shareholders, neither in listed nor unlisted companies. However, the protocol from the general assembly shall include the voting results, ie, how many shares voted for and against a resolution.

8 Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action against controlling shareholders for breach of these duties be brought?

The controlling shareholders do not owe any particular duties towards the company or the non-controlling shareholders. On the other hand, the general assembly may not come to a decision which may give certain shareholders or others any special advantages at the cost of the company or the other shareholders. Such a decision may be contested by other shareholders, members of the board and others, and deemed invalid by the courts. An example of a potentially invalid decision is a share issue reserved for the controlling shareholders at a share price lower than market price and which is not in compliance with the company's interests.

A controlling shareholder that due to its actions harms the company or another shareholder, may be liable for damages.

9 Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

In both private and public limited companies, the shareholders cannot be held responsible or liable for the company's acts or omissions and are not liable to make any payments to the company; the shareholders cannot be responsible or liable for the individual directors', the board's or the officers' acts or omissions. However, the shareholders may become liable for damages if they have caused a loss through their own negligence or wilful misconduct, for example by negligently delaying a bankruptcy.

Corporate control

10 Anti-takeover devices

Are anti-takeover devices permitted?

For listed companies anti-takeover devices are permitted, if they are approved by the general assembly for the purpose of obstructing takeover offers. Still, a listed company shall not expose the shareholders to differential treatment that lacks grounds in the common interest of the company and the shareholders. Hence, the board must exercise care and prudence when using anti-takeover devices. The board and management may only use authorisations from the general assembly (for example an authorisation to increase the share capital) to obstruct takeovers if the authorisation has been granted for that purpose.

In non-listed companies, the company may adopt anti-takeover devices as it sees fit, provided that the board acts in the company's interest when making use of such devices (in this respect mainly the shareholders' interest) and that all shareholders are treated equally unless the company's interests warrant unequal treatment.

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

The board is not permitted to issue new shares without having been granted a mandate. By the same majority as is required for an amendment to the articles of association (two-thirds majority), the general assembly may grant the board of directors a mandate to increase the share capital by subscription for shares. The total nominal value of the shares which may be issued in accordance with the mandate cannot exceed half the share capital at the time at which the mandate was granted. The mandate cannot be granted for a period of more than two years at a time.

The Norwegian Code of Practice for Corporate Governance recommends that mandates granted to the board should be restricted to defined purposes, and that mandates to the board should be limited in time to no later than the date of the next annual assembly. In connection with an increase in the share capital by subscription for shares in return for cash contributions, shareholders have preferential rights to the new shares in proportion to their current shareholdings in the company. These pre-emptive rights may be set aside by the general assembly by the same majority as is required for an amendment to the articles of association.

12 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted, and if so what restrictions are commonly adopted?

According to the Private Limited Companies Act shareholders have pre-emptive rights to acquire shares which are being transferred, and that acquisitions of shares are subject to the board's approval. Private limited companies may deviate from these restrictions in the articles of association. Public limited companies may induct restrictions on the transfer of shares through the articles of association, but will commonly not have such transfer restrictions. In unlisted companies there will often be a shareholders' agreement with transfer restrictions.

It is uncommon that listed companies have restrictions attached to transfer of fully paid shares. The stock exchange is likely to decline any listing of shares which cannot be freely transferred.

Regarding the term 'fully paid shares', shares cannot be transferred prior to registration in the Norwegian Register of Business Enterprises or, when applicable, in the securities register. A share issue cannot be registered prior to full payment of the shares.

13 Compulsory repurchase rules

Are compulsory share repurchase rules allowed? Can they be made mandatory in certain circumstances?

According to statutory law, a public limited company with sufficient free equity may offer to repurchase all shareholdings from shareholders which at the date of the offer hold shares worth 500 kroner or less (about US$85) in total. After the offer has expired, the company may request that the Ministry of Trade and Industry allow the company to execute a forced repurchase of the remaining shareholdings worth less than 500 kroner. The rules apply to both listed and unlisted public limited companies. The company will never be obliged to offer repurchase of shares. The company also needs an authorisation from the general assembly to acquire own shares to carry out a compulsory share repurchase. There are no similar rules for private limited companies.

There are no mandatory compulsory share repurchase rules, but such rules could in theory be implemented in the articles of association. A compulsory share repurchase would however always be subject to the company having sufficient free equity and the company would still need authorisation from the general assembly.

