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## Denmark

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### The Act on Employee Representation on the Boards of Danish Companies

#### Historical Background

Before going into detail on the adoption of the act on employee directors, it is worth noting the social context in which it was adopted. Throughout the 1960s and 1970s, the democratisation of enterprises and organisations was debated in many parts of Danish society and the outcomes of these discussions were not limited to the legislation being looked at here. For instance, there was also a revision of the rules governing universities.

That said, the story of this particular piece of legislation dates back to 1965, when the Danish Confederation of Trade Unions (LO) set up a committee to look into a democratisation of the Danish business community and employees' rights to take part in general decisions about company policy within the existing representation system. The committee recommended a model similar to the German one and proposed that the issue be negotiated between the two sides of industry. Another proposition, aiming exclusively at making the employees eligible for board representation, could not get a majority, as it was believed that the employees would not have a real say until a profit-sharing scheme was adopted. Ownership and influence were thus linked closely together.

In 1967, the Social Democrat government addressed the democratisation issue and submitted a bill on profit sharing. The Danish Parliament threw out the bill.

In 1971, LO submitted a new proposal for a profit sharing scheme. In 1972, after Denmark had joined the EEC, LO and the Social Democrats submitted a proposal for employee representation on the boards of Danish companies as well as a proposal for a profit sharing scheme.

The Danish Employers' Confederation (DA) and the right-wing parties objected to these proposals, particularly the one recommending profit sharing via central funds.

As a result of the debate, two bills were put to the vote in the Danish Parliament. The act on profit sharing was rejected and the act on employee representation on boards was adopted. Employee representation was exclusively based on employment, not on membership of a trade union. The act was carried unanimously and was backed by the two sides of industry.

The act on employee representation was carried in 1973 and incorporated in the Danish Public Companies Act, the Danish Private Companies Act and the Danish Act on Commercial Foundations.

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## **The Content of the Act**

### **Corporate representation**

Corporate representation implies that the employees in a public limited company, a private limited company or a commercial foundation may – through a vote among all employees – elect two or more members to the company’s board of directors on equal terms with the directors having been elected by the shareholders. Staff representatives have exactly the same rights and obligations as any other director, including the same secrecy, the same criminal liability and the same liability for damages.

### **Election of staff representatives to the boards of private limited companies and commercial foundations**

The right to elect staff representatives to the boards of private limited companies and commercial foundations essentially follow the same rules as apply to public limited companies.

### **Employee representatives in public and private limited companies**

In order for employees to submit a request for staff representation on the board, it is a prerequisite that at least 35 employees on average have been working in the company for the past 3-year period and that a majority of the employees have – in a vote among themselves – voted for employee representation on the company’s board of directors.

The first condition for corporate representation is that the company must, for a certain period of time, have had a certain size. It follows directly from Danish law that employees in companies having had an average of 35 employees for the past 3-year period are entitled to request a vote among the employees for the purpose of deciding whether to elect directors and alternates among the employees.

The second requirement is that a majority of the employees want such corporate representation. Thus, in order for employees to become entitled to elect staff representatives, a yes/no vote must be held among the employees.

A yes/no vote may be requested by:

- a) A majority of the employees in the company’s works council;
- b) Organisations in the company, such as clubs and staff associations representing at least 10% of the company’s employees; or
- c) 10% of the company’s employees.

The request for a yes/no vote must be submitted in writing to the company’s board of directors. Once in receipt of the request for a yes/no vote, the board of directors must ensure that an election committee be set up to organise the vote. The yes/no vote must be held not later than 4 weeks after the election committee has been set up. The vote must be in the form of a secret ballot.

Voters are all employees working in the company at the time of the ballot.

For the proposal to be carried, an absolute majority is required, meaning that more than 50% of the voters vote in favour of the proposal. If the proposal is rejected, a new request for a yes/no vote cannot be made until 6 months after the first vote.

If the proposal is carried, staff representatives must be elected to the board.

### **Appointment and function of the election committee**

The board of directors in a company is obliged, within 6 weeks of their receipt of a request for a yes/no vote, to set up an election committee comprising representatives from the management and the employees. The employees must form a quorum in the committee.

Shop stewards, if any, in the company should – if possible – be represented in the election committee. As the committee is appointed for purposes of an election, the choice of staff representatives to the committee should not give rise to any problems. The committee appoints a chairman from among its own number.

