

Corporate Governance

Contributing editor
Holly J Gregory



2018

GETTING THE
DEAL THROUGH 

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Corporate Governance 2018

Contributing editor
Holly J Gregory
Sidley Austin LLP

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Preface

Corporate Governance 2018

Seventeenth edition

Getting the Deal Through is delighted to publish the seventeenth edition of *Corporate Governance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Bermuda, Hungary, Kenya, Malaysia, Mexico, Norway, Spain and Thailand.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Holly Gregory, of Sidley Austin LLP, for her continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
May 2018

Norway

Anne Kaurin, Janne Kaada Erichsen and Marius L Andresen

Kvale Advokatfirma DA

Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The main Norwegian company laws are the Private Limited Liability Companies Act (Companies Act), the Public Limited Liability Companies Act (Public Companies Act) and the Partnership Act.

The following laws and regulations also apply to listed companies:

- The Securities Trading Act (Securities Act);
- Oslo Stock Exchange listing rules (Listing Rules);
- Continuing obligations of stock exchange listed companies (Continuing Obligations); and
- The Norwegian Corporate Governance Board Code of Practice (Code of Practice).

The Companies Act, the Public Companies Act, the Securities Act, the Partnership Act, Listing Rules and Continuing Obligations are mandatory provisions. The Code of Practice applies on a 'comply or explain' basis.

2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder groups or proxy advisory firms whose views are often considered?

The Norwegian Parliament is responsible for implementing all Norwegian laws.

The Listing Rules and Continuing Obligations are prepared by the Oslo Stock Exchange. The Code of Practice is made by the Norwegian Corporate Governance Board.

The Norwegian courts enforce rules of law in general. The Oslo Stock Exchange enforces the Listing Rules. The Norwegian Financial Supervisory Authority supervises and controls compliance with laws and regulations applicable to listed companies.

Proposals of new legislation are published and it is common that well-known law firms and other relevant private or public bodies submit their views in respect of the proposals. Such submissions are considered by the Norwegian Parliament.

The rights and equitable treatment of shareholders

3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

The shareholders appoint and can remove members of the board of directors of a company. Such resolution shall be passed by the general meeting with an affirmative vote of more than 50 per cent of the shareholders represented at the meeting.

The shareholders cannot require the board to pursue a particular course of action as such. Shareholders representing at least 10 per cent of the share capital of a company can require the board of directors to convene a general meeting in order to resolve a particular matter.

4 Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

A number of important decisions are reserved to the shareholders pursuant to the Companies Act and the Public Companies Act. The main decisions that must be adopted by the general meeting are:

- approval of the annual accounts;
- other matters that, pursuant to the articles of association, shall be resolved by the general meeting;
- election of board members;
- amendments of the articles of association;
- election of auditor;
- distribution of dividends;
- approval of agreements between a company and related parties;
- amendments of the share capital;
- mergers and de-mergers; and
- liquidation.

There are no regulations regarding non-binding shareholders' vote pursuant to the Companies Act or the Public Companies Act.

5 Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

The main rule is that all shares have the same rights. The general meeting can resolve that the company shall have different share classes. If such resolution is passed this shall be reflected in the articles of association, together with information about the rights pertaining to each share class. Different share classes may have different rights, such as voting rights or the right to receive dividend payment.

6 Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

Private limited companies

All shareholders can participate in general meetings and vote for their shares. Shareholders can act by written consent without a meeting or by a virtual meeting if no shareholders object to such procedure.

Public limited companies

All shareholders can participate in general meetings and vote for their shares. The right to vote at the general meeting can, by written regulation in the articles of association, be limited to persons or companies registered as shareholders on the day falling five days prior to the date of the general meeting. The articles of association can include

regulations stating that shareholders wishing to participate in a general meeting must notify the board within a set deadline not less than five days prior to the meeting. Shareholders that do not comply with this deadline may be excluded from the meeting.

The main procedure for public limited companies is that the general meeting is held as a physical meeting. The shareholders can participate through electronic measures unless otherwise specified in the articles of association. If specified in the articles of association, the shareholders may cast their vote in writing prior to the general meeting.

7 Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

Shareholders representing at least 10 per cent of the share capital of a company may require the board of directors to convene a general meeting in order to resolve a particular matter, including director nominations. If the board does not convene the general meeting, the local court shall convene the meeting if requested by a board member, member of the corporate assembly, the CEO, a shareholder or the auditor.

