РАЗДЕЛ 4
УГОЛОК ПРАКТИКА

SECTION 3
PRACTITIONER'S CORNER

THE DANISH COMPANY LAW REFORM

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1. Introduction

Company law in the European Union is rapidly changing. Recent years have seen company law reform in large Member States such as the United Kingdom,[75] Germany[76] and France.[77] In the Nordic region, the Companies Acts of Finland [78] and Sweden[79] were extensively reformed in 2006 and now it is the turn of Denmark. This paper will present the background to the proposed reform of Danish company law and provide an overview.

2. Background to the reform

The present Danish legislation on limited liability companies is contained in two separate acts, one on public limited companies (*aktieselskab, A/S*) and one on private limited companies (*anpartsselskab, ApS*). The distinction was introduced into Danish law in connection with the accession to the then European Economic Community in 1973. Until then, Danish company law only had one form of limited liability company, the A/S. Denmark introduced the ApS to emulate the distinction found in German law between the public company (*Aktiengesellschaft, AG*) and the private company (*Gesellschaft mit Beschränkter Haftung, GmbH*), each regulated by a separate act. This distinction was deemed necessary as the 2nd Company Law Directive on capital[80] that reflects the German doctrine on the protection of capital in a limited company to protect its creditors (*kapitalschutz*) applies only to public limited companies.

The A/S Act of 1973 has been amended several times, the last major reform being Act No 1060/1992. In 1996, the ApS Act, which also dated from 1973, was reduced considerable in an attempt to avoid unnecessary legislation. However, following the 1996 reform the users of the ApS Act had to look to the A/S Act for guidance in the absence of specific provisions in the ApS Act, and although some of the more important parts have since been reintroduced into the

[75] For an insider's view of the 2006 reform, see P. Bovey, *A Damn Close Run Thing – The Companies Act 2006 (Legislative Comment)*, Stat. L. R. 2008, 29(1), 11 – 25.

[76] *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen*;the law entered into force on 1 November 2008. See M. Beurskens & U. Noack, *The Reform of German Private Limited Company: Is the GmbH Ready for the 21st Century?*, 9 German Law J. No 9, Special Edition (available on-line on www.germanlawjournal.com).

[77] *Loi de modernisation de l'economie*; the law entered into force on 6 August 2008. For a comment on the reform in German, see C. Klein, *Frankreichs kleine und mittlere Unternehmen sollen gestärkt werden*, RIW 11/2008 770 - 773.

[78] Act (624/2006) on companies; the law entered into force on 1 September 2006.

[79] Act (2005:551) on companies; the law entered into force on 1 January 2006. For an insider's view, see R. Skog, *The New Swedish Companies Act*, Die Aktiengesellschaft 7/2006 238 - 242.

[80] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. Later amended by Directive 92/101/EEC and, more substantially, by Directive 2006/68/EC.

ApS Act, it is still insufficient on its own.

In October 2006, the Minister of Economic and Business Affairs appointed a committee to advice on the modernisation of Danish company law. The mandate of the committee was to provide a flexible legislation allowing for new technology and to avoid over-implementation of EU law unless it was considered necessary for the protection of important vested interests. The Committee was quite large, consisting of 27 members including representatives of all major interests in Danish business life and the relevant public authorities. Its secretariat was vested with the Danish Commerce and Companies Agency that is the principal public authority in respect of company law. Although the Committee also comprised three university professors it was not intended to be engaged in an academic enterprise exploring various possibilities within company law but to produce a draft bill that would likely pass the legislative procedure. The Committee fulfilled these expectations and published a 1270 pages long Green Paper in November 2008 including a draft bill with comments.[81] After a brief public hearing, a proper bill was put before Parliament in March 2009, [82] where it had its first hearing out of three on April 14 and is expected to be passed within the end of the current session in June.

