

# **Who is afraid of being a company director?**

**Organising Commission(s)**

**City, year of Annual Congress – Working Session 06**

**National Report of Denmark**

**Rikke Line Lyngaae Rasmussen**

IUNO  
Njalsgade 19  
2300 Copenhagen S  
Denmark  
+45 53 74 27 14  
rllr@iuno.dk

General Reporter:

[Rikke Line Lyngaae Rasmussen, IUNO, Copenhagen, Denmark]

27<sup>th</sup> February 2014

## **1. The legal position/status of a director and/or managing director in the different jurisdictions**

### **1.1 Definition of the mandate of a director / managing director from a legal perspective. Distinctive factors between the mandate of director and the mandate of managing director.**

The managing director is hired by the board of directors who is responsible for the overall management of the company. According to the Danish Companies Act the managing director is responsible for the daily management of the company and can make decisions on behalf of the company. However, decisions regarding unusual transactions or decisions of great importance to the company can only be made according to a special authorization from the board of directors.

According to the Danish Companies Act the company is obligated to honor agreements concluded on the behalf of the company by either the board of directors jointly, a member of the board separately or the management. However, this power to sign for the company can be limited in two ways. Firstly, it can be limited to several members in association and secondly, it can be limited to one or more specified members separately or in association. The power of the entire board of directors in association to sign for the company cannot be limited in any way.

Furthermore, according to the Contracts Act the CEO has, due to his position, general authority to conduct legal transactions within the boundaries of the usual power given a CEO.

### **1.2 Terminology: difference between managing director and CEO**

In Danish law the Danish term “administrerende direktør” translates either into “managing director” or “CEO”, depending on whether UK og US English is used, and both terms are used to describe the same role. In the following CEO is used for simplicity. Danish law only differentiates between the CEO and the employees. The relationship between the CEO and the company is not regulated by any law, but only by the contract, whereas the employees, who are hired by or on behalf of the CEO, are protected by various employment laws.

The categorization as a CEO will depend on the analysis of a number of factors. There are some obvious indicators e.g. if he has been given the title of CEO or if he is registered as the CEO with the Danish Business Authority, but these can only lead to a presumption.

The question therefore is, in each individual case, whether the person from a concrete and overall assessment, is subject to the day to day instructions of others in the organization, or whether the person has a more independent role, comparable to that of ordinary CEOs.

The Danish courts have developed some guidelines for the categorization:

- The matrix structure and reporting lines within the organization
- Whether the CEO is registered with the Danish Business Authority as a managing director
- The authority of the CEO to bind the company
- The extent of day-to-day instructions from the Board or group management
- The CEO's participation on Board meetings
- The reality of the local Board compared to the group management
- The contractual basis between the parties
- The composition of the remuneration
- The ownership, if any, of shares in the company

The list is not absolute, but can be help as a guideline.

### 1.3 **Distinction between aspects of employment law and aspects of company law**

#### 1.3.1 What is the contractual relation with the Company

The CEO's contract with company is typically the result of a negotiation between the future CEO and the chairman of the board on behalf of the whole board of directors.

#### 1.3.2 Under what status a director / managing director carry out his /her tasks do: can a director and/or managing director carry out his/her duties as an employee?

The CEO is not regarded as an employee. On the contrary he is regarded as the employer and therefore he carry out his tasks and duties as an employer. Therefore he is not covered by any of the Danish protection laws regarding employees. However it will depend on the scenarios mentioned under section 1.2.

## 2. **What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director / managing director**

In Denmark there is a committee for corporate governance. The aim of this committee is to make recommendations on corporate governance for Danish companies whose shares are admitted to trading on a regulated market. These recommendations comply with Danish and EU company law, OECD's Principles of Corporate Governance and recognized best practice. NASDAQ OMX Copenhagen A/S has decided that companies, whose shares are exchanged on their stock exchange, must comply with these recommendations. Therefore,

corporate governance legislation has a huge impact on listed companies in Denmark.

Regarding the not listed companies the impact of corporate governance legislation or soft-law is not the same, on the contrary. However, the recommendations above can be used as inspiration for the not listed companies. For example public owned companies, foundation-owned companies etc.

### **3. Liability of a company director / managing director ?**

#### **3.1 Civil liability**

The civil liability for the CEO is based on fault liability, and therefore depends on negligently or intentional behavior as well as proof of damages. More specifically, the management is judged according to the so-called “business judgment rule”, which allow management some discretion to make poor business decisions without liability. In the relationship between management and the company, the management is only liable in case of gross misconduct.