'Squeeze out' rules are implemented by statute for both public and private limited companies, allowing a shareholder that owns more than 90 per cent of the votes to acquire the remaining 10 per cent of the shares of the company at market value from the minority shareholders.

14 Dissenters' rights

Do shareholders have appraisal rights?

Shareholders do not have appraisal rights in the form of the right to sell their shareholdings to the company in connection with a merger or other share transactions. Such appraisal rights may be regulated in the articles of association, but are uncommon. More general tag-along and drag-along provisions are however often found in shareholders' agreements.

A shareholder may also ask the courts to be redeemed. Redemption requires that the court finds that there are weighty reasons in favour of the shareholder to withdraw from the company and that these weighty reasons are based on a serious and permanent conflict of interest between the shareholder and the other shareholders regarding the running of the company. Further, redemption cannot be decided if it would seriously harm the activities of the company or would otherwise be unreasonable for the company. The court's decision may be subject to appeal in accordance with the ordinary procedural rules. Redemption shall be implemented by cancellation of the shares in accordance with the rules on reduction of the share capital. The redemption price shall be the real value of the shares at the time when the redemption claim is put forward.

The responsibilities of the board (supervisory)

15 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The Norwegian company legislation, as with most Norwegian law, belongs neither to the common law system nor the civil law system.

As to organisation of companies, this is reflected in a structure not really being a one-tier system or a two-tier system.

If the company has more than 200 employees, the company shall have a corporate assembly, unless otherwise agreed between the company and the majority of the employees. This structure is best categorised as a two-tier structure. Financial institutions shall however always have a two-tier structure due to special regulation.

If the company has less than 200 employees, the company has no corporate assembly, unless otherwise decided in the company's articles of association. The listed SMB companies are predominantly one-tier structures as these companies typically want to avoid a corporate assembly, owing to the increased administration and costs.

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

The board's primary legal responsibility is the management of the company. The board is responsible for the overall planning and budgeting for the company's business and shall supervise the day-to-day management. Any decision outside the ordinary course of business which is of material importance to the company, pertains to the board. In companies with a corporate assembly, the corporate assembly decides matters which concern either investments that are substantial compared to the company's resources or such efficiency measures or changes to the business of the company which entail a major change or reallocation of the workforce.

17 Board obligees

Whom does the board represent and to whom does it owe legal duties?

The board represents and owes its duties to the company as such. The company in this context means interests of the shareholders and to some extent the other stakeholders. Although the collective economic interests of the shareholders are the focal point for the directors, the interests of the employees and creditors shall also be considered if their interests are at stake due to the company's actions. In practice the elected representatives tend to perceive the interests of the employees as their focal point.

Board representatives are independent, even when they are nominated by a certain shareholder under a shareholders' agreement. As such, the board representative owe no special legal duties to the nominating shareholder. If the nominating shareholder is displeased with the representative's actions, the shareholder is left with the possibility to replace the representative. Replacement must be done by voting at the extraordinary or the ordinary general meeting (see question 36).

The board representatives can also be held personally liable by the company and any third party for damage caused by negligence during the cause of their work as board representatives.

18 Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed?

The individual directors of the board can presumably not be ordered by a court to vote in favour of passing a particular decision. If a majority of the shareholders desire to enforce a particular action, they must instead replace the directors than take legal actions against the current directors. However, if there is legal basis for holding the directors individually liable for damages, enforcement action as to the claim for damages can be brought by the sufferer.

19 Care and prudence

Do the board's duties include a care or prudence element?

The board's duties are onerous under Norwegian law regarding control and supervision of the management of the company. The board is responsible for taking action at an overall level and the board duties will thus involve elements of care and prudence for the business of the company. Any negligent action or omission can give basis for liability as to the economic loss sustained by the company, the shareholders or any third party caused by negligence.

20 Board member duties

To what extent do the duties of individual members of the board differ?

The directors of the board will generally have the same duties regardless of skills and experience. Directors of the board are expected to possess the necessary skills and experience to conduct their tasks. The board acts collectively and is obliged to ensure that the directors jointly possess the necessary capacity to supervise and control the company. The chairman has some additional duties relating to convening and chairing the board meetings.

Although the board acts collectively, the representatives are judged individually as to their duties as board members. In this individual judgment the individual representative's knowledge, background, position as chairman, CEO, etc, will be relevant. As the representatives will be judged individually, any dissents as to the board's decisions often is and should be recorded in the minutes.