This lack of a greater academic discourse and the speed by which it was presented to Parliament has been the subject of some criticism especially among company law scholars excluded from the process. It is true that more academic scrutiny may have enhanced the product. On the other hand it is noteworthy that the Committee availed itself of the extensive literature from the other recent European reforms and as such was in no need of inspiration and the considerable width of the represented interests ensured that the necessary political compromises that inevitably trump academic propositions were reached during the Committee's tenure enabling a result that perhaps is more viable than a drawn out procedure would have produced.

3. The overall structure of the Act

The bill before Parliament closely resembles the draft presented by the Committee and as such reference is made both in commentary part of the bill itself and in this paper to the comments made by the Committee in its Green Paper to the various provisions.

The experience of the 1996 reform of the ApS Act had convinced the Committee that it was necessary either to expand that Act considerably, to avoid the need for references to the A/S Act, or to combine the two acts.[83] Since a combined act for both public and private limited liability companies is well-known in several Member States, e.g. the United Kingdom and in the Nordic region, Finland and Sweden, and taking into consideration that the difference between public and private limited companies is diminishing,[84] the new act will cover both company forms. In this way certain provisions that would only be binding on public companies will either be a default solution for private companies, allowing the shareholders to decide otherwise, or an inspiration for them to follow the same procedure as a public company would be obliged to do. In this way, guidance is offered for private companies without compromising their greater freedom to choose differently.

4. Corporate governance

To a considerable degree the Nordic countries share a common understanding of company law, notably in respect of corporate governance.[85] All five Nordic countries, comprising the three EU Member States of Denmark, Finland and Sweden, and the EEA Member States of Iceland and Norway, still share the same corporate governance model known as the dual executive system originally introduced into Danish law in 1930.

This could be viewed as a hybrid between the one-tier system known in the United Kingdom with its board of directors and the two-tier system known in Germany with its distinction between a supervisory board (*Aufsichtsrat*) and a management board (*Vorstand*). In the Nordic system the general meeting of shareholders appoints a board of directors (*bestyrelse*), which hires a board of managers (*direktion*).[86] Collectively, these two executive organs are referred to as the management and share responsibility for their governance of the company. This may appear to be a two-tier system, but it is more closely related to the one-tier system. First of all, the board of directors is the superior executive organ and although it is also vested with the obligation of supervising the board of managers, it is itself engaged in management in a way that is irreconcilable with the role of a German supervisory board and more resembles the distribution of responsibilities between executive directors and outside directors in the English one-tier system. Second and equally like the English system, it allows for double mandates, i.e. a person can serve as a director and as a manager at the same

[81] Cf. Green Paper (Betænkning) No. 1498/2008 on Modernising Company Law.

[82] Bill No. L 170 (Parliamentary session 2008/09).

[83] The 1996 reform is discussed in paragraph 2 above.

[84] The distinction between public and private companies is inapt as a public company does not have to be public, have more shareholders, or in any other way be larger than a private company. A more relevant distinction seems to be between a publicly traded company, i.e. listed companies, and other limited companies.

[85] See in general J. Lau Hansen, *Nordic Company Law*, DJØF Publishing (Copenhagen, 2003), Chapter III.

[86] One small difference is that in Finland, Norway and Sweden the board of managers usually comprises only the CEO, whereas in Denmark and Iceland it is a collective organ that can comprise more than one manager.

time comparable to the English notion of an executive director. Third, the system is strictly hierarchical with the shareholders in general meeting as the supreme decision makers and is as such more vested with the shareholder value approach than the stakeholder approach normally associated with the two-tier system. In fact, due to the widespread occurrence of dominant shareholdings even in publicly traded companies, the hierarchical nature of the Nordic system is more pronounced than in most other shareholder value jurisdictions, e.g. the UK and the US, which tend to be more a managerial controlled system than a shareholder controlled system.

As the international debate has so far proven unable to point to one system as being superior to the others, the Committee concluded that it was better to offer a freedom of choice to the shareholders of each company between the one-tier and the two-tier model as a supplement to the existing Nordic version of the one-tier model, which would leave the ultimate choice of governance model to the shareholders. Although the new act will offer a choice between one-tier and two-tier models, both models are curtailed by certain requirements mandated by law to provide good corporate governance. A manager may simultaneously serve as a director, but the majority of the board of directors may not consist of managers, nor can a manager chair the board of directors.[87] Thus, the powerful position of an American CEO chairing the board of directors or a French PDG is not available.

