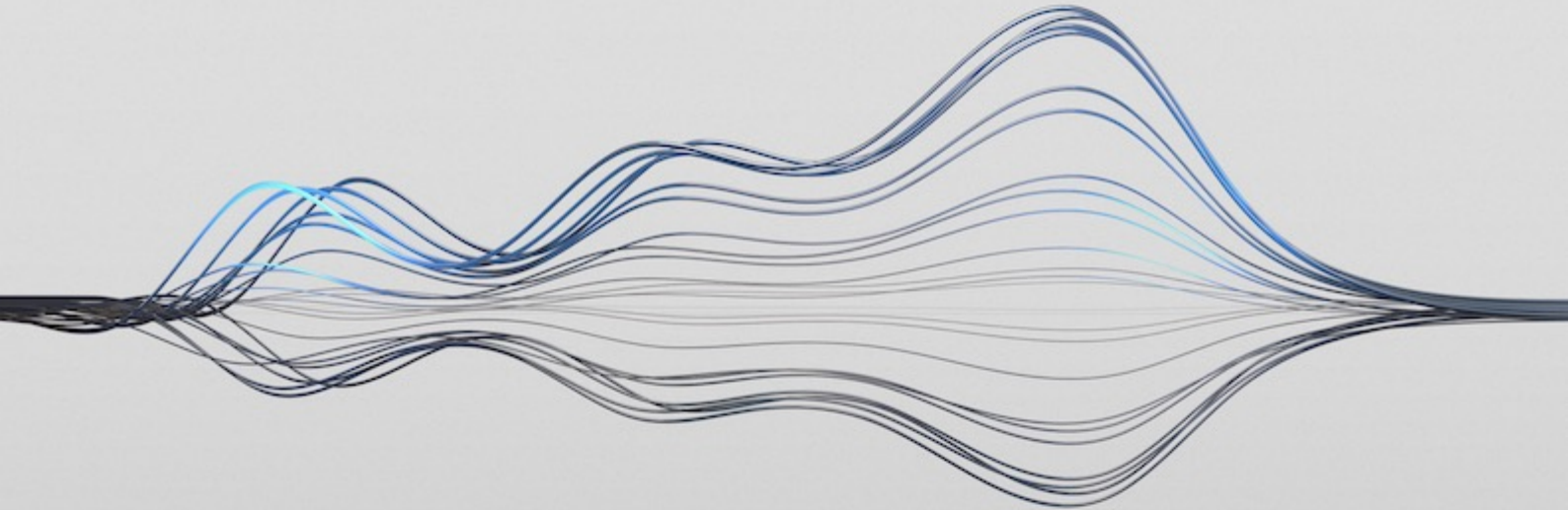


DENMARK

# Global Guide to Directors' Duties





# Denmark

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## Corporate entities

**What type of company is typically used in group structures?**

The type of entities which are typically used in corporate group structures in Denmark are the private limited liability company (in Danish *anpartsselskab* or *ApS*) and the public limited company (in Danish *aktieselskab* or *A/S*). This guide focuses on directors' duties in these types of companies.

## Types of director

**What is a "director"?**

There is no codified definition as such of the term "director" in the Danish Companies Act. However, a director is a natural person who takes and implements decisions on behalf of the company.

The term "director" typically refers to a member of the board of directors in a company that has chosen a two-tier governance structure which is further described in [Minimum/maximum number of directors](#). Thus, this guide also deals with the duties of a board of directors.

**What are the different types of director?**

There is only one type of director under the Danish Companies Act, which is an individual who has been appointed as a director (usually) by the shareholder(s) at the general meeting and is registered as such with the Danish Business Authority.

Employees have a statutory right to appoint and elect employee representatives to the board of directors provided that the company in question has maintained an average of no less than 35 employees in the preceding three years. The employees are entitled to elect a number of representatives corresponding to half of the number of members elected by the shareholder(s) or others, however, no less than two members. An employee representative has the same rights and obligations as other members of the board of directors i.e., in relation to confidentiality, conflict of interests, remuneration, etc.

## Eligibility

**Who can be a director?**

A director is required to be at least 18 years old and must not be under guardianship. A director may only be a natural person and thus a corporate director is not feasible under Danish law. Foreign individuals may be elected as directors as there are no nationality or residency requirements to be met to be eligible for election.

