ICLG

The International Comparative Legal Guide to:

Corporate Governance 2019

12th Edition

A practical cross-border insight into corporate governance

Published by Global Legal Group, with contributions from:

Arthur Cox
Ashurst Hong Kong
BAHR
Barun Law LLC
Bowmans
Cektir Law Firm
Cleary Gottlieb Steen & Hamilton LLP
Cravath, Swaine & Moore LLP
Cyril Amarchand Mangaldas
Davies Ward Phillips & Vineberg LLP
Davis Polk & Wardwell LLP
Elias Neocleous & Co. LLC
Ferraiuoli LLC
Glatzová & Co., s.r.o.
Hannes Snellman Attorneys Ltd
Herbert Smith Freehills LLP
Houthoff
Lenz & Staehelin
Luther S.A.
Macfarlanes LLP
Mannheimer Swartling Advokatbyrå
Miyetti Law
Nielsen Nørager Law Firm LLP
Nishimura & Asahi
Novotny Advogados
NUNZIANTE MAGRONE
Olivera Abogados / IEEM Business School
Payet, Rey, Cauvi, Pérez Abogados
Pinsent Masons LLP
Schoenherr
Stibbe
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH
Tian Yuan Law Firm
Travers Smith LLP
Uría Menéndez
Villey Girard Grolleaud
Wachtell, Lipton, Rosen & Katz
Walalangi & Partners (in association with Nishimura & Asahi)

glg
global legal group

glg
global legal group

Contributing Editors
Sabastian V. Niles & Adam O. Emmerich, Wachtell, Lipton, Rosen & Katz

Publisher
Rory Smith

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Senior Editors
Caroline Collingwood
Rachel Williams

Group Consulting Editor
Alan Falach

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
July 2019

Copyright © 2019
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-87-4
ISSN 1756-1035

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

global legal group

Country Question and Answer Chapters:

EDITORIAL

Welcome to the twelfth edition of The International Comparative Legal Guide to: Corporate Governance.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate governance.

It is divided into two main sections:

Seven general chapters. These are designed to provide an overview of key issues affecting corporate governance law, particularly from a multi-jurisdictional perspective.

The guide is divided into country question and answer chapters. These provide a broad overview of common issues in corporate governance laws and regulations in 33 jurisdictions.

All chapters are written by leading corporate governance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Sabastian V. Niles & Adam O. Emmerich of Wachtell, Lipton, Rosen & Katz for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 16

Denmark

Peter Lyck

Thomas Melchior Fischer

Nielsen Nørager Law Firm LLP

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The Danish Companies Act (the "Companies Act") facilitates four types of companies in which the shareholders' liability is limited to the capital contributed as payment for the shares: (i) the public limited company (in Danish: *aktieselskab* or *A/S*); (ii) the private limited company (in Danish: *anpartsselskab* or *ApS*); (iii) the limited partnership company (in Danish: *partnerselskab* or *P/S*); and (iv) the entrepreneur company (in Danish: *iværksætterselskab* or *IVS*). After only two years since its introduction, the entrepreneur company is abolished and phased out by way of a recent amendment to the Companies Act.

Only public limited companies, as opposed to, e.g. private limited companies, are admitted to official listing. 'Nasdaq Copenhagen A/S', which is owned by Nasdaq, Inc., is the only regulated market in Denmark. It also operates another marketplace for smaller growth companies called Nasdaq First North Denmark, which is categorised as a multilateral trading facility and is not a regulated market.

This chapter focuses on public limited companies whose securities are admitted to trading and official listing on Nasdaq Copenhagen A/S. There are certain governance-related provisions in the Danish Financial Business Act applicable only to financial institutions. These have been excluded from this chapter, unless otherwise stated.

1.2 What are the main legislative, regulatory and other sources regulating corporate governance practices?

The key sources of corporate governance for Danish listed companies consist of a combination of legislation (acts and executive orders), corporate documents (e.g. the articles of association of a company), stock exchange regulations, codes/recommendations of a soft law nature containing generally accepted best practices, and guidelines.

The Companies Act lays down the fundamental rules under which public and private limited companies operate in Denmark. Being a public limited company, a listed company is subject to the Companies Act. The Danish Financial Statements Act (the "Financial Statements Act") also includes certain provisions regarding corporate governance, and the Danish Act on Approved Auditors and Audit Firms specifically deals with auditors and the audit of financial accounts including corporate governance-related provisions. The Danish Business Authority operates the Danish Central Business Register and is the authority surveilling compliance with the Companies Act, the Financial Statements Act and the Auditors Act. The Danish Financial Supervisory Authority (the "Danish FSA") also carries out the supervision of accounts under the Financial Statements Act with respect to listed companies that are financial institutions.

