

UPDATE OF THE DANISH COMPANIES ACT

A committee under the Danish Business Authority has made an overhaul of the Danish Companies Act.

The well-functioning Danish Companies Act adopted in 2010 contains a premise that the act should be evaluated after two years of experience with its practical application.

The experience base is now in place and the above-mentioned committee has rendered a draft amendment to the Danish Companies Act. The draft includes both material changes and a number of technical adjustments.

This newsletter describes the most significant changes proposed to the Danish Companies Act.

Reduction of the Minimum Capital Requirement for Private Limited Companies

The modernization Committee, that drafted the framework for the 2010 Companies Act, suggested to completely eliminate the minimum capital requirement for Private Limited Companies. However, the political processing of the Danish Companies Act in 2010 resulted in a minimum capital requirement of DKK 80,000.

A reduction of the minimum capital requirement for Private Limited Companies to DKK 50,000 is now proposed.

In particular, the amendment will be relevant for start-ups as the capital required to be paid in for the incorporation of a Private Limited Company is reduced. However, it is important to note that tax issues should be considered before an entrepreneur determines the framework best business for the future activities.

As regards existing companies' incorporation of subsidiaries, the reduction of minimum capital requirement will in practice not have any significant importance as cash-pooling or similar is often used within a group.

Generally, companies should have an increased focus on the creditworthiness of companies as a result

of the suggested reduction of minimum capital requirement for Private Limited Company and the suggested new company type mentioned in the following under section 3.

No incorporation of S.M.B.A Companies

According to the Act on Certain Commercial Undertakings, it is currently possible to use the corporate form of S.M.B.A (limited liability company). The corporate form is to a wide extent unregulated. In practice, a higher percentage of S.M.B.A companies go bankrupt in comparison with other corporate forms.

Based on the higher percentage of bankruptcies, the draft suggests to exclude the possibility of incorporating S.M.B.A companies after 1 January 2014. S.M.B.A companies incorporated before 1 January 2014 may be continued after this date.

In our view, the corporate form S.M.B.A does not include any significant advantages compared to other corporate forms. We do not expect that the window for incorporation of S.M.B.A companies until 1 January 2014 will lead to any increase in the number of registered S.M.B.A companies.

Entrepreneurial companies

As mentioned above, the minimum capital requirement for Private Limited Companies is reduced from DKK 80,000 to DKK 50,000.

Meanwhile, it will be possible to incorporate a particular type of Private Limited Companies with an initial share capital of as low as DKK 1. This particular type of company is referred to as an "*Iværksætterselskab*", shortened IVS.

According to the draft amendment, an entrepreneurial company may only be incorporated by cash contribution of the share capital. This way, the possibility of conducting a tax free company transformation from a personally driven company to an entrepreneurial company is prevented.

The entrepreneurial company is particularly relevant to the segment for which a tax free company transformation is relevant. In our view, the requirement of cash contribution of the share capital is therefore not appropriate. For in kind contribution of assets or of an existing company, the necessary guarantee for the payment of the share capital would be ensured by an auditor's valuation report.

A consolidating mechanism for entrepreneurial companies will be incorporated into the Danish Financial Statements Act for such companies.

Thus, it becomes a requirement that entrepreneurial companies transfer 25% of the annual profit into a tied reserve which cannot be used for dividends or for covering loss. The requirement of depositing a percentage of the annual profit into a tied reserve only applies until the share capital with addition of the tied reserve amounts to DKK 50,000.

It is thereby ensured that entrepreneurial companies which generate profit over time build up a capital structure, including a minimum capital, that corresponds to the capital structure of a Private Limited Company.

When an entrepreneurial company is sufficiently consolidated, i.e. when it has a share capital and equity capital of minimum DKK 50,000, the company may be re-registered as an ordinary Private Limited Company.

It might seem attractive to incorporate an entrepreneurial company as the frame for a new company because it provides for a limitation of liability qua the corporate form without any initial capital requirement. However, it is important to consider the tax issues before the incorporation of the company, as it may be tax efficient to operate the business as a personal business undertaking or as a tax transparent company.

Even though the description entrepreneurial company indicates a specific purpose, there are no limitations as to who can incorporate an entrepreneurial company or which object the company must have. We cannot exclude the possibility of the description entrepreneurial company being considered an indication of it being an ambitious and industrious company. Attention should however be paid to the fact that it may also signal to contractors that it is a company with limited working capital.

As mentioned above, contractors should particularly pay attention to the fact that often, an entrepreneurial company is not well-consolidated.

As regards liability, the same rules that apply to other corporate forms regulated by the Danish Companies Act will apply to entrepreneurial companies. As regards the limited equity capital in an entrepreneurial company, the management should particularly focus on making decisions on a sound basis as to avoid that the company's shareholders, including creditors and lenders, suffer losses.

The entrepreneurial company model is developed with inspiration from Germany where a similar model has been successful in recent years.