**Minimum / maximum number of directors**

According to the Companies Act, Danish public limited companies may opt for a two-tier corporate governance structure by which an elected board of directors is responsible for the overall and strategic management, while appointing an executive board to be responsible for the day-to-day management of the company. If a public limited company has adopted a governance structure where the company is managed by a board of directors and an executive board, the company must have at least one member in the executive board. The board of directors must then have at least three members.

There are no restrictions on the maximum number of directors under the Danish Companies Act. However, for public limited companies, information on the number or the lowest or highest number of members of the various management bodies is required to be stipulated in the articles of association. Also, for limited liability companies it is very common to stipulate in the articles of association a range of the required minimum and maximum number of directors.

While members of the executive board may also be elected to the board of directors, the Danish Companies Act provides that in public limited companies, the majority of the board must not also be members of the executive board. Furthermore, no member of the executive board of a public limited company may be chair or vice-chair of the company's board of directors.

## Appointment and removal

### How are directors appointed?

Members of the board of directors are elected by the shareholder(s) at the general meeting which may be held in person or by written resolution. The articles of association may include detailed provisions on the appointment of directors, such as allowing others to appoint directors.

The election of a director must be filed with the Danish Business Authority no later than two weeks after the election has taken place. If a director is foreign, the following information is required to be provided to the Danish Business Authority:

- Copy of passport or an identity card.
- Full name.
- Residential address and proof of such address (for example an electricity bill or similar document where the address is specified).
- Information on citizenship at birth.

The name and residential address of a director will – as a starting point – be publicly available through the Central Business Register's website: [CVR.dk](https://www.cvr.dk).

### How are directors removed?

Directors are removed by the shareholder(s) at the general meeting by a simple majority of votes if the directors have been elected at the general meeting. However, directors that have been appointed by e.g. a third party in accordance with the articles of association may at any time be removed by that person having appointed such director.

Directors are entitled to resign at any time during their term.

The decision to remove directors must be filed with the Danish Business Authority together with the general meeting minutes in question no later than two weeks after the meeting.

## Board / management structure

### Typical management structure

The Danish Companies Act provides the possibility for a private limited liability company to adopt a governance structure where the company is managed either by a board of directors (in Danish *bestyrelse*), which appoints an executive board to be responsible for the day-to-day management of the company, or an executive board (in Danish *direktion*).

Both governance structures are common in a private limited liability company.

## How are decisions made by directors?

In general, private limited liability companies are free to regulate when board meetings are to be held. However, any member of the board of directors or executive board or the company's auditor may request that a board meeting be held. Nevertheless, a company should have at least one annual board meeting in order to prepare the annual report to be presented at the annual general meeting for the approval of the company's shareholder(s).

The function and duties, including the decision-making of the board of directors may be governed by a set of rules of procedure of the board of directors if such procedure has been adopted by the board of directors. Adopting rules of procedure is mandatory for limited liability companies if the board of directors consists of more than one member.

The board of directors forms a quorum when more than half of the members are present, unless the articles of association require any larger quorum. However, it is required that all members have been allowed to participate in the board meeting in question.

Meetings of the board of directors are held in person, unless the board decides that members may participate by electronic means or by written resolution and such participation is compatible with the members carrying out their duties. However, any member of the board of directors or executive board may request that a meeting be held in person.

Matters to be determined at board meetings may be passed by simple majority of votes, unless otherwise stipulated in the articles of association or the Danish Companies Act.

## Authority and powers

A limited liability company is bound by agreements made by the entire board of directors on behalf of the company even if there are internal limits on its power to do so (e.g., in the rules of procedure, internal instructions etc.).

However, a company will not be bound in cases where members of the board of directors have entered into contracts that either:

- go beyond the limitations set forth in the Danish Companies Act; or
- are outside the scope of the company's objectives or outside of the board members' power to do so

provided that the third party in question knew or ought to have known that the board members acted outside the scope of the company's objectives or their powers.

Pursuant to the Danish Companies Act, a company is also bound by agreements made by a sole member of the board of directors or by a member of the executive board. This general rule may, however, be derogated from in the company's articles of association which companies usually do. The articles of association may derogate from the Danish Companies Act by e.g. stipulating that the company is bound by the joint signature of a board member and a member of the executive board.

## Delegation

Directors may authorise an individual to act on its behalf by way of a power of attorney. However, this delegation only covers matters qualified to be day-to-day business and within the scope of the directors' powers. Other matters which are deemed to be more extraordinary require a specific power of attorney.

# Duties and obligations of directors

## What are the key general duties of directors?

The board of directors is entrusted with the ultimate responsibility of the company as it has both the supervisory function of the executive board and the overall strategic responsibility of the company.