In addition, listed companies are subject to the new Danish Capital Markets Act (which entered into force on 3 January 2018 and replaced the Securities Trading Act) and the EU Market Abuse Regulation (Regulation 596/2014) ("MAR"). The Danish FSA is the competent authority monitoring compliance with this legislation. While the new Capital Markets Act implements MiFID II into Danish law and includes provisions related to the MiFIR, the Act has not changed the substance of the rules most frequently used by practitioners, such as the rules on listing requirements, prospectus requirements, disclosure requirements, rules on takeovers, major shareholder flagging, etc. A recent amendment to the Capital Markets Act increases the offering threshold for when a prospectus is required to EUR 8 million (and always if admitted to trading and initial listing).

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market entered into force on 21 July 2017 and applies to the Danish offering of securities to the public. As most of the provisions thereof will not enter into force until 21 July 2019, the Capital Markets Act will govern offerings until this date.

Under the authority of the said acts, the Danish Business Authority and the Danish FSA have adopted a number of executive orders providing a more detailed regulation on specific matters. Generally, non-compliance with the legislation is subject to fines and/or reprimands and to some extent sanctions are published revealing the identity of the listed company and/or the natural person in question. Market abuse violations are subject to imprisonment.

The primary constitutional documents are the articles of association (the "Articles") which prescribe the overarching rules governing the company. The Articles are publicly available and can be requested from the Danish Business Authority. The Articles reflect the legal relationship between the shareholders (and the company) and include rules on the company's corporate objective, its share capital and rights attached to the shares, the meetings of shareholders, the powers to bind the company, the duties of the board of directors and the management board, restrictions, if any, on share transfers, the company's financial year, and many other aspects relating to the governance.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Companies listed on Nasdaq Copenhagen A/S must adhere to the terms and conditions set out in the latest revised version of the Nasdaq Copenhagen A/S's 'Rules for issuers of shares', which were updated on 3 January 2018 due to the entry into force of and in order to be aligned with the Capital Markets Act, MiFID II and MiFIR. Nasdaq Copenhagen A/S monitors compliance with these marketplace rules and may in the event of non-compliance give the issuer a reprimand, a fine, decide to delete the issuer's securities from admittance to trading and/or publish any such sanction and the identity of the issuer. This rulebook includes listing and disclosure requirements and adopts the "comply or explain" principle, whereby the issuer shall give a statement on how the company addresses the Danish Recommendations on Corporate Governance of May 2013 (revised as of 23 November 2017) issued by the Committee on Corporate Governance. Listed companies must either comply with those recommendations or explain why they do not comply. The Danish Recommendations on Corporate Governance as revised on 23 November 2017 apply to financial years commencing on 1 January 2018 or later. The practice developed by Nasdaq Copenhagen A/S suggests that it is not sufficient to merely explain the reason for non-compliance. The company must also specify its different approach to the recommendations. The recommendations do not have legal force but are considered "soft law"; however, the "comply or explain" concept is embedded in the Financial Statements Act, requiring issuers to present a statement in its annual report or on its website concerning any given applicable rules on corporate governance (i.e. in this context, the Danish Recommendations on Corporate Governance).

The set of Danish Recommendations on Corporate Governance as amended by the previous revision of November 2014 afforded more attention than before on value creation, the framework for active ownership and board assessment procedures.

The most recent revision of the Danish Recommendations on Corporate Governance dated 23 November 2017 includes recommendations concerning, among other things, (i) disclosure of information to the market (quarterly reports to be disclosed, disclosure of and board resolutions to be passed regarding board members carrying out management assignments, disclosures on board committee activities, adoption and presentation of a self-assessment procedure, including an assessment of the appropriate limit for other executive functions), (ii) policy to be prepared on diversity, i.e. age, gender, international experience, in terms of the board composition (changed from actual diversity target figures), (iii) repeal of the age limit applicable to board members, (iv) restrictions on dual functions (board members should not also be members of the management board and the chairman and vice chairman of the board of directors should not be the resigning CEO), (v) strengthen board independency by recommending that at least half of the members should be independent (e.g. independent of major shareholders), and (vi) increase transparency on management remuneration (the company policy on remuneration should now e.g. be approved at least every fourth year and upon any critical amendments and support long-term value creation for the company).

