GUIDE

on the rules for company and group representation

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Table of contents

1. Introduction 3
2. Company representation 4
   2.1. Establishment 4
   2.1.1. Which companies and which persons 4
   2.1.2. Elections Committee 6
   2.1.3. Yes/No vote 8
   2.1.4. Candidates and terms 8
   2.1.5. Organisation of elections 10
   2.1.6. Peace elections 11
   2.2 Changes once the scheme is established 12
   2.2.1 Changes during the parliamentary term 12
   2.2.2. Corporate restructuring 13
   2.3. Termination of the scheme 13
   2.4. Voluntary schemes 14
   2.4.1. Establishment 14
   2.4.2. Termination of the scheme 15
   2.5. Registration in the Business and Companies Agency's IT system 15
3. Group representation 16
   3.1. Establishment 16
   3.1.1. Which companies and which persons 16
   3.1.2. Organisation of elections 18
   3.2. Termination of the scheme 20
4. Protection of company and group representatives 20
   4.1. Content of protection 20
   4.2. The protected circle 20
5. Rights and duties of company and group representatives 21
   5.1. Duty to provide information 21
   5.2. Confidentiality 21
6. Statutory right of appointment 21

1. Introduction

The rules on employee representation were introduced in 1974 and until 2009 only minor adjustments had been made, as the area is subject to considerable political scrutiny and the rules were at the time the expression of a broad compromise between stakeholders. The rules safeguard the interests of both management and employees. The rules are intended to ensure that employees have a say in and are informed of management decisions and to increase the possibility of employees being informed of matters within the company which have an impact on management decisions.

On 29 May 2009, Parliament adopted the Companies Act[1], which has now entered into force. The Companies Act continues the possibility of company and group representation in share and limited companies, but has introduced new collective concepts for management bodies. The new concepts are due to the fact that companies have been given the possibility to choose between the different management structures.

The definition of the collective notions is:

- "The supreme governing body":
    - the board of directors of companies which have a management and a supervisory board, and
    - the supervisory board of companies which have a management board and a supervisory board.
- "The central management body":
    - the board of directors of companies which have a management and a supervisory board, and
    - the management of companies which have a management and a supervisory board.

Common to the management models in the Companies Act is that the day-to-day management lies with the management of the company. In addition, public limited companies must always have either a board of directors or a supervisory board. Private limited companies must have a board of directors or a supervisory board if the employees have opted for company representation. The rules of the Companies Act are supplemented by Order No 806 of 28 June on employee representation in joint stock companies (hereinafter the Order).

The previous rules are known and incorporated in many companies, so the main lines of the previous rules have been retained. At the same time, however, the new rules allow for a greater degree of flexibility. It is now possible to derogate from several of the rules if there is agreement between management and employees. The requirement for agreement ensures that the derogation is not to the detriment of the interests of one party.

The new rules apply in principle to all company or group representation schemes, i.e. both to schemes established after the Order has entered into force and to schemes established under the previous rules. No decision is required in this respect. However, for example, questions concerning electoral periods which started at a time when the previous set of rules was applicable must be decided under the new set of rules, respecting the conditions which applied under the previous set of rules. In practice this means, for example, that in a current election period it is not

[1] Act No 470 of 12 June 2009 on joint stock companies (Companies Act)

possible to apply Article 53(1)(1) of the Regulation, under which a retiring employee representative is replaced by the alternate who received the most votes, since under the previous set of rules alternates were elected as personal alternates. The election was therefore based on the assumption that the alternates were personal, which must be respected.

This guidance is intended to help all those who have to apply the rules by detailing the changes to the previous rules and describing the Board's practice in relation to known issues.

2. Company representation

2.1. Establishment

2.1.1. Which companies and which persons The Companies Act continues the possibility of company representation in share and limited companies, cf. Article 140 of the Companies Act.

In companies that have employed an average of at least 35 employees over the last three years, employees have the right to elect a number of members to the company's highest management body and their deputies equal to half of the other management members.

Staff

Employees of a company are defined as employees of the company and, as a novelty, employees of the company's foreign branches located in an EU/EEA country, cf.

An employee is any person over 15 years of age who performs work for a company as an employee, unless he

- is registered (or notified for registration) in the Business and Companies Agency's IT system as a member of the company's management or as a director of a company within the group, or
- is permanently based outside the EU/EEA.

It is the rules of labour law that determine whether a particular situation constitutes an employment relationship. External consultants are not usually covered by the concept of employee.

Calculation of average of at least 35 employees in the last three years

In the last 12 quarters (3 x 4 quarters), a company must have paid into the Labour Market Supplementary Pension (hereafter ATP) an amount equal to at least 105 (3 x 35 employees) times 45½ weekly contributions. The requirements are met regardless of whether there have been fewer than 35 employees in one or more quarters during the 3-year period. The decisive factor is the total amount paid into the ATP in the last 12 quarters.

Weekly contributions for persons registered (or notified for registration) in the Business and Companies Agency's IT system as members of the management are not included. The same applies to weekly contributions for persons who have a permanent place of work outside the EU/EEA.

Employees of the company's foreign branches are "employees", see above, but are not included in the calculation of whether the company has employed on average at least 35 employees in the last three

years, because no ATP contribution is paid for these. However, employees of the company's foreign branches are eligible and have the right to vote, see below in the subsection on Eligibility and Right to Vote.