### **Outline of time and deadlines relating to a yes/no vote**

Below is a summary of the time and deadlines to be observed in connection with a yes/no vote concerning staff representation on boards:

- 1<sup>st</sup> week: Submission of a request for a yes/no vote to the company's board of directors
- 6<sup>th</sup> week: Deadline for the appointment of the election committee
- 10<sup>th</sup> week: Deadline for the holding of the yes/no vote. The result of the voting must be announced as soon as possible after the vote
- 36<sup>th</sup> week: Deadline for the election of staff representatives to the company's board of directors.

### **Election of staff representatives to the company's board of directors**

If the outcome of the yes/no vote is a 'yes', the election committee must as soon as possible, and not later than 6 months after the result of the voting is available, arrange for an election of employee directors and alternates to the board. If this deadline is not kept, the resolution to elect employee directors will lapse and the procedure must begin all over, if relevant.

### **Number of directors**

The number of employee representatives on the board of directors of a company depends on the number of directors elected by the company in general meeting. The employees must elect half the number of directors elected by the shareholders in accordance with the company's articles of association – however always at least two. If the number is not an integer, the number is rounded up. The majority of the directors are thus always elected by the company in general meeting.

### **Voting power, eligibility and election**

All employees working in the company both at the time of the publication of the electoral register and at the election day can vote. At the time of the announcement of the election day, the election committee must have prepared a list of voters in the company.

Once the nomination deadline has expired, the election committee must draw up two lists: One showing the candidates and one showing the alternates. The employees must be notified of both of these lists not later than two weeks before the election.

It is only the employees of the company who can be elected. Members of the election committee cannot be nominated and elected.

### **Outline of time and deadlines relating to an election of employee directors**

Below is a summary of the time and deadlines to be observed in connection with an election of employee directors:

- 6-10 weeks before the election day: The election committee announces the election day, and the employees are called upon to make proposals for candidates and alternates
- 4 weeks before the election day: Submission deadline for proposals for candidates and alternates
- 2 weeks before the election day: The election committee advertises lists showing candidates and alternates
- Election day: The election is held. The result of the voting is published as soon as possible after the election
- Annual General Meeting of shareholders: The members elected by the employees join the board of directors.

If, on the expiry of the deadline, only the number of candidates and alternates to be elected have been nominated, no election need to be held. Instead, the employee directors and the alternates will be appointed.

### **Ordinary election of employee directors**

An ordinary election of directors and alternates is held every fourth year. Thus, the term of office is four years. An ordinary election requires that there are still more than 35 employees in the company – computed as the average number in the last three years –

on the expiry of the term of office. If this condition is not fulfilled, the right to elect employee directors will be forfeited.

### **Retirement from the board of directors**

An employee director must/will retire from the board if he or she (I) is removed by the employees, (II) is no longer employed in the company, (III) wishes to retire, or (IV) dies. In such a situation the employees may request that a by-election be held. The same rules as apply to an ordinary election apply to a by-election.

The same parties who may request a yes/no vote may request that an employee director be removed. The same requirements as to form must also be observed if the employees wish the arrangement to come to an end.

### **Group representation**

Group representation implies that the employees in a group of companies are entitled, through indirect elections, to elect employee directors and alternates in superior companies. The election is carried through by an electoral college comprising employee representatives from the group companies.

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### **Employees' election of directors for parent companies**

The conditions for obtaining group representation are largely the same as apply to corporate representation. However, special rules apply to group representation in a parent already having corporate representation.

## **Employment law**

An employee director may sometimes be in a dilemma, as there may very well be several interests to look after. Therefore, two special rules have been laid down in the two executive orders issued in pursuance of the Public Companies Act regarding corporate representation and group representation. Those two rules lay down the framework for employee directors' position.

### **1. Protection against dismissal**

Employee directors and their alternates are protected against dismissal and other impairment of their situation in the same way as are shop stewards in the same or similar industry. Any disputes arising in this connection will be settled through industrial disputes procedures. However, despite this protection, employee directors do not have the same obligations as shop stewards, including the obligation to seek to bring strikes in contravention of the collective agreement to an end. The protection is, actually, based on a wish to safeguard the employee director's right to freely put forward his or her points of view to the other board members.

### **2. Duty of notification**

In companies and groups in which the employees have elected employee directors, the boards are required to ensure that the employees are provided with good and efficient information channels allowing the employees to keep abreast of the company's/group's affairs.

