KYLLINGSTAD KLEVELAND

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Simplification and modernization of the company legislation

The Norwegian Parliament adopted on the 6th of June this year several amendments to the Limited Liability Companies Act ("ASL") and the Public Limited Liability Companies Act ("ASAL"). The two main purposes for the changes are as follows:

- ***to adapt the legislation for electronic solutions, and***
- ***to simplify and modernize certain provisions in ASL and ASAL.***

The legislative amendments constitute the third round of simplifications of the ASL and ASAL acts. Overall, the changes are not significant, but several of them have noticeable implications for very practical questions.

ELECTRONIC SOLUTIONS

To facilitate for electronic solutions, the amendment deem physical and electronic preparation and storage of documentation and electronic and physical signing of documents as acceptable.

Previously, the articles of association, minutes from the general assembly meeting and minutes from the board of directors meeting had to be physical documents. The amendments allow executing and saving the documents electronically. The only requirement is that the preparation and storage shall be done in a adequate manner, and that the documentation is readable and available from Norway. It follows from the preparatory work that it is up to the company to consider what constitutes satisfactory information security, but that includes at least backup storage.

Prior to amending the legislation, the main rule was that all documents were signed by hand. The amendment now adopt electronic signatures as an equal alternative. The equal status may be cost-effective, time-efficient and practical for companies.

Furthermore, the amendments also sets out that the articles of association, minutes from the general meeting and minutes from the board meeting must be stored throughout the company's lifetime. This is mainly a clarification and not a substantive change to the current regulation.

The amendments regarding electronic solutions entered into force on 1 July 2017 for both ASL and ASAL.

SIMPLIFIED PROCEDURES FOR THE GENERAL MEETING

The option to hold a simplified general meeting procedure were first introduced for private limited liability companies in the 2013 amendments to the ASL. One of the requirements for the procedure was that all shareholders positively agreed to the implementation of a simplified procedure for the general meeting.

Following the amendement the absence of objections is sufficient to hold simplified general meeting. However, the shareholders must still be notified and thus given the opportunity to oppose the simplified procedure. Furthermore, shareholders may participate and exercise their rights in the general meeting electronically.

The amendments entered into force on 1 July 2017.

ELECTION OF MEMBERS OF THE BOARD OF DIRECTORS

Limited Liability Companies can now elect directors for an indefinite period. The prior maximum service period was 4 years. A shorter or longer term of service, including service for an indefinite period, must be stipulated in the articles of association.

The amendments entered into force on 1 July 2017.

NOTICES ETC. FROM THE COMPANY TO THE SHAREHOLDERS

Communication between the shareholder and the company is governed by the ASL. Until the amendment, private limited company should send messages to the shareholders with a letter to a known address. Electronic communications as e-mail required consent from the shareholders.

The new provision applies to "notice etc.". With notice it is meant all communication between company and shareholder in accordance with the ASL. The term includes, inter alia, invitations to the general meeting, notice of first option rights and other notifications.

The board now choose how to send notices. There are two requirements for communication method. First, the board of directors shall inform the shareholders within reasonable time before a new form of communication is brought to use. Secondly, notices shall be given in a secure and appropriate way.

It is unfortunately the terms "secure" and "appropriate way" are subject to interpretation. A letter is clearly appropriate, but for any other means of communication we encounter interpretation problems. We believe the legislator has here created unnecessary problems. As an example, the department concludes that oral information may be secure given the circumstances. Furthermore, "secure" is interpreted so that the address must be verified. Reading confirmation or equivalent may be sufficient, but what the board should do with a shareholder that prevents verification is unclear to us. Disagreement on notice requirements are already a popular tool in shareholder disputes , so that unambiguous standards are attrative. Loose standards combined with deadlines are, based on our experience, prone to cause disputes. Companies may be hence tempted to continuing with letters.

The rules concerning notice etc. between shareholders and companies entered into force on 1 July 2017.

NOTICES ETC. FROM THE SHAREHOLDERS TO THE COMPANY

Previously, shareholders could communicate with the company electronically by e-mail or by other manners the company opened for that purpose.
Now, it is possible for the shareholders to send notice etc. to the registered address of the company, and to a digital address and mailing address provided by the company. Shareholders can always use the company's mailing address and e-mail address as specified. The reason for such a clear rule is because shareholders exercise their rights through notice etc. to the company. Thus, it is important that the messages cannot be intercepted.

The legislative preparatory works mention digital address, among other things, as available electronic message channels the company has opened for the purpose. The provision raise the same interpretation issues as for notices etc. from the company to the shareholders, as it is clear from the provision that there are two alternative communication solutions, regardless of whether other digital addresses are provided.

The rules concerning notice etc. between shareholders and companies entered into force on 1 July 2017.