Number of representatives and alternates

Employees shall be entitled to elect a number of members of the company's supreme management body and their alternates equal to half of the number of members otherwise elected by the general meeting or appointed by others by virtue of a statutory right of appointment. Members appointed by others may, for example, be appointed by a public authority. However, in public limited companies, the members elected by the general meeting must always constitute a majority, cf. Article 120(1) of the Companies Act.

Examples:

- A company has 8 directors elected by the general meeting. Employees are also entitled to elect 4 representatives.
- A company has 7 board members elected by the general meeting and 1 appointed by the municipality. In addition, the employees have the right to elect 4 representatives.

Note!

Members of the supreme management body whom the articles of association confer the right to appoint, such as a public authority, are included in the number of representatives that employees are entitled to elect, but are not included in the number of members elected at general meetings of limited liability companies. However, where the articles of association of a limited company confer on a particular class of capital or on a minority of capital owners the right to elect one or more members of the supreme management body, these are considered as "elected by the general meeting" and not as "appointed by others". This does not apply, however, if the right is conferred on a named shareholder.

Examples:

- A limited liability company with A and B shares has 6 members elected by the general meeting and in addition 2 members elected by the shareholders of capital class A. Employees are also entitled to elect 4 representatives.
- A limited liability company has 3 board members elected by the general meeting and 1 board member appointed by the municipality. The employees would then have the right to elect 2 additional representatives, but the members elected by the general meeting would not constitute the majority. Therefore, for example, the General Assembly would elect 5 members (instead of 3) at the General Assembly and the employees would then have the right to elect 3 representatives. The members elected by the General Assembly then constitute the majority. Another option would be to reduce the number of board members appointed under the articles of association, so that the members elected at the general meeting would still constitute the majority. You can read about compulsory reduction in section 2.2.1.
- A limited company with A and B shares has 5 directors elected by the general meeting and 1 director appointed by a named shareholder. The employees have the right to elect 3 additional representatives, and those elected by the general meeting still constitute the majority.

If the conditions for obtaining company representation are met, employees can always elect at least 2 members and their alternates. If the number of members to be elected by the employees is not a whole number, round up.

Example:

- A company has 3 directors elected by the general meeting. Employees are also entitled to elect 2 representatives.

Note!

If it is not possible to elect the number of representatives to which the employees are entitled, for example because there are too few candidates standing for election, the employees can, as an innovation, elect a lower number of representatives than they are entitled to elect, see Section 140(2) of the Companies Act and Section 10(4) of the Statutory Order.

Example:

- A company has 6 directors elected by the general meeting. Employees have the right to elect 3 additional representatives, but only 2 candidates stand for election. Employees can elect 2 representatives.

The number of employee representatives is fixed for the entire term, regardless of whether the number of other members changes, unless there is a compulsory reduction. See section 2.2.1. on changes during the term of office.

The number of alternates depends on how the election is conducted. See section 2.1.5. on the organisation of elections.

Eligibility and right to vote

Every employee is eligible if he or she is of legal age, i.e. 18, and not incapacitated. In addition, the person must have been employed by the company for the last 12 months before the election. The existence of an employment relationship is determined by the rules of labour law. As an innovation, the election committee may decide by consensus that an employee is eligible even if he/she has been employed for a shorter period of time, cf.

Persons who are registered (or notified for registration) in the Danish Business and Companies Agency's IT system as members of the company's management or who have their permanent place of work outside the EU/EEA are not considered employees and are therefore not eligible for election, see section 2.1.1. in the Employees subsection.

Note!

If a company has both group and company representation on the highest governance body, a person can only act as either company or group representative and thus cannot stand or be elected to both. The same applies to alternates.

Every employee has the right to vote if he/she is employed by the company both at the time of publication of the election list, cf. section 39, paragraph 4 of the Statutory Order, and at the time of the election, cf. section 15, paragraph 1 of the Statutory Order. Employees who are recruited after the publication of the electoral roll but before the elections are held are therefore not entitled to vote. However, part-time employees are entitled to vote, regardless of their weekly working hours and whether or not they pay contributions to the ATP.

It should also be noted that under the new rules, employees of the company's foreign branches located in an EU/EEA country are also eligible and have the right to vote under the same rules as their Danish colleagues. However, employees of the company's foreign branches located in an EU/EEA country are not counted in the calculation of the number of employees, see sub-section Calculation of an average of at least 35 employees in the last three years in section 2.1.1.

Note!

The General Assembly may decide to extend the circle of employees eligible and entitled to vote to one or more foreign subsidiaries. For further details, see section 3.1.1. on group representation.

2.1.2. Election Committee

Establishment and composition

The election committee shall be composed of representatives of the employees and representatives of the central management body, cf. Article 29(1) of the Statutory Order.

The central management body is responsible for setting up the electoral committee. This duty is incumbent on the central management body from the moment that a demand for a yes/no vote is made in the company.

An election committee must be set up within six weeks of the demand for a yes/no vote being made, cf. section 27 of the Statutory Order.

As the central management body is responsible for setting up the electoral committees, the central management body is also free to determine the number of members on the committees. However, the rules governing the composition of the committees must be respected.

The majority of the members of the election committee shall be representatives of the staff side, while at least one of the members of the committee shall represent the central management body. For details of the composition, see Article 29 of the Order.

Note!

The wording "representatives of the central management body" now allows the central management body to appoint representatives to the election committee.

Therefore, for example, an HR manager can in future sit on the election committee and represent the interests of management, even if he or she is not registered as a member of the central management body of the company. In cases where members of the central management body do not participate in the

election committee themselves, but where the central management body has appointed other representatives instead, it is the representative in person who attends election committee meetings, takes decisions on his own and signs in his own name.