In November 2016, the Committee issued a new set of Danish Recommendations on Shareholder Activism (seven recommendations) applicable to Danish institutional investors such as pension funds and insurance companies making investments in Danish listed companies. These new recommendations came into force on 1 January 2017. According to these recommendations, any institutional investor shall publish its policy on active ownership addressing its methods for escalating active ownership, collaborative efforts with other shareholders, voting policies including use of proxy advisors and disclosure of how votes are cast, and policies for identification and handling of possible conflicts of interest. Furthermore, it is recommended that the investors at least annually publish a report on their activities pertaining to active ownership, including voting activity. Although considered "soft law", non-observance must be explained in accordance with the "comply or explain" principle.

The revision of the existing Shareholders' Rights Directive (2007/36/EC) was finally adopted on 3 April 2017. Member States will have until 10 June 2019 to implement it into domestic law. On 4 April 2019, the Danish Parliament adopted an amendment act by which the said revision of the Shareholders' Rights Directive was adopted. The aim of this new directive is to strengthen corporate governance in listed companies by increasing transparency levels and encouraging long-term shareholder engagement. The new requirements will apply to: (i) the remuneration of directors and managers; (ii) the identification of shareholders; (iii) the facilitation of exercise of shareholders' rights; (iv) information distribution; (v) the transparency regarding institutional investors, asset managers and proxy advisors; and (vi) related party transactions. The Shareholders' Rights Directive leaves implementation options to the EU Member States. By way of an example, Denmark has chosen to entitle the listed issuer to request an intermediary to identify any shareholder regardless of the size of the shareholding. Other EU countries may have implemented the directive in such a way that listed companies/issuers only enjoy the right to learn about the identity of shareholders with holdings on or above 0.5%.

The Committee on Corporate Governance expects to revise the Danish Recommendations on Corporate Governance in 2020.

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

While having been in existence for some time, many aspects of the corporate governance debate in Denmark remain topical and important, focusing on: (i) diversity (in terms of qualifications, age, international experience and gender issues, etc.); (ii) independence of the board of directors; (iii) transparency in terms of individual management and board remuneration and policies related thereto; (iv) the duties of the board of directors in connection with a public takeover bid; (v) the impact of corporate social responsibility; (vi) risk-taking with particular focus on remuneration as well as the board of directors' duties in insolvency situations; (vii) nomination committees in respect of election of members of the board of directors and assessment of existing members of the board of directors; and (viii) shareholder activism, e.g. in the form of an increased number of shareholder proposals and statements at general meetings and the practical implications for the companies as a result thereof, and the need to enhance the transparency on the operation and activities of proxy advisors. The predominant proxy advisors covering Danish-listed companies are Institutional Shareholder Services Inc. and Glass, Lewis & Co. The implementation of the Shareholders' Rights Directive has attracted significant attention with focus on the remuneration policy and remuneration report as well as shareholder transparency.

Lately, following larger private equity driven IPOs, substantial focus and political voicing of the need for regulation has been directed towards very profitable management incentive schemes and significant increases in general remuneration of C-level executives.

Since the spring of 2013, legislation has been aiming at equalising the gender composition by requiring that larger companies – including listed companies – should set specific target figures and implement a policy seeking to achieve a greater balance between men and women at board and management levels. Companies are

© Published and reproduced with kind permission by Global Legal Group Ltd, London

required to include a statement in their annual reports describing the company's gender policy and reporting the target figures and current status. Alternatively, the reporting may be made on the company's website or as a supplement to the annual report if reference thereto is made. If the target figures are not met, an explanation must be provided. New guidelines issued in March 2016 by the Danish Business Authority emphasise the flexible nature of these rules by clarifying that new target figures do not necessarily have to be higher than target figures already achieved.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In general, various recommendations included in the Danish Recommendations on Corporate Governance are based on an objective to promote long-term value creation of the listed companies, and as such short-termism is a recognised challenge that should be addressed properly (e.g. reflected in the recommendations on board and management remuneration).

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Shareholders exercise their power of decision-making at the general meeting. Besides that, being a shareholder does not entail additional rights to make decisions regarding the company or to act on behalf of the company. The rights of the shareholders are protected through the general corporate law principles, including equal treatment of all shareholders and the fiduciary duties of the board of directors and the management board.

