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Company law and capital market aspects of covid-19

Andreas Wirén / Partner / Advokat & **Emil Blomqvist** / Associate

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Due to the corona outbreak and the disease covid-19, various legal issues have arisen. The spread of the coronavirus has, inter alia, lead to several companies deciding to take measures before upcoming shareholders' meetings, which for many public companies involve the gathering of a large number of shareholders. What options are available for companies to allow shareholders to participate or for a shareholder feeling concern about attending the meeting? Moreover, covid-19 risks affecting both the continuous disclosure of information by listed companies and the information disclosed in the coming financial reports.

Shareholders' meetings and covid-19

The main rule according to the Swedish Companies Act (Sw. aktiebolagslagen) is that the shareholders' meeting shall be held in the physical place where the company has its place of business or the place which is set forth in the articles of association. There are, however, some alternative courses of action for shareholders not wishing to physically attend the meeting and measures companies can take that are compatible with the Swedish Companies Act.

Proxy

One option for a shareholder not wishing to personally attend the meeting is to use a proxy. The right for shareholders to be represented by a proxy at the shareholders' meeting is unequivocal, and thus the company may not deny a shareholder this right. To participate through a proxy, the shareholder must have issued a written, dated and signed proxy form. The proxy form can be set out to, for example, the chairman of the meeting or another that with relative certainty will attend the meeting. The proxy form can be combined with voting instructions.

Postal vote

It is possible to incorporate in the articles of association a provision that shareholders are able to exercise their voting rights by mail, or for the board to make such a decision ahead of a shareholders' meeting. Few companies have incorporated such a provision in their articles of association, but for those who have this may be an alternative to participating at the physical meeting.

Remote participation

Another question that arises is whether it is possible for the company to arrange the shareholders' meeting in such way that it is possible for shareholders to participate remotely, for example through a video link. As long as the shareholders' meeting as such is held in the city where the company has its place of business or the city which is set forth in the articles of association, shareholders may participate in such a manner. Arranging the meeting in this way, however, requires that the meeting approves of the procedure. It is also crucial that it is arranged in a way that allows for a shareholder participating remotely to follow the proceedings and participate in discussions and decisions. If the shareholders are to be offered the possibility to vote remotely as well, this requires a lot from the software being used in terms of identifying shareholders, means to vote in real time as well as reliability in the counting of votes etc. Therefore, there may be certain practical aspects making it difficult to arrange the meeting in such a way, particularly on short notice.

Change in venue

Due to the spread of the virus, several companies have ahead of the shareholders' meeting decided, after the notice has been sent out, to change the venue to, for example, allow for greater dispersion of the participants and facilitate entry. Such change in venue is possible according to the Swedish Companies Act, as long as the new venue is also located in the city whereas the company has its registered office or as otherwise set out in the articles of association. The change in venue may not, however, result in any shareholder missing the meeting, so it may be necessary to, for example, redirect shareholders arriving at the venue stated in the notice, to the new venue.

Public gatherings and shareholders' meetings

A question, which arises due to the government's decision to prohibit gatherings of more than 500 participants, is how this is to be viewed in relation to shareholders' meetings. Our assessment is that a shareholders' meeting normally is not to be considered a public gathering, given that the shareholders' meeting is aimed at a closed group and not at the public. The exception may be shareholders' meetings in very large companies with many shareholders, where the invited group is large enough that the meeting may be compared to a public gathering. It is therefore clear that the vast majority of all Swedish shareholders' meetings at present are not included in the government's prohibition. However, it cannot be ruled out that this assessment might change in the future if the government were to impose other restrictions to limit people's ability to meet in larger groups/crowds.

Since the company cannot deny the shareholders the right to participate at the shareholders' meeting, the company can choose to postpone the meeting if the current guidelines concerning limits on gatherings were to change. For annual general meetings this may particularly cause problems if the ban on gatherings were to hold for a longer period of time, since an annual general meeting must be held within six months after the end of the financial year. The company may then risk having to pay penalties for delay if the annual financial report cannot be registered with the Swedish Companies Registration Office. The rules regarding sanctions from the Swedish Companies Registration Office when in delay with the annual financial report are mandatory on behalf of the Swedish Companies Registration Office i.e. the authority is obliged to impose sanctions. However, the Swedish Companies Registration Office has pointed out on its website that it is possible to request remission of the sanction or to appeal the decision. If the reason for the delay is linked to covid-19 it could be a reason for remission.

Disclosure of information by listed companies and covid-19

Disclosure of information according to the regulation on market abuse in relation to covid-19

A company whose financial instruments are admitted to trading on a regulated market (such as Nasdaq Stockholm and NGM Equity) or a multilateral trading venue, MTF (such as Nasdaq First North Growth Market and Spotlight Stock Market) has a duty according to the EU Market Abuse Regulation (MAR) to as soon as possible disclose to the public inside information which directly concerns the company. Inside information means (i) information of a precise nature, which (ii) has not been made public, (iii) relating to the company or its financial instruments, and which would be likely to have a (iv) significant effect on the prices of those financial instruments if it were made public. In connection with the covid-19 outbreak it is possible that the subsequent effects mean that, for example, the financial position or result of a company is negatively affected in such a way that the information falls within the criteria above and must thus be disclosed immediately (so-called profit warning). It is also possible that companies' results in certain sectors may improve because of covid-19 due to, for example, changes in the consumers' purchasing patterns that cause such information to fall within the criteria above and must be disclosed immediately (so-called positive profit warning).

When assessing whether information regarding the effects of covid-19 on the company's financial position or result is to be considered inside information, an overall assessment is to be done based on information previously disclosed by the company. The general rule is that if the information substantially deviates from what has previously been disclosed or can be assumed to be in line with the market's expectations, there may be cause to consider the information inside information that must therefore be disclosed as soon as possible.

Delayed disclosure

Within the term “as soon as possible” there lay some possibility for the company to delay the disclosure in so far as it is necessary to ensure that the information can be disclosed in a way that is compatible with the requirements for disclosure according to MAR, i.e. that the information must be correct, relevant and clear and not misleading. A delayed disclosure of inside information is possible when the three following conditions are fulfilled.

- An immediate disclosure is likely to harm the company’s legitimate interests or market participants.
- It is unlikely that a delayed disclosure misleads the public.
- The company can ensure that the information remains confidential.

A delayed disclosure can for instance be appropriate if it is clear that information regarding the effects of covid-19 will have significant effect on the price of the company’s financial instruments, but the information held by the company regarding the effects cannot yet be presented correctly, relevantly and with clarity, without being misleading. The company itself assesses whether conditions for delayed disclosure are at hand and a delayed disclosure is therefore done at the company’s own risk.

Certain recommendations from the European Securities and Markets Authority (ESMA)

Beyond the requirements that always apply according to MAR regarding disclosure of inside information, ESMA has issued certain recommendations regarding companies’ continuous information disclosure as well as financial reporting, owing to the continued outbreak of covid-19, which are accounted for below.

- The companies should as soon as possible disclose relevant and essential information pertaining to the effects of covid-19 on the companies’ business, prospects and financial situation in accordance with their transparency obligation according to MAR.
- The companies should, in their annual financial report for 2019, openly account for actual and potential effects of covid-19 in so far as it is possible possible based on both a qualitative and quantitative assessment of their business, financial situation and financial result. If the annual financial report for 2019 is already completed, this should instead be highlighted in the companies’ interim reports.

Contact:
Andreas Wirén / Partner / Advokat
andreas.wiren@delphi.se

Emil Blomqvist / Associate
emil.blomqvist@delphi.se