The legislation also stipulates that the membership of the board in public limited companies must be comprised of both men and women.

21 Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The board may delegate the preparation of a decision to the management or a subcommittee of the board. Regardless of this, the board must always pass the final decision itself.

The board may also grant the management or specific persons a proxy power to carry out or make a decision on behalf of the board, but even so the board is always responsible for the decision made under the power of a proxy granted by the board (provided that the proxy holder complies with the proxy). Certain decisions shall always be made by the board itself according to statutory rules and regulations.

22 Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent directors' and how do their responsibilities differ from executive directors?

For listed companies the corporate governance code states that at least a majority of the shareholder elected directors of the board should be independent of the management of the company and the company's business connections. Furthermore, at least two of the shareholder elected directors of the board should be independent of the major shareholders in the company. For listed companies the corporate governance code states that the senior management of the company should not be directors of the board. The current Continuing Obligations and the Listing Rules set by Oslo Stock Exchange are even more restrictive; however, these rules are under consideration and may be modified in the near future. No such recommendations apply to unlisted companies.

Whether a director is independent or not depends on a broad assessment on whether the director has business, family or other relationships with the management or major shareholders that might be assumed to affect his or her views and decisions.

All directors of the board have the same responsibilities regardless of whether they are independent or not. The term 'executive director' is not used in a clearly defined context in Norway, but is

generally understood as a director of the board with executive power through an additional position in the company. Executive directors are rarely used in public companies.

23 Board chairman and CEO

Do law, regulation, listing rules or practice require separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

Public limited companies shall always have a chief executive officer. The same applies to private limited companies with more than 3 million kroner in share capital. For private limited companies with a share capital less than 3 million kroner, the board decides whether the company shall have a CEO or not.

As regards public limited companies, the chief executive officer cannot be the chairman of the board. The same applies to private limited companies with more than 3 million kroner in share capital. In smaller private limited companies the chairman of the board and chief executive officer may be the same person. Members of the management are not commonly elected as directors and in particular not as the chairman. Exceptions may be found in private companies with very few shareholders.

Both private and public limited companies shall elect a chairman to lead the board.

24 Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Public limited companies shall have an audit committee, which shall be a preparatory and advisory committee to the board and consist of non-executive members of the board. For private limited companies, no board committees are mandatory.

All companies may create as many board committees as the company sees fit, provided that the power to pass any resolution remains with the board at large.

For listed companies the Norwegian Code of Practice for Corporate Governance recommends that the company implement a nomination committee (which proposes candidates for election to the board), and a remuneration committee (which reviews the executive remuneration). According to the Norwegian Code of Practice for Corporate Governance, the nomination committee should not be a subcommittee of the board, but an independent company body empowered by the articles of association, which pass decisions within its own power.

The Norwegian Code of Practice for Corporate Governance contain provisions regarding committee compositions. The audit committee should be composed of directors with relevant qualifications who are independent from the management. In the nomination committee the majority of the members should be independent of the board and the management.

25 Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

For unlisted private and public limited companies, the mandatory board approval of the annual accounts implies that at least one board meeting must be held each year. For most companies it would be highly advisable to hold more board meetings, subject to the scope of the company's business. Each director may demand that a board meeting is convened. The chairman shall convene the board meetings.

Listed companies shall publish quarterly annual accounts approved by the board. Hence for listed companies, the Continuing Listing Obligations imply that at least four board meetings must be held each year.

26 Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

The board practices and minutes are considered internal documents. There is no requirement to disclose the information. However, the committee structure and the fundamentals of board practices shall be described in listing applications, listing prospectuses and other prospectuses made in compliance with the EEA prospectus directive. Additionally, the annual accounts for listed companies shall include a corporate governance statement and the existence of and the fundamentals of the board practices shall be described therein.

In specific court cases all documents and material, including internal documents, can normally be challenged to be produced and will then become a publicly accessible document.

27 Remuneration of directors

Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions between the company and any director?

The relationship between the company and its directors in relation to term, remuneration and transactions is regulated by the Companies Acts and continuing listing obligations, in addition to the Norwegian Code of Practice for Corporate Governance.

The term of service for a director is two years unless otherwise stated in the articles of association. The corporate governance guidelines recommend that the term of service is not extended. The company may remove a director at any time without cause. The director may also withdraw at any time with due cause.