A shareholder is entitled to attend and address the general meeting and to exercise voting rights, if any, on the shares. In a public company whose shares are admitted to trading and are officially listed on a regulated market, the shareholder's right to attend and the ability to vote shall, however, be determined based on the shareholding one week before the date of the general meeting (record date). In addition, the Articles may provide that shareholders are required to notify the company no later than three days before the date of a general meeting if they wish to attend.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

The shareholders do not have an obligation to promote the interests of the company. Thus, the shareholders are not obliged to attend the general meetings of the company, and the shareholders do not have a duty to vote for or against specific proposals at such meetings. However, there is legal basis for holding shareholders liable in damages for losses caused to the company, to other shareholders or to third parties as a result of acts or omissions by a shareholder carried out with intent or gross negligence.

For instance, shareholders can be instrumental in wrongful decisions if, through their influence, ownership interest, voting rights or similar, the shareholder has participated in deciding on proposals at the general meeting which they know will cause the company to suffer a loss or give certain shareholders an unjustified benefit. It should, nevertheless, be stressed that imposing liability on shareholders is a rare phenomenon under Danish law.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Annual and extraordinary general meetings are convened and organised by the board of directors.

Any shareholder may attend a general meeting either electronically in the case of an electronic meeting, or physically in the case of a physical meeting. Furthermore, any shareholder may vote by letter, email or other written instrument or attend and vote by proxy.

The general meeting is omnipotent and may decide on any matter which is not explicitly made a prerogative of the board of directors. Matters reserved for the general meeting are amendments of the Articles, election and removal of members of the board and the company's auditor, remuneration of the members of the board and approval of the annual report.

Any shareholder is entitled to address the general meeting (*cf.* question 2.1 above), and is entitled to request and receive specific information on issues related to the annual accounts, the financial position of the company and items on the agenda, provided always that conveyance of such information is not exposing the company to a risk for substantial damage. If information is not available at the general meeting, it must be made available to the shareholders (e.g. on the company's website) no later than two weeks thereafter.

Shareholders holding 5% of the share capital or such smaller fraction of the capital provided for in the Articles can request for an extraordinary general meeting to be held to resolve specific issues. A meeting must be convened within two weeks after receipt of the request.

Resolutions at general meetings are passed by a simple majority of votes unless the proposal in question relates to an important matter which requires qualified or supermajority (or unanimity) pursuant to the Companies Act, e.g. an amendment to the Articles which as a general rule can only be passed by at least ⅔ of the votes cast and of the votes represented at the general meeting. The Articles may provide increased or additional requirements.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities? Are there any stewardship principles or laws regulating the conduct of shareholders with respect to the corporate entities in which they are invested?

No, they do not owe any duties to the corporate entity/entities or to other shareholders, unless otherwise provided for in the articles of association, or any shareholders' agreement entered into by and between the shareholders.

A public limited company is characterised by the fundamental principle that the shareholders are not personally liable for the acts and/or omissions of the company, and the liability of shareholders is limited to their investment.

While the applicability of the "piercing the corporate veil" doctrine remains to be discussed in legal theory, the only express authority for holding a shareholder liable is a provision in the Companies Act, according to which a shareholder is liable for any loss inflicted intentionally or with gross negligence on the company, the other shareholders or any third party, e.g. through the shareholder's

© Published and reproduced with kind permission by Global Legal Group Ltd, London

participation by way of voting for an unlawful proposal at the general meeting.

It should be noted that EU antitrust case law establishes that a parent company may be held liable for its subsidiary's participation in cartel arrangements.

A "soft law" Stewardship Code was introduced in November 2016 applicable to institutional investors making investments in Danish listed companies, *cf.* question 1.2 above.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders or the company may bring an enforcement action against members of the management board and the board of directors, if these corporate bodies have breached their duties under the Companies Act or the Articles and/or if individual members, in the performance of their duties, have intentionally or negligently caused damage to the company and/or shareholders. A decision to commence legal actions against members of the management board and/or members of the board of directors is a matter to be resolved by the shareholders at a general meeting.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Certain governmental approval requirements in the Financial Business Act apply to acquisitions of qualified holdings in Danish financial business undertakings. In regard to other companies, an investor's ability to invest in shares is not subject to any limitations under the Companies Act. However, the Articles may include provisions which generally limit ownership to the effect that no shareholder is allowed to hold more than a specific predetermined percentage of the share capital and/or voting rights or provisions, to the effect that no matter how large a percentage of shares any shareholder possesses, the attached votes may only count for a certain predetermined percentage.