Section 111 of the new act offers a choice between the one-tier model and the two-tier model. The two-tier system is a novelty in Danish company law and consists of a supervisory board appointed by the shareholders in general meeting and a management board hired by the supervisory board. A manager cannot be member of the supervisory board but has the right to participate in its meetings unless the supervisory board decides otherwise *ad hoc*.[88] The management board is the only executive organ and the supervisory board lacks executive powers.

Whereas the two-tier system closely resembles its German origin, it becomes clear upon closer inspection that the one-tier model is divided into three different versions, which are already part of existing Danish company law but have been spelled out more clearly in Section 111:

(i) A solitary board of managers, however, this is only available for private companies.[89]

(ii) A board of directors and a board of managers, where all the managers are hired among the directors. This resembles the one-tier system known in English law. Although technically it does comprise two independent boards with different powers and corresponding obligations the dual capacity of the directors cum managers veils the distinction.

(iii) A board of directors and a board of managers, where some or all of the managers are hired from outside the board of directors. This is the present Nordic model and is expected to continue as the preferred model of choice.

To emphasise the position of the shareholders as the supreme decision-makers, at least the majority of the board of directors or the supervisory board must be appointed by the general meeting and may be dismissed by it at will.[90] Besides reducing the incentive for Danish nationals to avail themselves of the freedom to choose another company law regime than Danish law when forming a limited company afforded by the case law of the EC Court of Justice, the freedom to choose between different corporate governance systems is believed to offer an incentive for foreign companies to establish a subsidiary in Denmark as they will be able to chose a corporate governance model familiar to them.

To strengthen this incentive and to induce more foreign direct investment by individual investors as well as active participation in the management of Danish companies, the company will be able to decide in its Articles of Association that the company language shall be English or Scandinavian, in which case all members of the board including employee representatives would be obliged to speak the preferred language.[91] Even without an express provision in the Articles, the company can submit public documents, e.g. its annual accounts, to the Danish Commerce and Companies Agency in English or Scandinavian, thus avoiding the expense of translation. Any language can be used at the general meeting of shareholders as long as simultaneous translation into Danish is provided, and if a simple majority of shareholders so decide, the meeting can be held in English or Scandinavian without translation. As Danish company law has made on-line participation by shareholders in the general meeting legal since 2003, this possibility of conducting the

[87] National corporate governance codes applying the comply-or-explain principle may further strengthen this division between directors and managers. The Danish code recommends that managers do not serve as directors in publicly traded companies. However, even if the CEO is not a director, he or she may attend the meetings of the Board of Directors unless the Board decides otherwise *ad hoc*.

[88] This is to overcome the problem of communication between management and supervisors that appears to inflict the German system.

[89] The new Finnish Companies Act of 2006 (footnote 4 above) provides this choice for public limited companies as well.

[90] Employees may have a right to appoint directors, however such directors must form a minority of no more than 1/3 of the board. On co-determination, see paragraph 5 below. Although rare in practice, the Articles of Association may provide for the right of others, e.g. the original founder of the company, to appoint directors. Nonetheless, the majority of directors must be appointed by the shareholders in a general meeting which will appoint the whole board if nobody else has a right to appoint.

[91] The three Scandinavian languages of Danish, Norwegian and Swedish are closely related but different. A speaker may decide which Scandinavian language to speak.

general meeting in English and relying on documents and accounts in English would benefit foreign investors that could actively participate via electronic means without being physically present.

5. Co-determination

As the law stands, if a Danish company has employed on average 35 or more persons within the last three years, the employees or their unions may call for a referendum of the employees as to whether they should elect representatives to sit on the board of directors. If a majority is in favour, the employees have a right to appoint at least two directors to the board of directors or a higher number equal to half of the rest of the board, i.e. one third of the total number of directors. Employee representatives on the board will thus always constitute a minority. A director appointed by the employees is on par with all other directors on the board in respect of rights, obligations and payment, and an employee director may be disqualified *ad hoc*, as in the case of any other director, if that director has a substantial conflict of interest with regard to a particular matter so that the matter must be decided in his absence.