A shareholder may require that a specific matter is put to a shareholder vote at the general meeting. In this case, the matter in question, accompanied with a proposed resolution and a description of the reasons for putting the matter to a shareholder vote, must be submitted to the board in writing at least seven days before the summons to the general meeting is to be distributed. If the summons has already been distributed, a new summons, including the requested matter, shall be distributed, unless the deadline for summoning the general meeting has passed.

8 Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

The shareholders do not owe duties directly to the company or to non-controlling shareholders. However, there are regulations to protect the minority shareholders from misuse of authority. A minority shareholder may require its shares to be redeemed. A shareholder can also be liable for damages caused to another shareholder or to the company.

9 Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

A shareholder cannot be held responsible for acts or omissions of the company. A shareholder can be liable for any loss incurred by the company or a third party based on acts or omissions that the shareholder has caused in his or her capacity as a shareholder, if he or she acted negligently or with wilful misconduct.

Corporate control

10 Anti-takeover devices

Are anti-takeover devices permitted?

The Norwegian takeover rules correspond to a large extent to the rules within the European Union as the Directive 2004/25/EC on takeover bids (the Takeover Directive) is implemented in Norwegian law. The rules apply to public takeover bids (listed companies).

The Code of Practice states that in a bid situation, the company's board of directors and management has an independent responsibility to help ensure that shareholders are treated equally, and that the company's business activities are not disrupted unnecessarily. The board has a particular responsibility to ensure that shareholders are given sufficient information and time to form a view of the offer. The board should not hinder or obstruct takeover bids for the company's activities or shares. The equal treatment principle is also a fundamental principle of the Public Companies Act and a requirement in respect of mandatory and voluntary offers pursuant to the Securities Act.

The Securities Act, which implements the Takeover Directive, also sets out various restrictions of the offeree company's freedom of action. Article 11 of the Takeover Directive prevents a company from using certain measures, including restrictions on the transfer of shares and restrictions on voting rights, to defend itself from a takeover bid (breakthrough). The general meeting of a company may, by way of the articles of association, stipulate that article 11 shall apply.

Further, the Code of Practice states as a general principle that in the event of a takeover bid for the company's shares, the company's board should not exercise mandates or pass any resolution with the intention of obstructing the takeover bid unless this is approved by the general meeting following announcement of the bid. This corresponds to article 9 of the Takeover Directive. The Securities Act, which applies to mandatory and voluntary offers, states that article 9 will apply if adopted in the articles of association.

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Issuance of new shares requires the general meeting's approval. The general meeting can, however, grant the board a proxy to issue new shares. Such proxy cannot exceed 50 per cent of the registered share capital.

Existing shareholders have preferential rights to subscribe for shares. However, the general meeting (or the board, pursuant to proxy) can resolve that issued shares can be subscribed by others than existing shareholders and that the existing shareholders' preferential rights shall be deviated from. If the general meeting, with the applicable vote, resolves that persons other than existing shareholders shall subscribe for shares, then the existing shareholders do not have pre-emptive rights to subscribe or acquire the shares.

12 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Transfer of shares in private limited companies requires consent by the board of directors unless otherwise specified in the articles of association. Existing shareholders of private limited companies have pre-emptive rights unless otherwise specified in the articles of association. For public companies, restrictions may be specified in the articles of association. Such restrictions are mainly consent requirements, pre-emptive rights and ownership restrictions or shareholders' qualifications.

13 Compulsory repurchase rules

Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Compulsory share repurchase is not common in Norway.

14 Dissenters' rights

Do shareholders have appraisal rights?

There are no such rules in Norwegian legislation. Shareholders of private limited companies may request that their shares are redeemed in the event of violation of minority rights or if there are continuing and unresolvable conflicts of interest or opinions between the shareholders.

The responsibilities of the board (supervisory)

15 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The board structure in Norway is one-tier.

If a private or public company has more than 200 employees, the company shall have a corporate assembly. The corporate assembly is, among other duties, responsible for supervision of the board and the CEO. The main purpose of the corporate assembly is to elect the board members and supervise the board and the CEO's management of the company.

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

Management responsibility

The board is responsible for the management of the company and shall ensure that the business is properly organised. The board shall adopt plans and budgets for the activities of the company. The directors must keep themselves informed about the company's financial situation and ensure that its activities, accounts and management of assets are subject to adequate control.

Supervisory responsibility

The board has a supervisory responsibility of the day-to-day management performed by the CEO. The board may also lay down instructions and issue guidelines for the company's business. This is not a compulsory obligation, but will often be necessary for supervising the CEO.

17 Board obligees

Whom does the board represent and to whom does it owe legal duties?

The board represents and owes it legal duties to the company. The board shall act in the best interests of the shareholders, to the extent that this is not in conflict with the company's interests.