It is the employee representatives on the Works Council who choose the employees who will sit on the Election Committee.

If there is no works council in the company, the central management body appoints the employees' representatives to the election committee. As far as possible, trade union representatives shall be represented on the election committee.

In practice, there will often be overlaps between the people who sit on the works council and those who sit on the election committee.

"Standing Committee"

The Election Committee is a "standing committee" within the meaning of Article 29(1) of the Statutory Order. It follows that the Committee continues to exist as long as the system of employee representation is in place. This implies that the members of the Committee are permanent members who cannot be replaced on an ad hoc basis.

In cases where the replacement of a member of the Election Committee is necessary, for example due to termination of employment, the member resigning must inform the Election Committee and the procedures for electing representatives to Election Committees must then be followed.

If a member of the Election Committee is nominated for election as an employee representative or alternate, he or she may not remain a member of the Election Committee, cf. Article 29(4) of the Statutory Order. A member standing for election may resign from the election committee.

Possibility to derogate from rules by agreement

A number of the rules of the Ordinance allow the Election Committee or the staff of the Election Committee to decide by consensus to derogate from specific rules of the Ordinance.

Note!

Deciding "by consensus" to derogate from certain rules means that the decision cannot be taken by a majority vote. The individual member of the electoral committee has a de facto right of veto.

The requirement of consensus leads to the need to obtain the consent of a member who, for example, cannot be present at the meeting of the electoral committee where one of the decisions requiring consensus of the electoral committee is taken. If the electoral committee takes such a decision without obtaining such consent, the decision shall be null and void.

2.1.3. The yes/no vote

If the company meets the conditions for establishing a company representation scheme, the eligible persons referred to in Article 25 of the Decree may request that a yes/no vote be held to determine whether a representation scheme should be established.

The parties that may request a yes/no vote are:

- A majority of employees, not appointed by management, on the company's works council,

- trade unions in the company, such as clubs and staff associations representing at least 1/10 of the company's employees, or

- 1/10 of the company's employees.

Inventory method

At least half of those entitled to vote in the yes/no vote must have voted "yes" for a decision to establish a representation scheme to be deemed adopted, cf. Article 34(3) of the Statutory Order.

Note!

At least half of those entitled to vote must have voted "yes", which means that those not casting a vote in a yes/no vote are counted as a "no" vote for the purposes of calculating the result.

Opting out of the yes/no vote

Note!

As a new feature, the electoral committee now has the possibility to "skip the yes/no vote" by consensus and instead go directly to the organisation of the actual election concerning the representation system, cf. Article 33(1) of the Statutory Order.

If the election committee has decided by consensus to hold the actual election directly, i.e. without a prior yes/no vote, and the employees do not wish to introduce a system of employee representation, the eligible parties have the option of requesting a yes/no vote on the termination of the system, cf. section 23 of the Statutory Order, as soon as the election committee calls for elections. Such a vote may be taken even before the election which the electoral committee wishes to hold.

2.1.4. Candidates and terms of office

Call for candidates

At the same time as the date of the election is announced, the Election Committee shall invite proposals from the employees for candidates to be put forward for the election, in accordance with Article 39 of the Statutory Order.

In addition to the list of employees entitled to vote, the Election Committee shall, at the time of publication, indicate the number of employee representatives and alternates to be elected. In the case of alternates, the single-list system does not allow the electoral committee to indicate the exact number to be elected, as the number is determined only after the election results have been established (see section 2.1.5 on the organisation of elections). In this situation, the election committee must instead simply state the number of employee representatives to be elected and state that all candidates who received at least one vote were elected as alternates.

"Election Day" or "Voting Period"

Note!

As a novelty, it is now possible to hold the vote over a limited period of time, rather than on a specific day, as was previously the case, see Article 39(1) of the Statutory Order.

If the vote is held over a period, the last day of the period shall be considered as the date of the election for the purposes of calculating deadlines.

Length of the electoral period

Note!

Whereas the term of office has hitherto been 4 years, it is now possible to choose a shorter term of office, cf. Article 19(1) of the Statutory Order. However, the starting point is still 4 years.

The decision must be taken by the election committee prior to each election and then published prior to each election. The decision requires consensus, see more in section 2.1.2 of the sub-section Possibility of derogation from rules by consensus. The Electoral Committee may not, as a general rule, introduce an election period other than the four-year period.

"Rolling replacement"

The possibility of changing the starting point for the length of the 4-year term means that it is possible, for example, to introduce a "rolling replacement system", so that elected employee representatives do not resign at the same time, but rather on a rolling basis, in order to achieve greater continuity in the highest governance body.

When a "rolling replacement system" is introduced, the electoral commission must already provide information on the length of the electoral period(s) when the date of the election is published.

If an established system of employee representation with an election period of 4 years is to be changed to a "rolling replacement system", it will be necessary during the transition period to set different election periods for the employee representatives to be elected.

Note!

In a "rolling replacement" system, it should be borne in mind that elections for employee representation will have to be held more frequently than if all representatives' terms of office expire at the same time.

Example:

A company has 4 company representatives who have so far been elected at the same time. It now wishes to introduce a "rolling replacement system", so that every two years 2 of the company's 4 company representatives are replaced.

The election committee must already announce the date of the forthcoming elections:

- 2 candidates for a term of 2 years and

- 2 candidates for a term of 4 years.