This system, which is viewed as favourable by both employer and labour organisations, is continued. However, some procedural requirements will be relaxed in the new act, making it easier to decide on employee representation and if the employees cannot provide the number of candidates to fill the seats available to them, they may settle for a lower number. The present system only applies to employees in Denmark, but under the new act the general meeting of shareholders may decide to expand the system to cover all its employees globally. If the company has employees in Denmark, however, they are entitled to at least one seat, and two seats if they form more than 10 per cent of the work force.

6. Minority protection

Danish company law already provides considerable protection of minority shareholders and this regime is continued in the new act. Each shareholder has a right to suggest issues for the agenda of the general meeting, may participate in the general meeting personally or by an attorney, may vote by proxy, may speak at the general meeting and put questions to the management in respect of any item on the agenda or in the annual accounts. Shareholders holding more than 5 per cent of the capital may call for an extraordinary general meeting to be convened.[92] Shareholders holding more than 10 per cent may require the appointment of an additional auditor by the Commerce and Companies Agency, and shareholders may by simple majority decide an examination of the company's accounts, and if the request is supported by shareholders holding more than 25 per cent an examination may be ordered by the courts. Specific provisions, known as general clauses because in essence they codify broad principles, prohibit the majority of a general meeting from making decisions that may unjustly benefit certain shareholders or others to the detriment of the company or other shareholders, and equally they prohibit directors and managers from a similar abuse of their powers.

7. Capital

It is apparent from its Green Paper, that the Committee was in favour of affording wide discretion on the company and its shareholders *qua* investors in deciding how to organise the capital structure of the company unless the protection of creditors warrants otherwise. This, the Committee believed, was supported by experience and also in line with the development in other Member States and visible in the relaxation of the 2nd Company Law Directive by the reform in 2006.[93] Consequently, the Committee's proposal provided a very flexible regulation of capital. However, due to criticism in the media which argued that it would be irresponsible to abandon the stricter regime of the existing legislation, the bill presented before Parliament was less liberal in a few areas.

The present legal minimum of DKK 500,000 (EUR 67,120) for public companies in share capital will be maintained, although it is considerably above the EUR 25,000 required by the 2nd Company Law. The bill would reduce the legal minimum for a private company from DKK 125,000 (EUR 16,780) to DKK 50,000 (EUR 6,712).[94] Upon subscription, the shareholders must pay in at least DKK 50,000 but only 25 per cent of any additional capital.[95] Outstanding capital can be called in with 2 – 4 weeks notice from the management and shareholders who fail to pay loose their voting rights on all shares in the company including fully paid in shares. A shareholder may at any time volunteer to pay in the outstanding amount and may opt to do so in case of a transfer of shares as the obligation to pay rest on both the seller and any prospective buyers of the shares.

The requirement for a minimum share capital in private companies and a minimum ratio of paid in capital are the two only major areas where the bill departs from the draft proposed by the Committee. The Committee had suggested that the legal minimum for a private company should be abandoned and that the minimum ratio of paid in capital should set in only

[92] The present threshold is 10 per cent. A company's own shares are not counted when calculating these figures.

[93] See footnote 6 above.

[94] The requirement for a legal minimum share capital follows from Article 6 of the 2nd Company Law Directive, but only applies to public limited companies. However, Danish law has applied a similar requirement to private companies.