Disclosure requirements under the Capital Markets Act apply to shareholders in a company which has its securities admitted to trading and official listing on Nasdaq Copenhagen A/S, as they are under an obligation to notify the company and the Danish FSA of the shareholdings in the company when the holding of shares (i) reach or exceed 5% of the share capital's voting rights, or (ii) account for no less than 5% of the share capital. In addition, notification shall be made when the shareholding reaches or passes the thresholds of 10%, 15%, 20%, 25%, 50% and 90%, as well as ⅓ and ⅔ of the total outstanding share capital/voting rights on the day of trading. When computing the holding of shares, financial instruments related to already-issued shares must be included.

According to the Companies Act, major shareholders must notify their holdings to the company and the company must record this in a public register of shareholders. The reporting thresholds are, by and large, similar to those of the major shareholder disclosure requirement under the Capital Markets Act. The statutory obligation for a company to keep a (non-public) register of shareholders is not affected by these rules.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

No, there are not; however, institutional investors are recommended to make disclosures in this respect under the Danish Recommendations on Shareholder Activism (*cf.* question 1.2 above).

2.8 What is the role of shareholder activism in this jurisdiction and is shareholder activism regulated?

While shareholder activism over the years has been further strengthened by, e.g. rules on electronic communication used in connection with general meetings facilitating the dialogue between the companies and the shareholders, and, in general, most recently, the implementation into Danish law of the Shareholders' Rights Directive, *cf.* question 1.2, as well as various soft laws promoting shareholder activism such as the Danish Recommendations on Corporate Governance and the Stewardship Code, *cf.* question 1.2, the topic remains hot in Denmark and is seen as a challenge due to the dispersed shareholder base in listed companies.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

According to the Companies Act, Danish public limited companies may opt for a two-tier corporate governance structure by which a board of directors is responsible for the overall and strategic management, while appointing a management board to be responsible for the day-to-day management of the company. Alternatively, but rarely used in Denmark, a management board may be appointed by a supervisory board which shall monitor the management board. The board of directors or the supervisory board must have at least three members.

While executives may also be appointed/elected to the board of directors, the Companies Act provides that the majority of the board shall not be members of the management board. Furthermore, no member of the management board may be chairman or deputy-chairman of the board of directors.

The Companies Act offers more flexibility with regard to the governance structure for private limited companies.

3.2 How are members of the management body appointed and removed?

Shareholders are entitled to elect the members of the board of directors at the general meeting, unless public authorities or others have been granted a right under the Articles to appoint directors. In public limited companies, the majority of board members (or the supervisory board) must be elected by the general meeting. Any shareholder may, even as late as at the general meeting, propose one or more candidates. However, amongst Danish-listed companies the general practice is that candidates are proposed by the board of directors following a search and screening process, and for larger companies it is conducted by a nomination committee, being a fraction of the board.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

A board member may resign or be removed at any time. While the normal tenure is one year, the maximum term of office is four years. Re-election is possible, unless restricted by the Articles.

Employees may be entitled to employee representation on the board of directors (*cf.* question 4.1 below).

The management board must consist of at least one person and is appointed and removed by the board of directors (or the supervisory board).

Members of the management board (and the board of directors) must be registered as such with the Danish Business Authority.

3.3 What are the main legislative, regulatory and other sources impacting on compensation and remuneration of members of the management body?

The Companies Act provides that members of the board of directors and management board may receive remuneration, both in the form of base pay and a performance-related bonus. The amount of remuneration may not exceed what is considered ordinary given the nature and extent of the position, as well as what is considered financially reasonable and sound relative to the financial situation of the company.

The rights and obligations of the members of the management board are governed by the individual terms of employment (i.e. the service contracts). Such service contracts are generally subject to the freedom of contract and regulate the employee's functions and duties, remuneration and bonus, termination, vacation rights and pension plan, etc.

Before a listed company can enter into a specific agreement for incentive-based remuneration for a member of the board of directors and/or the management board, the shareholders must adopt general guidelines for such incentive-based remuneration at a general meeting. The Committee on Corporate Governance has prepared a guideline containing practices with respect to remuneration policies and incentive-based remuneration recommending that the board of directors does not receive warrants and stock options. The guidelines also recommend that incentive programmes to the management that are equity-based are revolving (consecutive allocation) and with vesting periods of at least three years, and that severance payments do not exceed two years' salary.