At the election 2 years later, it could be decided that the term of office for the two vacant posts (the posts of the two candidates elected for the 2-year term at the previous election) in the next 10 terms will be 4 years. This establishes a system of rolling replacement. In the example, 2 representatives will be elected every two years.

2.1.5. Holding of elections

The rules have changed significantly compared to the previous rules in this area.

Candidates on a single list

Note!

The starting point is that all candidates are put forward on a single list, cf. Article 40(5) of the Statutory Order. This is a significant departure from the previous rules, which always required candidates to appear on two lists: one for representative candidates and one for alternate candidates.

Candidates will no longer have to decide whether they wish to stand for a representative or an alternate post, as everyone will be standing for both representative and alternate posts. All candidates will stand on one list in alphabetical order and the number of votes will determine who is elected as representative and alternate respectively. Under this system, the reality is often that a number of employees of the company are elected as alternates, so that the number of alternates exceeds the number of representatives.

It is not possible to introduce a system whereby only one specific group of employees stands for election to the highest management body.

Note!

The candidates on the list receiving the most votes shall be elected as representatives, while all other candidates receiving at least one vote shall be elected as alternates, in accordance with Article 43(1) of the Statutory Order. If a greater number of alternates are elected than the number of employee-elected representatives, only a number of alternates equal to the number of representatives shall be protected by the confidence of the employees. For more details, see section 4.

The system offers more flexibility than the previous two-list system of personal substitutes, where a by-election was often necessary during the election period due to resignations. Under the new single-list system, by-elections will not be necessary in a number of cases, as the person who receives the most votes in the election will take office.

Note!

However, if employees do not wish to be on one list, they always have the option of requesting that they be on two lists, cf. section 40(6) of the Order.

The single-list system or parts thereof may be derogated from if the Electoral Committee so agrees, cf. Article 40(7) of the Statutory Order.

Example:

The Election Committee may decide, in connection with the nomination of candidates on a single list, that a maximum of 10 alternates shall be elected for the company representatives. In this case, the 10 candidates on the list with the highest number of votes after the elected employee representatives shall be elected as alternates.

Candidates on two lists

Instead of the new one-list system, the well-known two-list system can be applied, cf. § 40, paragraph 6 of the Statutory Order.

The Election Committee may decide by consensus to use one list for candidates standing as staff representatives and one list for candidates standing as alternates. In addition, personal substitutes may be nominated. If personal alternates are elected, one alternate shall be elected for each representative, i.e. a number of alternates equal to the number of representatives shall be elected.

If no personal substitutes are nominated, but candidates are nominated on two different lists, the candidates with the highest number of votes shall be elected as representatives and substitutes respectively, in accordance with Article 43(2) of the Statutory Order, unless otherwise decided. This means that, as a general rule, the same number of alternates shall be elected as representatives. As alternates are not normally personal, any alternate may act as an alternate for any representative, i.e. irrespective of the number of votes obtained by the alternate in question. This system provides a higher degree of flexibility than the previous 2-list system with personal alternates, where companies often had to hold by-elections.

However, the Election Committee may decide otherwise, cf. Article 43(2) of the Statutory Order. For example, the election committee may decide by consensus to place the candidates for representatives and

alternates on two different lists and at the same time decide that the candidates on each list who have received the most votes shall be elected as representatives, while all the other candidates who have received at least one vote shall be elected as alternates.

Note!

The staff of the Election Committee may always require that two lists be put forward instead of one, if they agree, cf. Article 40(6) of the Statutory Order.

Example:

In a company, 3 representatives must be elected. The Election Committee decides to conduct the election according to the two-list system. The deputies shall not be personal. Thus, 3 alternates shall be elected. As a result, the 3 candidates on the list of representatives who have received the most votes are elected as representatives and the 3 candidates on the list of alternates who have received the most votes are elected as alternates. All 3 alternates may act as alternate for each of the 3 representatives.

Candidates on more than two lists

The starting point is that all candidates are put forward on one list, unless the Electoral Committee has opted for the two-list system. Under the legal system, it is not possible to field candidates on more than two lists. However, where a voluntary system has been introduced under Article 24 of the Order, there is nothing to prevent the use of more than two lists. The new provision makes it possible to establish a voluntary system which derogates from the provisions of the Order. The starting point is that a scheme can be set up which is precisely suited to the individual company.

2.1.6. Peace elections

If only the number of candidates to be elected has been nominated, the Electoral Committee may decide, in agreement with the candidates nominated, to hold the election as a so-called peace election, provided that there is agreement among the candidates nominated on the distribution of the posts. This means that in this case no election is held, but the posts are simply distributed.

In the event of a lower number of candidates than the employees are entitled to elect, a general election may also be held under the same conditions. In this case, only the 12 posts for which there are candidates shall be filled, as explained in section 2.1.1 of the subsection on the number of representatives and alternates.

2.2. Changes once the scheme is established

2.2.1. Changes during the legislature

If an employee-elected member of the highest governance body resigns during the term of office, the person shall be replaced by the alternate who has received the most votes, in accordance with Article 53(1) of the Statutory Order. This is the starting point, unless the election committee has decided on a

different arrangement or, for example, has opted for the two-list system and in that connection has chosen personal substitutes, see in more detail section 2.1.5. on the organisation of elections.

If the electoral committee has opted for a system other than that whereby the alternate who has received the most votes takes his place, the committee shall at the same time be obliged to determine how to decide who takes his place as alternate. This also requires the Committee to determine how the order of precedence between alternates is determined when a post becomes vacant in the middle of the parliamentary term.