Loans and other transactions between the company and its directors shall be dealt with as a related party transaction in both private limited companies and public limited companies. The same applies to transactions between the company and related parties of the directors. Therefore any agreement outside the ordinary course of business where the consideration from the company exceeds 10 per cent of the share capital (20 per cent in private limited companies) shall be approved by the general meeting and the auditor shall issue a written statement to the general meeting on whether the relationship between the consideration and the value of the compensation received by the company in return is reasonable.

For listed companies, the board should arrange for a valuation to be obtained from an independent third party regarding the transaction if the transaction is material for the company or the other party, in all transactions between the company and its directors (and other related parties such as shareholders and senior management).

28 Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions between the company and senior managers?

The board determines the remuneration of the chief executive officer, who shall determine the remuneration of all other employees in line with applicable budgets and guidelines from the board. There is no law, regulation, listing requirement or practice which limits the level of the salary.

For public limited companies, the remuneration of the senior management shall comply with the guidelines for executive remuneration (see question 35 for further information). The board of directors may grant remunerations that deviate from the guidelines,

Update and trends

During 2009 the auditing directive (2006/43/EC) and the shareholders' rights directive (2007/36/EC) were implemented and caused amendments of several acts, inter alia the Private Limited Companies Act and the Public Limited Companies Act. The amendments include new requirements for an audit committee (as described in question 24) and new regulations as to the notice of and voting at the general meeting (as described in question 6).

Also, the Norwegian Code of Practice for Corporate Governance was amended on some points during 2009, including specifications as to the purpose of the increase of capital when the board is given a mandate to execute an increase of capital (see question 11). Other amendments are following from the implementation of the auditing directive and the shareholders' rights directive. As mentioned in question 22, the Oslo Stock Exchange is also considering a modification as to the independency requirements for the company's directors.

The financial turmoil during 2008/2009 has not resulted in any new regulation as to corporate governance. However, we expect new regulations as to remuneration of the management in financial institutions. These regulations will be based on European directives.

The crisis has caused a high number of bankruptcies, especially in the building and construction sector. As a consequence of this, there have been many unsuccessful and unfinished building projects. This has caused an increase in the liability cases as to the board's and the management's responsibilities for the solvency of the company and its responsibilities towards the company's contracting party. We expect that some of these cases will reach the courts of appeal and perhaps also the Supreme Court, which will enable us to draw more accurate guidelines for the board's and the management's responsibilities towards third parties.

Examples of bond defaults have also lead to court trials and clarification as to the legal capacity both in bankruptcy and in ordinary court cases. The Supreme Court decided after an unusually dynamic reasoning that the bondholder's trustee has legal capacity to represent the bondholders in legal action. Awaiting the Supreme Court's decision, the Financial Supervisory Authority proposed a new regulation giving basis for the trustee's legal capacity in this respect. The proposal is expected to be approved and implemented in the Securities Trading Act.

provided that the grounds for the deviation are stated in the board minutes. The chief executive officer cannot deviate from the guidelines for executive remuneration.

Loans and other transactions with the chief executive officer shall be dealt with as a related-party transaction in both private limited companies and public limited companies (see question 27). The same applies to transactions between the company and related parties of the chief executive officer.

In Norway quite a few companies are owned wholly or partially by the Norwegian government. There are special directives for remuneration of senior management for government-owned companies, which implies, inter alia, that the company shall not be wage-leading and that the remuneration shall not be option-based. The directives also contain limitations as to pensions, performance-based remuneration and severance.

29 D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

All companies may obtain D&O liability insurance. Obtaining such insurance is on the increase, but we would assume that a majority of listed companies and unlisted companies still do not have such insurance arrangements. The company may pay the premium if the insurance is approved by the general meeting. D&O liability insurance is commonly assessed as high risk and is therefore relatively expensive.

30 Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

Both private and public limited companies may resolve that its directors shall be indemnified or released from existing or future liability towards the company. Only the general meeting may pass such resolutions.

The decision will only be binding as far as the general assembly has received all and correct relevant information. This implies that the general assembly cannot indemnify directors on a general basis for all possible future liabilities, and further that the indemnification must be connected to a certain case involving possible liability for the director. The company may indemnify one or certain directors without indemnifying all board members.

Neither private limited companies nor public limited companies can indemnify or release its directors for damages caused by gross negligence or wilful misconduct by the director.

31 Exculpation of directors and officers

To what extent may companies preclude or limit the liability of directors and officers?