Please also refer to question 1.2 above regarding recommendations on remuneration of management as set out in the Danish Recommendations on Corporate Governance.

The Danish FSA has issued an executive order on remuneration in the financial sector. In addition to certain disclosure obligations, the executive order covers rules on how the salary of directors and managers shall be allocated between fixed and variable elements and equity-based instruments.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

In connection with the entering into force of MAR, the Danish regulators opted for an increase in the reporting threshold from EUR 5,000 to EUR 20,000 for members of boards of directors and of the management board, and certain other high-ranking employees trading in the securities of a listed company. The reporting regime in MAR provides that the reporting threshold is determined on a 12-month basis. The rules impose upon the reporting persons and their related parties (e.g. spouses, minors and legal entities controlled by the reporting person and/or his family) an obligation to notify the Danish FSA and the company of trading in securities of the company. High-ranking employees not formally being part of the registered management board are only subject to the rules if they have access to inside or privileged information which directly or indirectly relates to the issuer, and always provided that the employee has the authority independently to make executive decisions of a superior nature regarding the company's future development.

Following a change in administrative practice resolved in May 2018, the Danish FSA now applies the threshold separately to the reporting person and to each of his/her related parties bringing the Danish FSA in line with ESMA guidelines.

Notifications to the Danish FSA and the company must be made promptly and no later than three days after a transaction.

Further, as of 1 September 2019, according to a recent change of the administrative practice by the Danish FSA, the listed issuer is under an obligation itself to publish information about the said (related) transactions to the market, which must be done immediately, however, no later than three working days following the transaction in question.

3.5 What is the process for meetings of members of the management body?

The Companies Act requires that the board of directors has a set of rules of procedure governing its function and duties. The chairman of the board of directors shall ensure that the board of directors are convened whenever necessary and, in addition, ensure that all members receive due notice of any meeting.

Any member of the board of directors or of the management board may request that a board meeting is held. Members of the management board (or the company's auditor) who are not members of the board of directors have the right to be present and to speak at meetings, unless the board in the specific situation decides otherwise.

The board of directors forms a quorum when more than half of the members are present, unless the Articles require a larger representation. The opinion of the majority normally constitutes the decision of the board. In the event of a tie, the chairman of the board of directors shall have the casting vote if so provided in the Articles.

Meetings of the board of directors are held in person, unless the board decides that members may participate by electronic means and such participation is compatible with the members carrying out their duties. Certain defined duties may be dealt with by written procedure if the decision to do so has been made in advance. However, any member of the board of directors or of the management board may demand an oral discussion.

Depending on size, market cap, and area of industry, listed companies have a variety of committees, typically composed of fractions of the board of directors. While audit committees are required by accounting laws, other committees such as nomination, remuneration and risk committees are established on a voluntary basis and by reference to corporate governance recommendations.

3.6 What are the principal general legal duties and liabilities of members of the management body?

The board of directors is entrusted with the ultimate responsibility of the company as they have both the supervisory function of the management board and the overall strategic responsibility of the company. Therefore, it is a primary function of the board of directors to determine the company's policies in relation to business

© Published and reproduced with kind permission by Global Legal Group Ltd, London

strategy, organisation, accounting and finance, and the board of directors undertakes such policies to ensure the observance of: (i) book-keeping and financial reporting; (ii) risk management and internal control; (iii) reporting on the company's financial position; (iv) the management board's overall performance and duties; (v) sufficient liquidity in the company; and (vi) appointment and removal of the management board.

The management board is responsible for the day-to-day operations of the company and must observe the guidelines and recommendations issued by the board of directors. The day-to-day management does not include transactions which, considering the scope and nature of the company's activities, are of an unusual nature or magnitude. These decisions can only be made with the approval of the board of directors, unless awaiting the approval will be to the detriment of the company.

The board of directors and the management board may be held liable if the directors or managers in their performance of their duties have intentionally or negligently caused damage to the company, to the shareholders or any third party.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The main corporate governance responsibilities and functions of the members of the board of directors and the management board as determined by the Danish corporate governance committee are:

(i) to strengthen the relationship with shareholders through continuous dialogue;

(ii) to ensure that the management board and board of directors have the required expertise, diversity, etc.;

(iii) to adopt a remuneration policy and incentive schemes;

(iv) to secure quality and transparency in financial reporting;

(v) to monitor internal control and risk management; and

(vi) to ensure open and transparent investor relations activities.