By-election, re-election or reduction

If a retiring employee representative cannot be replaced by an alternate, either because there are no alternates "left" or - in the case of a system of personal alternates, for example - because the personal alternate has resigned, by-elections must be held to fill the post, cf. section 53(2) of the Statutory Order.

Note!

However, the Election Committee may decide to continue the term of office with the lower number of employee representatives, provided that there is a unanimous committee and that all remaining employee representatives and alternates agree to the reduction.

However, new elections shall be held rather than by-elections if 1/10 of the company's employees so request. Employees therefore have the right to demand that all employee representativeand deputy positions be put up for election, even if the election period has not yet expired.

Force reduction

In public limited liability companies, one or more members of the supreme management body elected by the employees must be compulsorily reduced if the rule that the majority of members must be elected by the general meeting, as laid down in Article 120(1) of the Companies Act, is no longer complied with.

If an employee-elected representative is to be compulsorily reduced, the representative who has received the fewest votes in the election for company representation must resign, cf. section 55 of the Statutory Order.

If an alternate has replaced a previously sitting employee-elected member, the alternate must resign before the other employee-elected representatives.

In the event of a tie, the reduction must be made by drawing lots.

Example:

A limited liability company has 7 members elected by the general meeting and 4 members elected by the employees in its supreme management body. 2 of the current members elected by the employees are

those originally elected. The other 2 representatives, A and B, are former alternates who received an equal number of votes in the election. The company's articles of association are subsequently amended so that in future there will only be 4 members elected by the general meeting of shareholders in the company's supreme management body. The employee-elected representatives will therefore be reduced by one from 4 to 3. 13

When the first alternate was appointed, it was Mr B who was appointed, since a draw - due to the tie - between Mr A and Mr B after the election had been held determined that Mr B should be treated as having received more votes than Mr A. It is therefore A who must resign.

However, this system of compulsory reduction may be waived if, for example, the electoral committee agrees that representatives and alternates may agree on a different solution.

If group representation is introduced in a company that already has established company representation, situations may also arise where it is necessary to reduce the number of company representatives. At the same time, it may be necessary to reduce the number of group representatives to a lower number than the 3 group representatives which are the starting point according to Article 11 of the Statutory Order.

Example:

For example, if there are to be 3 employee representatives in total in a parent company, the number of group representatives is reduced from 3 to 1, cf. Article 11(3) of the Statutory Order, with a minimum of 2 company representatives.

If the number of representatives is reduced due to the establishment of a group representation scheme and group representation subsequently ceases, employees shall be entitled to have the posts which have been occupied by group representatives filled by a company representative, cf. section 55(4) of the Statutory Order. This shall be done either by reinstating the company representative who previously held the post or by the Election Committee deciding otherwise by consensus.

2.2.2 Restructuring of companies The Danish Business and Companies Agency has published a separate guide on employee representation in connection with the restructuring of companies. Reference is therefore made to this guide, which is available on the Board's website www.eogs.dk.

2.3. Termination of the scheme

The employee representation scheme shall cease at the end of the election period if, at that time, the company no longer meets the conditions laid down in Article 1 of the Decree.

A company representation scheme ceases immediately if there are no longer any employees in the company.

A yes/no vote to terminate the scheme must be initiated if required by the eligible parties in Article 25(2) of the Order.

The Election Committee does not have the power to decide on its own that a termination vote should be held.

In the case of a yes/no vote in connection with the termination of an existing scheme, the electoral committee does not have the power to "skip the yes/no vote" as in the establishment situation. There must always be a proper vote on the termination of the scheme.

Article 33(1) of the Decree thus deals only with the establishment situation, since the provision refers only to the situation where the electoral committee has decided to skip the yes/no vote when voting on the establishment of a scheme.

2.4. Voluntary schemes

Voluntary schemes are regulated in Article 24 of the Order. The rules of this provision apply to companies regardless of whether they qualify for the rules on the right to elect employee representatives and regardless of whether the scheme is established in a new company or in an existing company.

The new provision allows for the establishment of a voluntary system of both company and group representation, which derogates from the provisions of the Decree. However, such an arrangement would not prevent employees from demanding representation in accordance with the rules of the Act, where the company meets the conditions to be covered by the rules on the right to elect employee representatives.

2.4.1. Establishment

The Cooperation Committee may decide by common accord to establish a voluntary system of company representation which derogates from the rules applicable to the legal system. In the absence of a works council, a voluntary scheme may be established by agreement between the employees' representatives who are informed and consulted pursuant to the relevant rules of the law on information and consultation of employees and the central management body.

The employees and management of a parent company may also decide by common accord in the works council to establish a voluntary system of group representation which differs from the legal system, irrespective of whether the employees are entitled to group representation. In the absence of a works council, the parent company may establish a voluntary scheme by agreement between the employees' representatives informed and consulted in accordance with the relevant rules and the central management body. If there are no employees in the parent company, the central management body shall decide.

The starting point is that a scheme can be set up to suit the specific company. However, the procedure set out in Article 24 of the Decree for setting up a voluntary scheme must always be followed. In addition, the term of office cannot exceed 4 years, as it follows from Article 120(4) of the Companies Act that a term of office ends at the latest 4 years after the election. This upper limit must be respected by both members elected by the general meeting and members elected by the employees of the supreme management body, also in voluntary schemes. In addition, in public limited companies, the members elected by the general meeting must always constitute a majority, cf. Article 120(1) of the Companies Act.