As further described in question 30, only the general assembly may indemnify or exculpate persons that may be held liable for actions or omissions under their performance of their company obligations. This applies to both members of the board, members of the company assembly, the CEO, shareholders and inquirers. As the general assembly cannot exculpate these persons on a general basis, limitation or preclusion of liability for the named persons cannot be done by amendments of the charter or the articles.

Other persons than those mentioned above may be exculpated by the board. General exculpations and exculpations for gross negligence or wilful misconduct will however seldom or never be accepted as binding for the company.

32 Employees

What role do employees play in corporate governance?

The employees are given the rights of representation in the corporate assembly or the board as described in question 4. Furthermore, the employees are to be kept informed and given the opportunity to discuss material matters such as merger, demerger and transfer of business before the board gives its approval. There are also provisions regarding employee representation on a company group level, so that the employees elect representatives in the parent company. The employees, when representing the majority of the employees, also have authority to bring legal action on the grounds of invalidity of the general assembly's decisions.

The Company Democracy Committee has authority to exempt companies from the regulations on the employees rights of representation in companies. The committee can also decide complaints regarding elections for the board and the corporate assembly.

Disclosure and transparency

33 Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

The corporate charter (the document evidencing the formation of the company) and the by-laws (the articles of association) are publicly available from the Norwegian Register of Business Enterprises for a minor fee. These documents are only available in Norwegian. Listed companies typically disclose their by-laws on their homepages in both Norwegian and English.

34 Company information

What information must companies publicly disclose? How often must disclosure be made?

All companies must disclose their annual accounts upon request. Any person may demand access to the annual accounts of the company. The shareholder register shall be available to anyone upon request. Furthermore, information sent to the Norwegian Register of Business Enterprises is publicly available. Unlisted companies do not have any further obligations to disclose information.

Listed companies have far more onerous disclosure requirements. Listed companies must publish quarterly accounts in addition to the annual accounts. Any 'inside information' shall be disclosed without delay. The Norwegian law is in compliance with the EEA directives with regards to disclosure of 'inside information'. 'Inside information' can roughly be defined as any information of a precise nature about the financial instruments or the issuer which is likely to have a significant effect on the prices of those financial instruments or of related financial instruments.

Companies listed on the Norwegian over-the-counter trade support system, undertake to disclose information of material importance for the valuation of the company and part year accounts if such accounts are prepared.

Hot topics

35 Say-on-pay

Do shareholders have an advisory or other vote regarding executive remuneration?

In public limited companies, the general meeting shall pass an advisory vote each year over the guidelines for management remuneration for the coming financial year in any form, including but not limited to bonuses, pension schemes and severance pay. The scope of the term 'management' has not yet been fully clarified, and it is therefore not clear which persons' remuneration the general assembly must pass the advisory vote for. However, the Norwegian Auditors' Organisation has listed three criteria as a guideline as to the scope. Due to these guidelines, members of the company's leader group, persons that have influence on the company's operational and financial strategies, and leaders for central parts of the company's business will be included in this group of persons. Additionally the general meeting shall pass a binding decision regarding the guidelines on any remuneration in the form of share allocation, share options and any of form of remuneration linked to the shares of the company or development of the share value. The articles of association may stipulate otherwise.

The advisory vote rules apply to both listed and unlisted public limited companies. No similar rules apply to private limited companies.

36 Proxy solicitation

Do shareholders have the ability to nominate directors without incurring the expense of proxy solicitation?

Proxy solicitation is not known under Norwegian company law. Hence, the cost of proxy solicitation is not an issue. If a shareholder is dissatisfied with the company's performance and wants to replace the directors, he or she is left to the voting and election at the general assembly, and any proposals for change in the management of the company must be put forward in accordance with the ordinary rules.

In listed companies the nomination of directors for election or reelection is made by the nomination committee. However, if election of directors of the board is on the agenda for the general meeting, the attending shareholders are free to propose alternative candidates (assuming the general meeting, not the corporate assembly, elects the directors). The non-attending shareholders have no right to nominate candidates. It is considered as good corporate governance to convey suggestions made by the shareholders. A listed company would therefore normally be inclined to give aid in distributing information about the proposed candidate. The company is not legally required to provide any assistance.

In unlisted public limited companies and private limited companies the directors are chosen by the general assembly unless the articles of association decides otherwise. In this process, the shareholders can in principle propose who they like as a director.

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