Some of the current key challenges in respect of corporate governance are: (a) the implementation of gender diversity policies; and (b) in the current low interest rate environment to consider whether excess cash should be allocated to investments or be distributed.

3.8 Are indemnities, or insurance, permitted in relation to members of the management body and others?

It is not uncommon that the shareholders at the annual general meeting decide to discharge the board of directors and/or the management board for liability with respect to actions taken in the past financial year.

Legal action may, nevertheless, be commenced by shareholders if the passed resolution on discharge was made based on information that was not essentially correct or complete. The discharge resolution does not shield against law suits from shareholders for claims for losses suffered exclusively by one or more of the shareholders (as opposed to the company itself). Similarly, a discharge resolution is also not a shield against legal actions taken by creditors and other third parties.

Members of the board of directors will sometimes, as a condition for accepting nomination and election, require the company or its controlling shareholder(s) to indemnify the member of his/her liability related to the performance of his/her duties as a board member.

Companies are also permitted to and usually do maintain insurance coverage (i.e. D&O insurance) for directors and managers. Special coverage is normally obtained for public offerings.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Please refer to questions 3.1 and 3.6 above.

4 Other Stakeholders

4.1 What, if any, is the role of employees in corporate governance?

Employees in listed companies are entitled to elect employee representatives to the board of directors if such companies had on average employed at least 35 individuals during the preceding three years. The employee representatives account for at least two and may equal up to half of the number of the members elected by the shareholders.

An employee representative has the same rights and obligations as other members of the board of directors, i.e. in relation to conflict of interests, confidentiality, remuneration, etc.

Special provisions entitle employees of a Danish parent company and its subsidiaries registered in Denmark, as well as the foreign branches of such subsidiaries situated in an EU/EEA country, to representation at group level.

4.2 What, if any, is the role of other stakeholders in corporate governance?

Please refer to the description of the recommendations set out in the Danish Recommendations on Corporate Governance and the Stewardship Code applying to institutional investors (*cf.* question 1.2 above), as well as the rules on CSR (*cf.* question 4.3 below).

4.3 What, if any, is the law, regulation and practice concerning corporate social responsibility?

In recent years, the Danish Government has afforded much focus on corporate social responsibility ("CSR") for Danish businesses aiming at fostering best practice by ensuring compliance with internationally-agreed principles and guidelines and by encouraging actions from the companies that go beyond compliance, integrating socially responsible behaviour and ethical values into the core values of the organisations.

Implementing the new Directive 2013/34/EU on annual financial statements, etc., the amended Financial Statements Act introduces more stringent requirements regarding the amount of information that larger companies must provide on CSR in accordance with the International Financial Reporting Standards issued by the International Accounting Standard Board.

According to the Financial Statements Act, listed companies shall in their annual reports provide a description of their business model and address CSR matters including considerations on human rights, social matters, employees, environment and climate, anti-corruption and bribery, etc. The statutory requirement means that the companies must account for their policies on CSR or explain the lack of a CSR-policy.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Most recently, an amendment of the Financial Statements Act – applicable to financial years commencing as from 1 January 2020 in (larger) listed companies – widens the CSR disclosures concerning the account for social responsibility, the gender composition in the management and the diversity policy in terms of age, gender, education and corporate background.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

In accordance with the general principle of collective responsibility, it is the board of directors as a whole, not any one individual member that is responsible for transparency and disclosure of information. Market practice in Denmark is, nevertheless, that the chairman of the board of directors in cooperation with the CEO is delegated the responsibility of handling market disclosures and official statements, press releases, etc.

5.2 What corporate governance-related disclosures are required and are there some disclosures that should be published on websites?

MAR sets out the main statutory disclosure requirements relating to the continuous disclosure of price-sensitive information relating to the company and publication of financial reports, etc.

Annual reports and company releases may now be published in the English language only. Listed companies are no longer legally required to disclose an interim management statement or quarterly interim reports. However, the Committee on Corporate Governance recommends that the companies publish quarterly reports and points out that periodic notifications do not fulfil this recommendation (*cf.* question 1.2 above).