Incorporation of Companies with Rolling Capital

The Danish Business Authority is of the opinion that company A incorporated by cash contribution is not allowed to use the share capital to incorporate company B, after which company B uses the share capital to incorporate company C and so on. However, the same share capital may be used to establish a traditional holding company structure, including both a holding company and an operating company.

In order for the Danish Business Authority's ability to verify that effective payment has been made, the authority's access to require appropriate information pursuant to the Danish Company Act, Section 17 will be extended to include information in relation to whether the capital base meets the legal requirements.

Cross Border Relocation of Registered Office

In a number of years it has been possible to carry out cross border relocation of a company's registered office. So far, it has, however, been necessary to carry out the cross border relocation as a cross border merger.

On 12 July 2012, the EU Court of Justice determined in case C-378/10 Vale that if a Member State allows national transformations, then the Member State must also give companies from other Member States access to transformation and thereby to cross border relocation of registered offices into the Member State.

As a consequence hereof, the draft amendment contains numerous provisions regarding the process for cross border relocation of the registered office, including both companies relocating in and out of Denmark.

As such, the rules will in our view not lead to an increased mobility for companies in Europe as it has also previously been possible to relocate via a cross border merger.

Simultaneously with the opening for cross border relocation of a company's registered office, the tax implications at cross border relocations have been the subject of several cases brought before the EU Court of Justice.

We cannot rule out that in the next years, the sum of changes in tax law and company law may lead to a situation where companies will move around in Europe to a wider extent than now in order to achieve the best commercial, company law and tax law terms, as well as in relation to recruiting, language, innovation etc.

Option for partial Payment of Premium in Private Limited Companies

Under the current Danish Company Act, it is a condition that any premium is paid in full regardless whether the share capital is merely paid in part.

The draft amendment suggests an opportunity for Private Limited Companies to only pay 25% of an eventual cash premium when it comes to incorporations and capital increases. Full payment of premium will still be a requirement in the case of non-cash contribution.

No Requirement for an Opening Balance Sheet by Contribution of a Block of Shares with controlling Interests

In case that in connection with incorporations or capital increases, the contribution is a block of shares with controlling interests, the Danish Company Act requires an opening balance sheet.

It has been suggested that this requirement be terminated. However, an opening balance sheet is still required when dealing with a contribution by a consisting company. Similarly, an opening balance sheet is not required on dividends of a block of shares with controlling interests, while the requirement remains in force on dividends of a consisting company.

Retroactive Incorporation

According to the Danish Company Act, a company can be retroactively incorporated in relation to its accounting by contribution of a consisting company or a block of shares with controlling interests in another Limited Liability Company.

It is suggested that this option be extended to also cover other company forms, regardless of whether the other company is not a Limited Liability Company governed by the Danish Company Act.

Arrangement of Register of Shareholders

According to the Danish Company Act, shares in a Public Limited Company and shares in a Private Lim-

ited Company must be entered into the register of shareholders in numerical order. The draft amendment suggests terminating this requirement. Further, it clarifies which information the register of shareholders must contain. This provides the opportunity to arrange the register of shareholders more in a more appropriate manner that clearly shows each shareholder's shares.

Option to conduct compulsory Redemption faster

According to the current rules, compulsory redemption of minority shareholders may take up to four months or longer if not all voluntarily transfer their shares to the redeeming shareholder. This seems inappropriate as the shareholders concerned maintain their rights as shareholders in this period, regardless of it being clear that in any case, they will be redeemed at the end of the period.

The draft amendment suggests shortening the period down to approximately four weeks.

Termination of the Requirement of Disclosure of a written Proxy

A proxy holder must be able to provide a written and dated proxy at the general meeting. This requirement is seen as inappropriate to foreign shareholders in particular.

The draft amendment suggests that this requirement be terminated, seeing as the proxy holder must still, if need be, be able to his authorization to act on behalf of the principal.

Proxy for the Management

As regards proxies to the management of the company, a more flexible form is suggested by terminating the requirement that a proxy to the management of the limited liability company cannot be given for a period longer than 12 months and that it must be provided for a specific general meeting with a pre-known agenda.

This should be seen in the context that a principal may withdraw the proxy at any time.

Division and Merger

According to the current rules, if a creditor statement is negative in connection with a division or a merger, the process will be extended with up to approximately eight weeks. It is suggested that this extended period be reduced to approximately four weeks.

Registration for general meetings

According to the current rules, unlisted companies that want to set a deadline for the shareholders' registration for general meetings etc. must follow the same rules as listed companies, which include setting a date of registration.

The consultation document suggests easing these rules, so that unlisted companies can decide between setting a deadline for registration, a date of incorporation or both.

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The draft amendment is out for consultation at the moment. The consultation period ends on 25 January 2013. We expect the bill to be submitted shortly after the end of the consultation period. A number of adjustments are expected in respect to the answers from the consultation, but the overall points of the draft amendment are expected to be completed.

The draft amendment is expected to be adopted by the Danish parliament before summer 2013. The Minister of Business and Growth determines the final effective date.

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