The company's articles of association must state that a voluntary scheme has been set up. This decision must be taken by the general meeting by qualified majority, in accordance with Article 106 of the Companies Act, as it constitutes an amendment to the articles of association. If the required majority cannot be obtained at the general meeting, a voluntary scheme cannot be established.

Employee representatives elected under a voluntary scheme shall have the same rights, duties and responsibilities as the other members of the company's supreme management body.

The representatives and the corresponding number of alternates, if any, elected under a voluntary scheme shall be protected against dismissal and other adverse treatment in accordance with Article 24(6) and Article 21(1) of the Statutory Order.

The representatives shall join the supreme management body immediately after the ordinary general meeting, in accordance with Article 24(6) and Article 50(1) of the Statutory Order.

Note!

A voluntary company representation scheme may also be set up when a company is formed. In that case, the Cooperation Committee shall, after the establishment of the company, give its unanimous consent to the establishment of the scheme. If there is no works council, the agreement of the employees' representatives who are informed and consulted pursuant to the rules on the subject must be obtained. If there is no agreement, the scheme cannot be set up.

The same applies to the establishment of a group. If there is company representation in the subsidiaries, the electoral committees of the subsidiaries concerned must consent by consensus to the establishment of the scheme. If there is no company representation in the subsidiaries, the works councils must by common agreement consent to the establishment of the scheme. The Order states that this must be done "after the formation of the parent company", which is not entirely adequate. This will be clarified at the earliest opportunity.

2.4.2. Termination of the scheme

An ongoing voluntary scheme may continue indefinitely unless there is no longer agreement in the Works Council or between the elected employee representatives in the voluntary scheme and the central management body, or if it is decided by a yes/no vote that a legal scheme should be introduced.

If the scheme is discontinued, the company's articles of association must be amended so that it no longer states that there is a voluntary scheme of employee representation in the company.

2.5. Registration in the Business and Companies Agency's IT system

When an employee representation scheme is established, the employee representatives and their deputies - up to the same number as the number of elected employee representatives - must be registered in the Business and Companies Agency's IT system. This applies regardless of whether the employee representation is elected under the legal or the voluntary scheme.

Representatives and alternates can be registered via the Board's self-registration system Webreg or via the Board's registration forms.

For representatives and their deputies, the full name, function in the company, CPR number and address of the member must be provided, cf. § 14, paragraph 1, no. 6 of the Notification Order[2]. For persons who do not have a Danish CPR number, a copy of the passport or national identification card that can be used for entry into a Schengen country must be submitted together with the notification. If the registration is made via Webreg, enter the passport number or identity card number. The registration or declaration must be accompanied by the electoral committee protocol signed by the electoral committee.

If there are later changes in the registered circumstances, for example because a representative resigns or the scheme is terminated, the change must be registered via Webreg or notified to the Danish Business

[2] Order No. 243 of 25 March 2011 on notification, registration, fees and publication etc. in the Danish Business and Companies Agency (the Notification Order)

and Companies Agency. Notification of the change must, as a rule, be received by the Danish Business and Companies Authority no later than two weeks after the changes have been adopted, cf. section 17 of the Notification Order. The registration or notification must be accompanied by the election committee minutes signed by the election committee. 2 Order No 243 of 25 March 2011 on notification, registration, fees and publication etc. in the Danish Business and Companies Authority (Notification Order)

Note!

Only deputies who have acquired protection as shop stewards are registered; for more details, see section 4 on protection for company and group representatives. Therefore, if an alternate who is protected as a fiduciary resigns, the company is obliged to register the alternate who takes over from the resigning alternate and thus obtains fiduciary protection.

3. Group Representation

3.1. Establishment

3.1.1. Which companies and which persons

Group

For employees of subsidiaries to have influence in the parent company, certain conditions must be met. The group companies must have employed an average of at least 35 employees in the last three years, cf. Article 26(1) of the Statutory Order.

The calculation of the existence of the companies must be based on the date of incorporation of the companies and not on the date of establishment of the group, i.e. the group companies must not have formed a group for 3 years. If, for example, only one group company has existed for 3 years and employed on average at least 35 employees, group representation is based on the date on which the company joins the group.

Examples:

- A group consists of a parent company and three subsidiaries A, B and C. The parent company has existed for 2 years, A for 5 years, B for 1 year and C for 15 years. The parent company has 1 employee, subsidiary A has 3 employees, B has 20 and C has 37 employees. The number of employees of the companies has remained constant over the lifetime of the companies. At least one of the group companies has been in existence for more than 3 years and the group companies have together employed more than 35 employees on average over the last 3 years. Therefore, the conditions for group representation are met.

- A group consists of a parent company and a subsidiary. The parent company has been in existence for 5 years and has employed 35 people in the last 3 years. The subsidiary has just been registered and has 2 employees. Thus, at least one of the group companies has been in existence for more than 3 years and the group companies together have employed more than 35 employees on average over the last 3 years. Therefore, the conditions for group representation are met.

There is now consistency between the group concept in Section 141(2) of the Companies Act and the general group definition in Sections 6 and 7 of the Companies Act. The group definition is also included in Article 4 of the Order.

This means that it is now the actual influence that determines whether a company is to be considered a parent company and whether its Danish-registered subsidiaries, and EU/EEA branches of these, are entitled to group representation.

If a foreign subsidiary is part of a group and the foreign subsidiary in turn has a Danish subsidiary, the Danish subsidiary of the foreign company is covered by the rules.