According to the Nasdaq Rule Book, the annual report (submitted for shareholder approval) of a listed company must be published no later than three months after the end of the financial year. The audited annual report as approved by the shareholders must be filed with the Danish Business Authority without undue delay after approval, and must be received no later than four months after the end of the financial year. Listed companies must disclose half-year financial reports within a recently revised deadline of three months.

The Financial Statements Act requires that information on how companies apply the principles of corporate governance be included either in the management's review in the annual report, which will be audited by the auditor(s), or posted on the company's website together with a reference thereto in the management's review.

As soon as possible after the publication of inside information listed public limited companies shall make all such information available to investors on the company's website.

The remuneration policy and subsequent remuneration report based on the new Shareholders' Rights Directive rules must be published on the company's website.

Information disclosed on the company's website must be available for at least five years. Financial reports, however, must be available for a minimum of 10 years from the date of disclosure.

The company's mandatory duty to prepare a statement on CSR (*cf.* question 4.3 above), must be included in the annual report or, alternatively, with a reference in the annual report, in another supplementary report or on the company's website.

The Danish Recommendations on Corporate Governance includes a number of disclosure recommendations regarding corporate governance-related information to be published on the company's website.

A listed company shall announce the voting results of a general meeting on its website no later than two weeks after the general meeting. Any questions raised by shareholders are deemed to have been answered by the company if the information is available on the company's website by way of a Q&A function.

5.3 What is the role of audit and auditors in such disclosures?

The annual report is prepared by the management board, adopted by the board of directors and audited by the company's auditor(s). The report, which is subject to final approval by the shareholders at the annual general meeting, must include statements from the auditor(s) regarding whether the auditor finds that the annual report gives a true and accurate view of the financial situation of the company.

According to Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC, listed companies (and other large entities) must: (i) ensure periodic rotation on auditors and audit firms; (ii) limit the volume of non-audit services assigned to the elected audit firm; (iii) increase responsibilities of the audit committee of the company; (iv) comply with certain search, election and nomination procedures by the audit committee when new audit firms are to be elected; and (v) opt for inclusion of external members of the audit committee who are not members of the board of directors.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Peter Lyck
Nielsen Nørager Law Firm LLP
Frederiksberggade 16
1459 Copenhagen K
Denmark

Tel: *+45 30 10 39 15*
Email: *pl@nnlaw.dk*
URL: *www.nnlaw.dk/en/*

Peter Lyck is partner in Nielsen Nørager Law Firm LLP in the M&A and Capital Markets practice group and has vast experience with public M&A and ECM transactions. He has assisted both listed and unlisted companies on corporate governance structures and documentation and has advised a number of blue-chip companies on a range of transactions covering public tender offers, IPOs and bond and rights issues.

Thomas Melchior Fischer
Nielsen Nørager Law Firm LLP
Frederiksberggade 16
1459 Copenhagen K
Denmark

Tel: *+45 31 18 04 34*
Email: *tf@nnlaw.dk*
URL: *www.nnlaw.dk/en/*

Thomas Melchior Fischer is a lawyer with several years of experience specialising in M&A and in the field of general company law, corporate finance and capital markets law with substantial cross-border merger and IPO experience in recent years.

NIELSEN NØRAGER

Nielsen Nørager Law Firm LLP is a mid-sized, well-reputed commercial law firm with broad experience in assisting a multitude of international and domestic clients. Nielsen Nørager Law Firm LLP's legal services are based on a commitment shared by the firm's attorneys to providing clients with the most specialised and cost-effective advice.

Nielsen Nørager Law Firm LLP's core values – quality, commercial approach, efficiency and accessibility – are well-reflected by the firm's and its lawyers' rankings by international rating firms such as *Chambers & Partners*, *IFLR1000*, *The Legal 500*, etc. Nielsen Nørager Law Firm LLP benefits from its strong international relations.

Located in the centre of Copenhagen and employing some of Denmark's most talented and experienced lawyers, Nielsen Nørager Law Firm LLP provides legal advice within a wide range of areas including: corporate and commercial, private and public M&A; IPOs, public tender offers; securities regulation, venture and private equity; debt and equity capital markets; tax; banking and finance; IP and TMT; IT; infrastructure; shipping and transport; energy; EU, competition and procurement; restructuring and insolvency; litigation and dispute resolution; insurance; employment; real estate; and construction, etc.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Foreign Direct Investment
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Sanctions
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com