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"First come, first served" when should minority owners be appointed?"

The legislator has introduced a range of minority rules to the Companies Act so that owners that find themselves in the minority can advantageously invest money in a company. One of these minority rules is the right to appoint a so-called minority auditor. Even if an auditor is subject to a regulatory framework that imposes independence on him or her, there is nonetheless a risk (albeit small) that there will be a sense of loyalty to the majority owners. If the minority suspects that the auditor is not satisfactorily fulfilling his or her duties, it is possible to request that the county administrative board appoints a minority auditor to the company. This measure should calm the minority's fears that the company is being mismanaged. A recent decision from an administrative court gives cause to draw the attention of minority owners to the rules on appointing minority auditors.

Procedure in the company

Shareholders who want a minority auditor to take part in the audit together with the other auditors must table a proposal to this end at the general meeting at which the election of auditors is dealt with, or at another general meeting if the proposal has been provided in the notice to attend the general meeting. An individual owner may request in writing that the board raises the issue of the appointment of a minority auditor in the notice to attend the general meeting which is to be held for other purposes, if the request has been presented with sufficient time to enable the matter to be included in the notice to attend. The minority is also entitled to call an extraordinary general meeting between annual general meetings to discuss the matter of appointment of a minority auditor. If owners of at least one tenth of all the shares in the company so request in writing, the board must call an extraordinary general meeting, for which the notice to attend must specify that the matter of a minority auditor is to be dealt with. If the proposal regarding the appointment of a minority auditor is supported at the meeting by owners of at least one tenth of all the shares in the company, or by owners of at least one third of the shares represented at the meeting, the county administrative board must appoint an auditor if requested by any of the shareholders.

Appointment of minority auditors

It is possible for both the minority or and individual shareholder to request that the county administrative board appoints a minority auditor. The shareholder making the request must show that the conditions for appointment of a minority auditor have been met. Once the request has been made, the county administrative board must give the company's board of directors the opportunity to make a statement on the election before an auditor is appointed. The preparatory work to the Companies Act highlighted the importance of the minority also

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having influence over the election of the auditor because the choice of person for the role is of great importance in ensuring that the interests of the minority are duly satisfied. For these reasons, the person proposed by the minority will be appointed as auditor if the person in question is suitable and there are no specific reasons why he or she should not be appointed.

The minority auditor fulfils the same function as the auditor appointed by the general meeting and is subject to the same confidentiality rules. Thus, the minority auditor is not a conduit by which the minority shareholders can acquire knowledge of the company’s inner workings. Otherwise – and regardless of whether appointed as a minority or ordinary auditor – an auditor must carry out his or her duties in accordance with generally accepted practice where competence, independence and confidentiality are watchwords. The choice of person for the role, seen in this light, is less important but clearly the minority auditor in question should have the confidence of the minority for the provisions to be effective.

“First come, first served”

The county administrative board can only appoint one minority auditor for the term of appointment. The term of appointment only runs until the following annual general meeting regardless of whether the auditor is to be elected at the annual general meeting or not. The wording of the relevant provision in the Companies Act makes it clear that the county administrative board is to appoint a minority auditor if “a shareholder requests it”. This means that any shareholder may request the appointment of a minority auditor by the county administrative board following due resolution of the board of directors on this matter. In other words, a situation may arise in which several shareholders independently submit a request for the appointment of a minority auditor to the county administrative board. Such a situation arose in the above-mentioned case.. This case concerned the appointment of a minority auditor when several different minority shareholders submitted a request. The administrative court decided that after a shareholder has submitted a request to the county administrative board, the other minority shareholders are not entitled to request appointment of further minority auditors. The Administrative Court of Appeal did not grant leave to appeal and thus the decision of the administrative court remains good law. The decision of the administrative court seems to imply that the “first come, first served” principle applies to the appointment of minority auditors. This is an unfortunate solution to the problem which arises when several proposals are submitted regarding the appointment of minority auditors. The consequence is that the proposal which is submitted first will be approved, provided the proposed auditor does not appear to be unsuitable in the judgement of the county administrative board or the board of directors do not submit acceptable reasons as to why the person in question should not be appointed as minority auditor. The post of minority auditor will in this way be reserved, pending judgment of the choice of person for the role, and other shareholders’ proposal for a minority auditor will therefore be excluded from the appointments procedure. Instead of appointing the best candidate, the first candidate will be appointed provided the person does not appear unsuitable.

Pending development of the law in this area, shareholders who wish to appoint a minority auditor are recommended to prepare the application documents and submit these as soon as possible after the resolution has been passed at the general meeting to ensure that their proposal for a minority auditor is dealt with by the county administrative board and is not dismissed as a result of another shareholder submitting their application first.

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