Such notification, which must be given in an adequate manner, may include financial, production and employment issues. The employee directors are not themselves obliged to notify all employees about the company's affairs in general, as this obligation rests with the board of directors and the executive board. Therefore, it is a challenge for the employee directors to be instrumental in ensuring that the board of directors and the executive board live up to the duty of notification.

The Danish courts of law have pronounced several judgments establishing that employee directors and directors elected by the company in general meeting have equal rights and obligations as far as liability and the size of directors' fee are concerned.

## **Employee directors' role on the board of directors**

In 1995-99, the Copenhagen Business School (CBS) performed an analysis of employee directors in Danish enterprises. This present description of employee directors' role on the board of directors is based on the results of CBS' analysis. The analysis was performed by Søren Christensen and Ann Westenholz, both research professors.

## Employee directors

According to the analysis, about 60% of employees were working in enterprises having employee directors. Employees that had decided to elect members to the board were mainly working in large companies. At the time the analysis was carried out, there were employee directors in 2/3 of all enterprises having at least 200 employees, whereas this trend showed only in 1/5 of enterprises with less than 200 employees.

The following question was posed in the analysis: What is important to the employee directors and the directors elected by the shareholders when they make large, long-term decisions about, say, corporate acquisitions, mergers, restructurings or the like?

The responses are illustrated in the following table showing five different weighting criteria. A high number indicates that much weight is being attached to the criterion, whereas a low number indicates a low weighting:

**Table: How do you weight the criteria listed below when passing important board resolutions?**

Weighting of the criteria as regards	Employee directors	Directors elected by the company in general meeting
Market	4.4	4.4
Innovation	3.9	3.9
Employees	3.6	3.4
Society	3.5	3.1
Shareholders	2.8	3.4

Note: The data derive from 41 enterprises representing a broad range of industries. In those enterprises, interviews were conducted with 100 employee directors and 28 directors elected by the shareholders. The material is not representative for Danish enterprises.

The table shows that the employee directors attach most importance to the company's market situation – its opportunities and threats – when making important decisions. Although the market criterion definitely takes the lead, the employee directors also attach weight to making innovative decisions – the criterion coming in second. The employee criterion takes third place, possibly reflecting the employee directors' attentiveness towards reactions from employees and trade unions.

Nearly as much weight is attached to society as a criterion, reflecting the attentiveness directed at reactions from the media, the local society and the legislators as well as considerations for the environment and society at large.

The criterion to which the employee directors attach least importance is shareholders, reflecting that the employee directors do not devote much attention to how the shareholders react, the size of dividends or how the stock market responds to the decisions they make as co-directors.

A comparison between the employee directors and the directors elected by the company in general meeting shows that the two groups do not differ much.

The latter group weights the market first, innovation second and employees third – even with precisely the same weight as the employee directors. Only the last two criteria differ in that the directors elected by the general meeting attach just as much importance to the shareholder criterion as to the employee criterion, whereas society is considered less important. A value of 3.1

does, however, indicate some weight. Thus, both director groups focus most on the enterprise and its surroundings when making their decisions, whereas their respective background groups – ie the employees and the shareholders – are not weighted equally high. This, however, does not mean that the employee directors do not see to the best interests of the employees when passing board resolutions.

In the analysis, the employee directors indicate that they look after the employees' interests. Such data are interpreted so as to indicate that the employees feel that they best attend to the employees' interests if they focus on the company's long-term survival. And that goes for the directors elected by the general meeting as well. They also find that their background group's interests are best safeguarded if they, as directors, focus most on the company's market situation.

The analysis reflects that the employee directors have developed a role as some kind of 'citizen of the international community', where they believe that the employees' interests are best protected if the company can survive in the long run. This view contradicts the usual wage earner culture where the general view is that the employees' interests are best looked after by maintaining a distinction between the employees ('us') and the management/owners of the company ('them').

### **Unions in Denmark**

A number of cartels and trade unions in Denmark (CO-industri, GmK, BAT, Handelskartellet and IDA) have joined forces with CBS in performing an analysis of the part played by employee directors in the decision-making process.

The unions in Danish trade and industry encourage employees to seek influence through corporate representation. Under the auspices of the Danish trade unions, courses tailored for employee directors are offered in order to prepare them for their duties as directors.

Annual conferences are held for employee directors. The purpose of the conferences is to create networks and to inform and inspire.

Furthermore, all employee directors receive a newsletter four times a year. The newsletter communicates technical information as well as general information of relevance to the work of a board of directors.