18 Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed?

The general meeting resolves whether or not the company shall take enforcement action against a board member, the CEO, a shareholder, member of the corporate assembly or an investigator, for loss incurred on the company caused by such persons.

If the general meeting decides to reject enforcement actions, the shareholders representing at least 10 per cent of the share capital may resolve to enforce such actions on behalf of and in the name of the company. If the company has 100 shareholders or more, the shareholders representing at least 10 per cent of the total number of shareholders may enforce such actions. These regulations do not apply if the initial resolution by the general meeting not to enforce enforcement actions was passed with a majority vote of at least two-thirds of the cast votes and the share capital represented at the general meeting.

19 Care and prudence

Do the board's duties include a care or prudence element?

The board is obliged to perform the management and supervisory responsibility in compliance with the general duty of care. This means that the board shall act with due diligence and with the care of a good merchant towards the company.

20 Board member duties

To what extent do the duties of individual members of the board differ?

The board members must exercise reasonable care, skill and diligence commensurate with the individual directors' knowledge and skills. There is also a minimum standard of care and skills that would be expected to be met by all the individual board members. It is also expected that the board members have basic knowledge of their duties as stated in the company legislation and other applicable laws.

21 Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The board may delegate its responsibilities on a case-by-case basis. It is not possible to delegate the management of the company or the supervisory responsibility in general.

22 Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

There are no applicable requirements regarding a minimum number of non-executive or independent directors for non-listed companies.

For listed companies it is required that at least two of the shareholder elected members of the board are independent. A director is independent if he or she is independent of the company's executive management, material business contacts and the company's larger shareholders. The Code of Practice states that the majority of the shareholder elected members should be independent of the company's executive management and material business contacts.

23 Board size and composition

How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

The size of the board is determined by the general meeting. For private limited companies, the minimum requirement is one board member. For public limited companies, the minimum limit is three members. If a company has a corporate assembly, then the board shall consist of five members. There is no maximum number of seats on the board.

The general meeting is authorised to appoint board members. Employee representatives are elected by and from among the employees. If a company has a corporate assembly, then all board members are elected by the corporate assembly.

A minimum of half of the board members must be resident in Norway, or both a citizen of and resident in an EEA country. It is also expected that the board members have basic knowledge of their duties as stated in applicable laws.

For public companies and state-owned private companies (eg, companies where all shares are owned by the Norwegian state) there are regulations in respect of gender representation. The exact representation varies depending on the number of seats on the board.

The current board composition shall always be registered in the Norwegian Register of Business Enterprises. For listed companies, amendments to the board composition shall be notified to the Oslo Stock Exchange.

24 Board leadership

Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

There are no requirements related to separation (or joining) of the functions of board chairman and CEO of a private company. In public companies, the CEO cannot be a member of the board. The Listing Rules state that executive employees cannot be a member of the board.

The Code of Practice states that executive employees should not be members of the board. This is also considered as best practice and common practice for both private and public companies.

25 Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

No board committees are mandatory for private companies. Listed companies shall have an audit committee that is elected by and from among the board members.

Update and trends

The Companies Act has been amended on several occasions during the last four to five years. Focus has been on simplifying incorporation and management of companies, as well as making the legislation technology neutral. Changes include:

- reduction of minimum share capital from 100,000 to 30,000 kroner;
- reduction of minimum number of board members and deputy board members;
- simplifying procedures for board meetings and general meetings;
- allowing smaller companies to operate without auditing their accounts; and
- reducing the number of auditor statements and investigations required to implement certain changes.

26 Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

There are no general requirements related to a minimum number of board meetings. However, the board shall comply with its duties related to management and supervision of the company. The board must hold as many meetings as necessary to fulfil these duties and obligations.

A physical board meeting is mandatory for public companies when approving the annual accounts and determination of salary and other remuneration for the general manager and other members of management.

27 Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

The Listing Rules state that the company shall provide an annual statement related to the company's management.

28 Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

The board proposes the remuneration, which is determined by the general meeting. The Code of Practice recommends that the remuneration is not linked to the results of the company. There is no other practice that affects the remuneration.

Agreements between a director and the company shall be based on market terms. Agreements that have a value above 10 per cent of the share capital of the company shall be approved by the general meeting.

29 Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

Salary and other remuneration to the CEO and other members of management is determined by the board.

The Code of Practice states that the board shall adopt a statement related to all remuneration to the management.

30 D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Directors' and officers' liability insurance is permitted and the company can pay the premiums.