[95] This requirement follows from Article 9 of the 2nd Company Law Directive. Again, it only applies to public companies, but would in the new act apply to private companies as well.

above the minimum threshold applicable to public companies of DKK 500,000, which would effectively have made it possible for a private company to have a guaranteed capital if it was kept below DKK 500,000. The reasoning was that the minimum share capital was so small that it was of no use as a protection of the creditors while proving an obstacle to new small entrepreneurs trying to set up a company. Furthermore, the Committee found it sufficient that both directors and managers are personally liable for maintaining at all times a sufficient level of capital for the company to meet its obligations and pointed to the similar trend in Germany and France and the new proposal for a European Private Limited Company.[96] However, this point was seized upon by the media which found it to be too risky in light of the present economic crisis. That a relaxation of an unnecessary capital requirement may actually help business in times of crisis as was the reasoning behind the German and French reforms was mostly ignored. By reducing the minimum share capital the bill has minimised the nuisance for small entrepreneurs. However, at the first hearing before Parliament, a majority appeared to be against lowering the minimum share capital for private companies and favoured maintaining it at DKK 125,000. It is yet uncertain whether the bill will be amended in this respect. If it is, it will greatly enhance the attractiveness of foreign private companies with no or less onerous requirements for share capital that the Committee tried to counter. The new act would introduces non-par value (npv) shares, which are already known in Finland and Sweden, as a supplement to traditional shares with a nominal value and a company may choose freely between the two forms of shares. In respect of voting rights attached to shares and other arrangements pertaining to control of the company, the Committee took note of the ISS report of 2007 which was unable to conclude that control-enhancing mechanisms would reduce the profitability of a company.[97] In the absence of clear empirical evidence that certain control arrangements may damage a company, the Committee decided to leave this for the existing and future shareholders to decide freely. The present restriction on voting differentiation, that differences in voting rights of shares representing the same capital may not exceed 1 – 10, will be abolished in the new act, leaving it to the company and the investors to decide.

As the law stands today private companies may issue voteless shares, which was possible also in public companies until the A/S-act of 1973. However, in the new act both public and private companies may issue such shares and there is no requirement that they should yield a minimum dividend or otherwise enjoy a preferential standing as the discount expected at subscription and in later transactions compared to similar shares with voting rights is considered amble protection of the shareholders who prefer to acquire these shares.

8. Protection of capital

In the opinion of the Committee, the most important safeguard for the creditors of a limited liability company is the obligation of the directors and managers to ensure that the company is adequately funded at all times and the personal liability which that obligation entails on each member of the management. Consequently, the Committee proposed to introduce into Danish law some of the relaxations of the formal requirements for the protection of capital that have been allowed at EU level by the reform of the 2nd Company Law Directive in 2006.[98]

According to the new act, public and private companies will be allowed to acquire their own shares and the present 10 per cent threshold is abandoned. The most important safeguard is the requirement that only free reserves may be used to acquire the shares. Since these reserves may be paid out by the company as dividends, it is obvious that creditors are not put at any additional risk by abandoning the 10 per cent threshold. By the same reasoning, the provision of financial assistance for the acquisition of shares in the company, which is presently absolutely prohibited, will be allowed but only by payment from the free reserves available for dividends. As additional safeguards, a decision to provide assistance must be put before the general meeting of shareholders, the management must explain why the decision is deemed to be in the interest of the company and the company's shares must be acquired at market price. In the first hearing before Parliament, a majority also favoured that a declaration should be issued by the company's auditor. In the Committee, a minority presenting auditors had made such a suggestion, but a sizeable majority had declined, fearing that it would entail further costs to the company and in stead making it optional for the company. After the publication of the Green Paper, the auditors lobbied considerably for this proposition in the media, apparently with success.

In Danish law, the ban on providing financial assistance is accompanied by a ban on lending to shareholders. In contrast to the ban on financial assistance, the ban on lending has no basis in the 2nd Company Law Directive and was introduced into Danish law as a response to earlier cases of abuse. Similar prohibitions are found in the laws of other Nordic countries, but the ban in Danish law is the most wide-ranging of these. Inspired by the reform of the ban on financial assistance, the new act will permit lending to shareholders under conditions similar to those for offering financial assistance and with the further requirement that the financial status of the

[96] See the Commission's Proposal for a Council Regulation on the Statute of a European Private company, COM(2008) 396.

[97] ISS, Sherman & Sterling, ECGI, *Report on the Proportionality Principle in the European Union*, 18 May 2007.

[98] See footnote 6 above.

shareholder should be assessed. Again, a majority in Parliament may be in favour of mandating a declaration issued by the auditor of the company.