Example:

A group consists of a parent company and a subsidiary A, which has a subsidiary B, which in turn has a subsidiary C. Subsidiary A is Danish, B is German and C is Danish. Subsidiaries A and C are subject to the rules on group representation. Company B is in principle not covered. Read more below in the sub-section *Eligibility and voting rights*.

Staff

Article 2(4) of the Decree defines which employees can be considered as group employees. These are the employees of the parent company - including its foreign branches located in an EU/EEA country - and the employees of the parent company's subsidiaries registered with the Danish Business and Companies Agency, as well as the employees of the above subsidiaries' foreign branches located in an EU/EEA country.

Employees in subsidiaries in Greenland and the Faroe Islands are included in the calculation of employees, as both Greenland and the Faroe Islands are part of the Danish realm.

Eligibility and right to vote

Note!

As a novelty, the general meeting of a parent company may decide that the employees of one or more foreign subsidiaries are eligible and have the right to vote in the elections for group representation in the parent company, subject to the exceptions provided for in Article 141(3) of the Companies Act. The exceptions relate to cross-border mergers and divisions and SEs.

The general meeting of the parent company has the power to decide whether the employees of one or more foreign subsidiaries should be included among those entitled to vote and stand for election.

The General Assembly is not bound to include the employees of all foreign subsidiaries among those entitled to vote and stand for election. The general meeting may, however, choose one or more specific subsidiaries from among all the foreign subsidiaries of the parent company. The foreign subsidiaries need not meet the conditions for group representation set out in Article 26(1) of the Decree.

When elections of group representatives are to be held, group representatives shall be elected only once for each parent company. The group in which group representatives are to be elected shall always be that whose parent company comprises the largest number of subsidiaries.

Subsidiaries may only participate in elections for group representation in their own direct parent company and for the ultimate parent company.

Note!

It is therefore important for subsidiaries to state precisely in which parent company they wish to have group representation. This is particularly true in the case of larger groups with several subgroups.

Example:

A group that meets all the conditions for establishing group representation consists of 6 group companies A, B, C, D, E, F. Subsidiaries E and F are located outside Denmark. Both E and F have been given the opportunity to participate in the election for group representation.

Group representatives must be elected for parent company A, which is the ultimate parent. All subsidiaries B, C, D, E, F therefore have the opportunity to participate in the group elections for parent company A.

As B is the direct parent company of C, C also has the possibility to obtain group representation in company B. The same applies to company D, which also has the possibility to obtain group representation in company C, which is the direct parent company of D.

The employees of companies B and C, on the other hand, cannot claim group representation in A alone (ABC). This is because, as described above, group representatives can only be elected once for each parent company and all subsidiaries must therefore have the opportunity to participate in the election for group representation in the ultimate parent A. Therefore, the company representatives of companies B or C cannot demand group representation in A alone.

The option for Company C, in addition to being able to participate in the vote for Company A, is that Company C can also choose to have group representation in Company B only.

3.1.2. Holding of elections

Note!

As a new feature, it is now also possible to hold elections to Group representation as a direct election, i.e. where employees directly elect representatives and deputies. Previously, the election could only be held as an indirect election, i.e. where an electoral college conducts the election itself.

Direct choice

If the Group Election Committee has decided to hold direct elections for Group representation, the rules on elections for company representation shall apply with the necessary adaptations. The rules of procedure for direct elections are set out in Articles 37 to 43 of the Decree and in section 2.1.4.

Indirect choices

Only eligible parties, as defined in Article 26(3) of the Decree, may request a yes/no vote on group representation.

Note!

Parent company employees do not participate in the yes/no vote on whether to establish a group representation scheme.

To conduct the yes/no vote, the central management body of the parent company sets up a group election committee composed of representatives of the employees and of the central management body. The majority of the members of the committee shall be representatives of the employees. At least one member shall be a representative of the employees of the subsidiaries and at least one member shall be a representative of the central management body of the parent company.

Note!

There are no rules on how many members there should be on the committee, but there must be at least three.

The Group Election Committee is a standing committee, i.e. members are replaced only if members resign from the Committee. The members are therefore permanent 19 members who cannot be replaced on an ad hoc basis. If members resign from the Committee, it is the responsibility of the Group Election Committee to ensure that new members are appointed.

In group companies, representatives of the central management body of the group companies and the employees may decide by agreement to set up only one group election committee, which may conduct several group elections within the same group, cf. Article 30 of the Statutory Order.

If the yes/no vote leads to the election of Group representatives, the Group Election Committee shall arrange for the establishment of a college of electors to conduct the election itself.

The College of Electors shall be composed of the company representatives of each company. If no company representatives have been elected in the group companies, the employees shall elect two of their number to the college of electors and any alternates.

Note!

If there is only one employee in a group company, this one employee joins the electoral college.

The Electoral College is not a standing committee like the Group Election Committee.

The members of the electoral college of each group company may, in the case of elections for group representation, together cast a total of 4 votes for every 35 or more employees of the group company from which they are appointed. For example, if there is only one employee in the group company, this triggers a total of 4 votes.

Example:

A group consists of group companies A, B and C. In group company A there is a total of 1 employee, in group company B there is a total of 35 employees and in group company C there is a total of 36 employees. In the Electoral College, Company A and Company B can each cast 4 votes and Company C can cast 8 votes.