ELECTRONIC ADDRESS

In order for the purpose of electronic communication to be achieved, the shareholders' digital address must be available to the company. An amendment in the provision of requirement of register of shareholders imposes the introduction of shareholder digital addresses into the shareholder register.

Current provision provide a general right of access to the shareholder register. In order to ensure privacy and prevent significant disadvantages for shareholders, a rule is introduced that the shareholders' digital address is not comprised by the free access of information. It may be considered that there is a lower threshold for unauthorized persons to contact the relevant shareholder via digital address than at postal address, such as advertising, junk mail and so on.

If the shareholders do not provide an electronic address to the company, the ministry proposes to introduce in regulations a duty for the shareholders to pay the actual costs incurred for postage and working hours as a result of mailed letters. The ministry also proposes to introduce a duty for the company to find solutions that ensure the shareholder's rights in the few cases where the shareholders do not have a digital address.

The amending legislation concerning the register of shareholders will enter into force on 1 January 2018.

COMPANY'S CAPITAL

Previously, the board was obliged to act if the capital equity represented less than half of the company's share capital. The board was obligated to at least inform the general meeting of the company's financial position and equity when the company passed the threshold. This threshold has now been removed.

The fact that capital equity form less than half of the company's share capital does not mean that equity or liquidity is irresponsible in relation to the operation of the business. The business may have changed significant since the share capital was last changed. Similarly, the law should not lead anyone to believe that equity is sufficient just because it exceeds half of the share capital. The share capital is a formal size that does not describe equity acompany has or should have, and it is often a result of unrelated factors such as subscription price at share issuances. The parliament did not intend to shift the focus to the share capital instead of liquidity and equity. The amendment does not change the standard for adequate capitalization.
The legislator's intention was to remove a mechanical obligation. In particular, for companies with low share capital, the legislator assumed that such a mechanical act entailed excessively high costs.

The amendment is further substantiated by the fact that the other rules regarding the board's duty to act under equity requirements provide adequate protection for creditor of the company and the shareholders.

The amending legislation entered into force on 1 July 2017.

REMOVAL OF EXTERNAL AUDIT

Limited liability companies may choose to not audit its annual accounts in accordance with the External Auditor Act in accordance with the changes in ASL. Public limited company are not entitled to so according to ASAL.

Firstly, the rule that the general meeting or the founders of the company must authorize the board to remove audits, is repealed. The change entails that the general meeting or the founders may decide to remove external audit even in the minute of incorporation. The amending legislation entered into force on 1 July 2017.
Secondly, the threshold for deselection of audits will no longer be stated in the Act, but instruction will be given in regulatory stipulations. Such, the provisions can easily be adjusted by executive government. It is not yet decided when this amendment enter into force.
Thirdly, also limited liability companies as parent company could deselect auditing if the terms for omission according the threshold values (consolidated) are fulfilled for the company group in general. The board has a continuous duty to assess whether the threshold values are low enough.

The amending legislation entered into force on 1 July 2017.

REQUIREMENTS FOR SPECIAL ATTESTATION

A number of equity transactions are conditional upon an auditor certifying certain circumstances, for example, that share deposits have been paid or that a notified capital reduction is not the object of opposition. The changes apply only to private limited liability companies. A number of such auditor certification cease to apply when the amendment enters into force:

- Certification that there is full coverage for the company's restricted equity at
  - Capital reduction on demerger where transferring company continues, or
  - Capital reduction with distribution or provision to free assets.
- Certification that the company has sufficient equity in the issue and redemption of shareholders.
- Confirmation by notification of capital reduction to cover losses that cannot be covered in any other way.
- Confirmation that the relationship with the company's creditors does not prevent the implementation of capital reduction that requires creditors notice.

The persons who can confirm settlement of share deposits in cash upon foundation or capital increase now include lawyers and authorized accountants. This amendment applies to both ASL and ASAL. It is not yet decided when the amending legislation enters into force.

For capital reductions for distributions or accrual to distributable equity or by demerger, as well as the redemption and redemption of shareholders who have to be implemented by capital reduction, the legislator appears to emphasize that the requirement for creditor notice and the creditor's right to contest the share capital reduction and demand security (for disputed or non-due claim) sufficiently protects the creditors. Hence, the statement from the auditor was superfluous.

Limited liability companies that do not have audit in accordance with the Auditors Act, provides limited protection of creditors, and board members should only with caution resolve a dividend distribution based on unaudited accounts. Both the task of examining the accounts in connection with distribution of dividends and the responsibility for dividends based on incorrect accounting is now liabilities placed to the board.

For limited liability companies, there is no longer a requirement for a statement by the auditor in case of capital reduction when the amount of the reduction applies to coverage of loss that cannot be covered otherwise. It is considered positive that uncovered losses are covered to the best of their ability, and the need for a statement from the auditor was deemed unnecessary.

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