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# RECENT DELAWARE COURT DECISION ON PRIVILEGED COMMUNICATIONS BETWEEN MANAGEMENT AND LEGAL COUNSEL — DANISH PERSPECTIVES

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## Introduction

In a recent decision dated 21 August 2020, the Delaware Court of Chancery (*In re WeWork Litigation*) held that management cannot unilaterally decide to withhold its communication with the in-house or external legal counsel from the board of directors or individual members of the board. Accordingly, directors have unfettered access to legal advice provided to the board or the company. This access can only be limited in exceptional circumstances, such as if a special committee of the board obtains separate legal counsel, and then only to the extent of the special committee's authority or if certain board members have interests that may be adverse to the company and could thus not expect to be considered clients of the legal counsel in question. The decision highlights a number of issues of relevance to Danish companies and seeks to provide a perspective on the corresponding provisions applicable under Danish company law.

## Governance Structures in Danish Companies

It is a general principle of Danish company law that the board makes its decision as a single entity. This means that all board members must have the opportunity to participate in discussions and decisions made by the board. This also means that all board members, in principle, have equal rights and responsibility, including with respect to remuneration and liability. It is recognized, however, that the chairman or co-chairman may have additional obligations and may thus also receive additional remuneration. Further, the board may decide to establish separate committees within specified areas. It is, however, important to emphasize that this does not change the fact that decisions must be passed by the board acting together, and that decisions within certain areas cannot be delegated to committees or certain individuals. It is possible to grant a separate power of attorney on a case-by-case basis, but this must relate to specified actions.

## The Role of special Board Committees in Danish Companies

Danish company law recognizes that it may be appropriate to establish special board committees. This is especially relevant in large companies; in boards in which certain members have specific competences; or in case an ad-hoc committee is deemed appropriate. However, it is important to emphasize that the role of such committee is solely to carry out preparatory work for the purpose of allowing the entire board to decide on the issue at hand. This is specifically emphasized in the Danish Corporate Governance Code which states that (i) the sole purpose of a board committee is to carry out preparatory work; (ii) that a committee may not cause sig-

nificant information of importance to the board to be communicated only to the committee; and (iii) that the necessary processing in the board may not be limited or omitted by the committee. It is further noted that the board is fully responsible for all decisions prepared by a committee.

### **The Role of In-House and external Legal Counsel towards the Board**

Regardless of whether legal advice is provided by in-house or external legal counsel, it is important to keep in mind the fact that the decisions of the board are made by the board acting as a single entity. This also means that any advice rendered to a committee or similar may form part of the material used by the board for making its decision. Accordingly, legal privilege cannot be extended to apply to only certain board members or committees, but is rendered to the board as such. Considering the liability associated with the role of being a board member, it is in our view not possible, even by way of a separate agreement, to limit access to legal advice to certain board members or committees. An exception must be made, however, in case one or more board members are deemed disqualified due to conflicts of interests.

### **Advice to Management, certain Board Members or Committees only**

It may be appropriate for a board committee to seek legal advice. However, it should be noted that any such advice is obtained for the purpose of providing the best possible basis for decisions to be made by the entire board. Both the committee and the legal counsel should thus bear in mind that the legal advice is provided on this basis and may be relied on by the entire board when making decisions. It should also be noted that an important role of the board in a Danish company is to oversee the actions of management. As a result, for such purpose and as part of its general duties the board has access to legal advice provided to the management or any other entity within the company.

### **Limitation of Access due to Conflicts of Interests**

Under the Danish Companies Act, no board member may participate in the transaction of business involving agreements or lawsuits involving the member or a third party if the member in question has a material interest therein that may conflict with the interests of the company. This means that such member is not only prohibited from participating in the vote on the matter but also in discussions related thereto. However, the remaining board members may permit the board member to provide a statement or similar in order to provide the board with the best possible basis for making the decision. Also, any board member excluded from the proceedings is still entitled to be informed about the decisions made by the board and the basis for such decision, including communication with the legal counsel. If the transaction of the matter occurs over a period of time involving a number of board meetings, it may be necessary to only allow the board member in question access to the resolutions and other documentation, once the matter has been concluded. When deciding whether a board member is disqualified due to a conflict of interest, it must be established that a specific conflict of interest exists that makes it likely that the board member may not act in the interest of the company. Accordingly, a board member is not disqualified if the board member has been elected by a majority shareholder, even if the transaction in question involves such major shareholder. This should be seen in connection with the fact that any board member, regardless of whether such member is appointed by a specific shareholder, has a fiduciary duty towards the company and its shareholders. If the board is not quorate as a result of one or more board members being disqualified, the board may decide to refer the matter in question to the shareholders at a general meeting.

### **Duty of Confidentiality**

Board members are subject to a duty of confidentiality and are thus prohibited from disclosing any information obtained in the performance of their duties without having been given permission thereto. It is generally assumed, although not firmly established, that a board member appointed by a major shareholder to a limited extent may keep such shareholder informed of matters discussed in the board. However, this access is in any case limited since shareholders are generally entitled to equal treatment, and the scope for providing information to certain shareholders only is very limited. Due to this uncertainty and the limited scope of any such access, it is recommended that the board resolves whether information may be provided to shareholders following each meeting. The fact that this duty of confidentiality exists also means that a board member's access to information cannot generally be restricted out of concern that information may be provided to other shareholders.

### **Our Assessment**

Despite different legislation and legal tradition, the Delaware case illustrates that a principle of unfettered access applies both in Delaware and in Denmark. However, this principle may be even stronger in Denmark, where an extended emphasis is placed on the fact that the board acts as a single entity, and that the role of any committee is thus to prepare the basis for a decision to be made by the entire board and that such access cannot be limited by management. Accordingly, in a Danish context the right to restrict access to privileged communications must be limited to cases where a conflict of interest exists, and even in such cases must be carefully considered.

## IF YOU WOULD LIKE MORE INFORMATION, PLEASE CONTACT:

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