Election procedure for foreign subsidiaries

If the general meeting has decided that the employees of their foreign subsidiaries are entitled to vote in the group election, the group election committee then decides on the conduct of the yes/no vote, as does the group election committee on the procedure to be followed for the subsequent election in the foreign subsidiaries.

As the election procedure is entrusted to the Group Election Committee, it is the Committee's task to ensure that the election itself is conducted in a satisfactory manner and that the principles of transparency and equal treatment are observed. At the same time, it must be ensured that the body set up by the group election committee, which may be responsible for conducting the elections in the foreign subsidiaries, has equal participation of management and employees.

If no majority can be obtained for the introduction of the scheme at group level, but the majority of the Danish subsidiaries have voted in favour of group representation, the employee representation scheme shall be deemed to have been adopted by the employees of the Danish subsidiaries, so that the group elections shall be held only in the Danish companies.

This rule means that a company's foreign subsidiaries cannot prevent the introduction of group representation for Danish subsidiaries.

3.2. Termination of the scheme

If there is no longer a group, group representation ceases.

A group representation scheme also ceases immediately if there are no longer any employees in the group's subsidiaries.

The scheme shall also be terminated if the eligible parties referred to in Article 26(3) of the Order request a yes/no vote on the termination of the scheme and at least half of the eligible parties vote in favour of the proposal to terminate the scheme.

If the group representation ceases, the employees have the right to have the positions filled by company representatives that have been filled by group representatives, cf. section 55(4) of the Statutory Order. This shall be done either by reinstating the company representative who previously held the post, by by-election or by any other means decided by the Election Committee by common accord.

4. Protection of company and group representatives

4.1. Content of protection

Employee representatives and a corresponding number of alternates have special protection under Article 21(1) of the Decree. This protection consists of the so-called "shop steward protection". This means that they are protected against dismissal and other deterioration in their conditions in the same way as trade union representatives in the same or a similar trade union field.

4.2. The protected circle

Note!

If a greater number of deputies than the number of employee-elected representatives are elected to the highest management body, only a number of deputies equal to the number of representatives is protected. The number of elected representatives determines the number of protected alternates.

Example:

If 3 employee representatives are to be elected and the one-list system is used, the 6 persons on the electoral list who have received the most votes enjoy the protection of shop steward. The 3 persons with the most votes by virtue of their post as employee representative and the 3 subsequent persons with the most votes by virtue of their post as deputies. If more than one alternate is elected, the subsequent alternates are not protected as shop stewards.

An alternate who is not protected by a fiduciary may obtain the protection by taking over the place of an alternate who is protected by a fiduciary, for example if the latter resigns from the company. This means that deputies who are not protected by a fiduciary duty after the election can obtain the special protection under Article 21 of the Decree at a later point in the same term.

Note!

Notification must be made to the Danish Business and Companies Authority if a deputy obtains protection as a trustee during an election period. See section 2.5 for details of registration in the Swedish Business and Companies Agency's IT system.

In the case of a voluntary scheme, as described in section 2.4, the number of representatives elected and, where appropriate, a corresponding number of alternates are similarly "trustee-protected". 21

5. Rights and duties of company and group representatives

5.1. Duty to inform

Where an employee representation system has been established, it is the responsibility of the company's highest management body to ensure that employees are informed of the company's affairs, cf. section 57 of the Statutory Order.

The highest governance body must, as often as necessary, inform employees of matters of interest to them, to the extent that the information is not confidential, see more on confidentiality in section 5.2.

5.2. Confidentiality

Members of the highest governance body who are elected by the employees may not - like the other members of the highest governance body - unjustifiably disclose information which has come to their

knowledge in the course of the performance of their duties. This is stated in Article 132 of the Companies Act. [3]

Confidential information shall not be divulged unless the member considers that disclosure is objectively justified for the performance of his duties and unless it is considered that disclosure would not harm the interests of the company.

6. Statutory right of appointment

Article 120(2) of the Companies Act provides that the articles of association may confer on public authorities or other persons the right to appoint one or more members of the administrative or supervisory board.

Note!

This is not a company or group representation! The company cannot choose to grant this right to all employees or to a specific category of employees, for example.

If a company wishes to introduce a voluntary system of company or group representation, it must follow the procedure set out in section 2.4.

There are no rules on how many members can or must be appointed. No yes/no vote has to be held and the procedure for any election of a given candidate does not have to follow the rules of a legal system.

Members of the supreme management body appointed pursuant to a statutory right of appointment are not protected against dismissal or other deterioration in their position.

The appointed members shall count towards the number of representatives that may be elected by the employees in connection with the establishment of a legal arrangement, cf. sections 140(1) and 141 of the Companies Act, but shall not count towards the number of members elected at general meetings, cf. section 120(1) of the Companies Act.

Example:

A company has 5 board members elected by the general meeting, and in addition 1 board member is appointed by the municipality on the basis of a statutory right of appointment. If a company representation scheme is established, employees have the right to elect 3 representatives.

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[3] In its judgment of 14 May 2009 in the case of Grøngaard & Bang, the Supreme Court clarified the scope of the duty of confidentiality of the members of the Board of Directors. It can be inferred from the judgment that there is a right to disclose inside information in confidence both to the supreme management body as a whole and to the individual member when this is deemed to be objectively justified, is done defensibly and constitutes a normal part of the discloser's function.

Following the judgment, it must be assumed that it is up to the individual member to decide how best to perform his or her duties. The general rule is that there is no obligation to "seek the authorisation" of the other members if the person concerned considers that the performance of his duties requires that specific information be communicated to third parties in confidence.