9. Publicity

The new act will introduce a public register of shareholders with holdings above 5 per cent to be maintained by the Danish Companies and Commerce Agency and accessible on-line at all hours without charge. For publicly traded companies disclosure of major shareholdings is mandated by EU law,[99] but publication will apply to all companies, including private companies, as it will be helpful for society in general to know of major shareholdings even in small and non-public companies, and it may also benefit public prosecutors when investigating economic crimes, e.g. money laundering.

10. Transfer of seat

Cross-border mergers and divisions are already provided for in Danish law, but the new act will further make it possible for a company to move its registered seat in or out of Denmark, if that is acceptable to the other Member State affected by the move.[100] The registered seat of a company provides its link to the Member State and thereby determines the applicable company law.[101] A company moving its registered seat out of Denmark will cease to be Danish. [102] Conversely, a company moving its registered seat into Denmark will become a Danish public company (A/S) or private company (ApS) and may have to increase its share capital and otherwise conform to Danish company law. The move itself will not affect the company and it will remain the same legal person after the move as before. Certain safeguards are provided for to secure employee representation and minority shareholders that have opposed the transfer may call for their shares to be redeemed, which are provisions already known from the regulation of cross-border mergers and divisions.

11. Conclusion

The Committee's proposal for a new companies act was an attempt to introduce a whole new legislation, completely rearranging the existing legislation, combining two different acts into one, abolishing well known caveats once thought necessary and introducing a flexibility viewed by some as daring. The purpose was to provide a companies act that would bring Danish law at least on par with the best of other Member States in the European Union.

Although the new act envisaged by the bill now before Parliament may appear unfamiliar when compared to the existing legislation, it may be argued that it is more a collection of what has already been done in Denmark or elsewhere. Indeed, if the new act is passed as is expected, not a single Danish company will have to change its statutes as the bulk of changes consist of options not presently available. It may even be argued that it does not provide true innovation as it might have done had it been submitted to a more prolonged and academic procedure with open hearings and public debates in lieu of the horse-trading done by the Committee's members. That, however, may turn out to be its major strength. By accepting almost all of Committee's proposals in its bill, the Government appears to have judged it has sufficient backing among the leading actors of the Danish business environment that formed the Committee to make it a viable reform. The anxiety displayed by the legislators at the first hearing of the bill in Parliament may result in an abandonment of the proposed relaxation of the capital requirements applicable to private companies. If that happens, the new act will probably fail to prevent the increased use of foreign private companies with more lenient capital requirements that the Committee sought to achieve. Despite this failure, which appears to be more a failure of nerve than a long term policy choice, the new act will provide a flexibility that brings it on line with the most modern companies acts in most other respects.

Since nothing human is ever perfect, and since the upheaval of reform is in itself a major obstacle to success, perhaps this carefully negotiated reform will succeed in providing a companies act at the forefront of company law in the European Union as envisioned. New amendments will probably be necessary within a few years, e.g. in respect of the minimum share capital requirement for private companies or in respect of new financial instruments that have survived the present crisis and proved their value. The new act then will not be a monolith to be left untouched for generations to come, but a sound foundation for keeping up with the rest.

[99] On the obligation to disclose major holdings in publicly traded companies, see Article 9 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

[100] On cross-border mergers, see the judgment of 13 December 2005 by the EC Court of Justice in Case C-411/03, *SEVIC Systems*, [2005] ECR I-10805.

[101] Cf. Judgement of 28 January 1986 by the EC Court of Justice in Case 270/83, *Commission* v *France*, [1986] ECR 273 at Para. 18.

[102] It should be noted that Denmark does not apply the *Sitztheorie* previously applied in German law prior to the judgement of 5 November 2002 by the EC Court of Justice in Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH*, [2002] ECR I-9919, and as such a company may freely move its administrative seat or main business out of Denmark without loosing its Danish nationality. However, the registered seat may not be moved, which was upheld by the EC Court of Justice in its judgement of 16 December 2008 in Case C-210/06, *Cartesio*.