#### **3.2 Criminal liability**

Members of the board of directors and the company directors can be subject to criminal liability in various situations. E.g. The Danish Business Authority can impose daily or weekly fines on the members and directors as a mean of pressure, if they do not comply with their obligations towards the authority. In general, the members and directors can incur criminal liability if they negligently or intentionally do not comply with a specific obligation to act. For example the members of the board and the management can incur criminal liability for violation of the Marketing Practice Act § 19 regarding trade secrets etc. and for violation of the Holiday Act.

### **4. Are there any recent changes in remuneration legislation / policies for company directors / managing directors?**

There have not been any recent changes in legislation or policies regarding remuneration, stock options, golden parachute, deferred compensation etc. for company directors / managing directors.

### **5. Has your jurisdiction issued specific legislation on female presence in the board of directors?**

There has not been issued a specific legislation on female presence in the board of directors in Denmark as such, but at April 1st 2013 a new law, which regulates the

gender composition in the board of directors, went in to force. Even though it addresses the “underrepresented” gender, the purpose of the law was to increase the number of women in the board of directors.

The law does not apply for all companies, but only those which meet certain criteria. These companies are obligated to set up targets for the ratio of men and women in the board of directors and every year account for the status of meeting the target. The penalty for not setting up such a target is a fine. If the company does not succeed in meeting the target within four years they have to explain why.

The private companies which are subject to the model are among other state-owned limited companies, limited liability companies, companies with equity interest, debt instruments or other securities included for trade regulated by the European Market, financial companies and financial holding companies

**6. Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board?**

According to the Danish Company Act the board of directors of a private limited company must not consist of a majority of its directors. Furthermore the CEO cannot be either chairman or vice-chairman of the board.

**7. Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics?**

The chairman of the board of directors in a public owned company may not be a member of the management board as the chairman must not be involved in the day-to-day management of the company. There are no similar requirements as regards public limited companies. If the company has a supervisory board, no members of the management board can be a member of the supervisory board.

There is no single provision in the Danish Companies Act that enumerates all duties and responsibilities of directors of a public owned company. Rather, these duties are found throughout the Act. Furthermore, the directors’ duties and responsibilities can be derived from the company’s articles of association, the company’s rules of procedure and the Danish corporate governance recommendations.

According to the Danish Companies Act the public owned companies have to comply with specific requirement regarding the Rules of Procedure. This obligation is wider compared to the public limited companies.

A general principle of openness and transparency applies for public owned companies in particular. This principle is related to the strict duty of disclosure for public owned companies. For that reason, the board must carefully observe these principles.

**8. Are there in your jurisdiction minimum requirements to become a company director ?**

There are no minimum requirements to become CEO in Denmark as far as education and experience is concerned. However, in order to become CEO of a private limited company or a private limited liability company you will have to be over eighteen years old and cannot be under guardianship.

**9. The position of directors/ managing directors in the event of disposal and/or merger of the company?**

**9.1 Is it typical to have wording on the position of the management in transfer agreements ? If yes, which topics would usually be covered?**

The CEO is not covered by the Danish Act on the Transfer of Undertakings, it will therefore depend on both the acquirer and the CEO whether the CEO transfers to the new entity. Regarding the rest of the management the transfer agreement may regulate the transfer, but the Danish Act on the Transfer of Undertakings will apply unless the management is terminated and released before the transfer date.

**9.2 Is it common to have wording on discharge for the services performed prior to the disposal/merger?**

It is not common to have wording on discharge for the services performed prior to the disposal/merger, unless the acquirer does not want to take over certain members of management (other than the CEO). However, sometimes the employment contracts for the management may contain a Change of Control Clause, which allows management to insist on discharge in case of transfer of the activities.

**9.3 Is it common to have contractual limitations of liability towards the acquirer?**

It is common to have contractual limitations of liability towards the acquirer, but the content solely depends on the specific circumstances.

**9.4 Is it common for the sale agreement to provide restrictive covenants on the part of directors / managing directors? If yes, what type of restrictive covenants?**

It has become less common after a law on no-hire clause went into force. It is now against the law or very restrictive to include no-hire and non-solicitation of employees' clauses and so it would mainly be non-competition clauses and non-solicitation of customers' clauses that would be relevant.

**10. Does a company director has specific obligations with regard to non-compete obligations and to reveal so-called "corporate opportunities" towards the company:**

According to Danish case law the CEO is subject to the duty of loyalty during employment and in the notice period. This means that he cannot act against the interests of the company in this period, and may not withhold any opportunities from the company. The CEO is allowed to prepare competing activities, provided that the CEO doesn't make use of any trade secrets or internal information in breach of the Danish Marketing Act.