In general, the board of directors must at all times act with due care and diligence and in the best interests of the company.

## What are directors' other key obligations?

### *Bookkeeping, financial position and capital reserves*

The board of directors must ensure that the bookkeeping and financial reporting procedures are satisfactory, taking due account of the

size and circumstances of the company.

The board of directors must also ensure that adequate risk management is established and that the financial resources of the company are adequate at all times, and that the company has sufficient liquidity to meet its current and future liabilities as they fall due. The board of directors must therefore receive on a continuous basis adequate reporting about the company's financial position and ensure that the existing capital resources are adequate.

If it has been established that the company's total equity represents less than half of the subscribed nominal share capital, the board of directors and the executive board must ensure that a general meeting is held within six months. At the general meeting, the board of directors must report on the financial position of the company and, if necessary, propose measures that should be taken, including a proposal to dissolve the company.

#### *Yearly assessment of the beneficial owners, annual report and annual general meeting*

At the time of incorporation, the information on the beneficial owners of the company must be registered in the Danish Public Register of Shareholders, and such information can be accessed through the Central Business Register's Website: : [CVR.dk](https://cvr.dk). Any changes to this publicly available information must be updated, when required. However, a company is also obligated to assess at least once a year whether any changes to the registered information on legal and beneficial owners have occurred and ensure that the registered information is accurate and up-to date. The result of the assessment must be disclosed at the board meeting where the directors approve the annual report.

The Danish Financial Statements Act prescribes that the board of directors must present the annual report at the annual general meeting for the shareholders' approval, and that the members of the board of directors must sign the annual report.

The board of directors is also responsible for convening and organizing the annual general meeting in due time for the general meeting to approve and submit the annual report so that the Danish Business Authority receives the annual report within six months after the end of the financial year.

### **Transactions with the company**

The Danish Companies Act provides that a company may solely grant loans or make assets available to directors and/or their connected persons provided that certain requirements in the act are met, unless the granted loans etc. are deemed to be in the course of a usual business transaction.

A member of the board of directors cannot participate in the decision-making process of a transaction involving an agreement either between the company and that member or between the company and a third party, if that member has a material interest in such business that may conflict with the interests of the company.

## **Liabilities of directors**

### **Breach of general duties**

Members of the board of directors may be held liable to pay damages to the company, the shareholder(s) or a third party if the directors in the performance of their duties intentionally or negligently caused damage to any of them.

The decision to bring an action against one or more of the directors is determined by the shareholder(s) by simple majority. However, shareholder(s) that hold(s) at least 10% of the total share capital may bring an action against a director on behalf of the company if the shareholder(s) has/have opposed either the resolution to grant protection against liability or the resolution to waive the right to commence legal proceedings.

### **Liabilities on insolvency**

The board of directors must continuously assess if it is reasonable to carry on the operation of the company. If this is not the case, the directors must file an application for dissolution, restructuring or bankruptcy on behalf of the company. Thus, directors may be held liable under certain circumstances if an application for restructuring or bankruptcy has not been filed in a timely way.

### **Other key risks**

A director may under certain circumstances be disqualified to participate in the management of a company by the bankruptcy court and

thus will not be able to participate in the management of a company without assuming personal and unlimited liability. Further, in certain cases criminal liability may arise for directors.

## Protection against liability

### How can directors be protected from liability?

- **Discharge.** At the annual general meeting the shareholder(s) may by simple majority decide to discharge the board of directors from liability with respect to events occurred in the past financial year.
- **Indemnification.** Members of the board of directors may require that the company or its shareholder(s) hold(s) the director harmless from liability arising out of their duties as board member. Proceedings to take legal action may, however, be commenced regardless of any previous decision on discharge or indemnification if the passed resolution was based on inaccurate or incomplete information.
- **Insurance.** Companies are also permitted to, and usually do, maintain insurance coverage (i.e. directors and officers liability insurance) for members of the board of directors and executive board in respect of liability to the company.

### What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up-to-date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and / or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

## Key contacts



**Nicholas Lerche-Gredal**

Partner

T +45 33 34 00 73

[nicholas.lerche-gredal@dk.dlapiper.com](mailto:nicholas.lerche-gredal@dk.dlapiper.com)

[View bio](#)



**Jens Krogh Petersen**

Partner

T +45 33 34 00 46

[jens.krogh@dk.dlapiper.com](mailto:jens.krogh@dk.dlapiper.com)

[View bio](#)

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