This insurance would cover the liability of a director on certain terms. It is quite common in Norway that a company provides such insurance, but it depends on the size of the company and the risk of the business.

Some of the typical terms of directors' insurance would be as follows:

- the loss has to be a recoverable damage under applicable Norwegian law;
- the loss has to occur in the capacity of being a director of the relevant company;
- the loss has to be established in the term of the insurance;
- claims made policies (only claims filed within the term of the insurance); and
- often exceptions from coverage when the director in his or her capacity as director caused the loss intentionally or by gross negligence.

The coverage would also be limited in accordance with the maximum insurance amount that appears from the specific agreement.

31 Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

The company may indemnify a director from liability by entering into an agreement with the director regulating or limiting his or her liability for loss. Such an agreement has to be approved by the general meeting and will not limit the director for loss caused by intent or gross negligence. The agreement will, however, not reduce the liability towards third parties.

The general meeting may also adopt a resolution on discharge of liability in specific matters. The company may, nonetheless, bring a claim based on a matter for which the general meeting did not receive correct and complete information on important points when the resolution was adopted.

32 Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

The company or a shareholder may preclude or limit the liability of directors by entering into an agreement with the directors regulating or limiting his or her liability for loss (see question 31).

33 Employees

What role do employees play in corporate governance?

When the average number of employees exceeds 30, employees are entitled to claim employee representation on the board. Employee board representatives are elected by and from among the employees, but are equally as authorised and empowered as the board members elected by the shareholders. The number of board representatives to be elected by the employees depends on the number of employees and the total number of seats on the board.

34 Board and director evaluations

Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

The Code of Practice states that the board shall annually evaluate its performance and expertise. The recommendation is that the report includes an evaluation of the composition of the board and the manner in which its members function, both individually and as a group, in

relation to the objectives set out for its work. The board should consider whether to use external resources to facilitate the evaluation of its own work.

Disclosure and transparency

35 Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

The articles of association are publicly available at the Norwegian Register of Business Enterprises (brreg.no) upon payment of an applicable fee.

36 Company information

What information must companies publicly disclose? How often must disclosure be made?

The following information shall be disclosed to the Norwegian Register of Business Enterprises:

- articles of association;
- incorporation date;
- municipality and business address;
- board members;
- CEO;
- signatory powers;
- auditor (if applicable); and
- annual accounts.

Amendments to the above must also be disclosed without undue delay. An example is amendment to the share capital, which requires amendments to the articles of association.

There are also extensive regulations related to disclosure of information of listed companies. In general, the company shall immediately disclose inside information that directly involves the company to the Oslo Stock Exchange.

Hot topics

37 Say-on-pay

Do shareholders have an advisory or other vote regarding executive remuneration? How frequently may they vote?

The general meeting of public companies shall vote on the guidelines regarding remuneration to management adopted by the board. This shall be done annually.

38 Shareholder-nominated directors

Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

A shareholder can nominate a director without the recommendation of the board by requiring the board to put board election on the agenda at the company's general meeting. The agenda is included in the summons to the general meeting, which is distributed at the company's expense.

39 Shareholder engagement

Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

Companies engage with shareholders both in connection with general meetings and by general communication at other times. Such communication can include provision of general information, obtaining views from shareholders and to engage in discussions with investors on a case-by-case basis.

Pursuant to the Code of Practice, the board should establish guidelines for the company's contact with shareholders other than communication related to general meetings.

The extent of engagement between a company and its shareholders depends on various circumstances, such as the number of shareholders, the structure of the company, and the size and type of the business.

Listed companies are subject to regulations and limitations in respect of providing information to shareholders (and others).

40 Sustainability disclosure

Are companies required to provide disclosure with respect to corporate social responsibility matters?

The board shall prepare an annual report in connection with the annual accounts. The report shall include information regarding the impact of the company's business on the environment and the measures that are implemented or planned to be implemented in order to reduce any negative environmental impact. Further, gender equality shall be described, including measures implemented or planned to be implemented in order to promote equality. If a company has more than 50 employees, then implemented or planned measures related to diversity of ethnicity, religion, disability, sexual orientation and gender identity shall be described.

The board of those private companies that have annual income below 70 million kroner, a balance sheet below 35 million kroner and fewer than 50 employees does not have to prepare this annual report.

The Code of Practice states that a board should describe the company's key values and set forth guidelines for ethics and corporate social responsibility.



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41 CEO pay ratio disclosure

Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

Companies are not required to disclose 'pay ratio' information. However, the annual compensation to the CEO shall be published in notes to the annual accounts.

42 Gender pay gap disclosure

Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

Companies are not required to disclose 'gender pay gap' information.

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