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REPORT ON MORE RIGOROUS LIABILITY ASSESSMENTS OF MANAGEMENT IN FINANCIAL COMPANIES PUBLISHED 28 JANUARY 2021

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Introduction

28 January 2021, the committee for more rigorous liability assessments of members of management in financial companies (the "Committee") published its report no. 1575 (in Danish: *Betænkning om skærpet ansvarsvurdering for ledelsesmedlemmer i finansielle virksomheder*).

The Committee's mandate was to consider whether it is ensured that responsible management and key persons in financial companies can be held criminally liable in case of violations of financial legislation. The Committee was also to assess whether there is a need to tighten the assessment of tort liability for the management of financial companies.

The Committee’s Conclusions

The Committee made the overall conclusion that the culpa norm remains the most suitable liability norm in relation to the liability assessment of the board of directors and the executive board. Based hereon, the Committee did not identify any need for any alternative liability standard in the form of e.g. a professional liability norm.

The Committee’s conclusion is based on the view that the culpa norm is flexible in the sense that it makes it possible to take the individual's prerequisites into account. This implies that when making an assessment based on the culpa norm, it may be taken into account whether the person in question has particularly good prerequisites for being attentive and diligent, among other circumstances, and consequently whether such person should be subject to a more rigorous assessment in exhibiting the same behaviour as a person with less prerequisites.

Furthermore, the Committee notes that the various initiatives and measures which were implemented after the financial crisis, including, but not limited to, the stricter requirements for competencies related to the fit and proper assessment for management in financial companies, has led to a significant increase of professionalization.

This professionalization indirectly impacts the culpa norm assessment, given that any executive director who has neglected their management responsibilities will be assessed based on the increased qualifications and standards required by and associated with such a position. For the same reason, the Committee finds that the introduction of a professional culpa norm will not significantly aggravate the tort liability assessment of the management compared to the existing applicable culpa norm.

Practice from court cases after the financial crisis has shown that it is difficult to prove and document the basis of a management liability. Accordingly, the Committee has proposed to introduce a reverse burden of proof in management liability cases, particularly in relation to cases where the loss suffered is related to agreements and engagements between the company and (among others) members of the management – i.e. agreements with inherent conflicts of interest.

A reverse burden of proof will e.g. imply that the board of directors must prove that an agreement between the financial company and either a director or a board member, or for example a company owned by a management member, was acceptable and reasonable to enter into. The Committee does, however, note that a rule on a re-verse burden of proof may create a false incentive to circumvent the customary procedure prescribed by law, by which such agreements must be submitted and discussed by the board of directors. To prevent such a situation, the Committee proposes that the board member, in whose interest an agreement is entered, is to be objectively liable for the possible loss related to such agreement, if the prescribed and customary procedure is not followed.

Lastly, the Committee proposes that any disregard and neglect of internal policies and guidelines intended to prevent the financial company from taking on risks beyond what is acceptable and reasonable, or which deviate from the financial company's business model and which have a significant effect on the financial position company's risk of loss, must be included with more weight in the liability assessment than what has thus far been the case in case law.

In this respect, the Committee notes that according to case law, disregard and neglect of internal policies and guidelines has had little effect on the liability assessment of the management, despite the fact that the considerations behind the requirement to adopt internal policies and guidelines in financial companies do not in principle differ from the considerations behind the regulation of management and control of financial companies contained in the legislation.

Our Comments

In accordance with the conclusions from the Committee's report, it is our assessment that the necessity of introducing a professional liability norm is, to some extent, redundant, given that a liability assessment under the applicable culpa norm already takes into account the position of the management member, including the requirements and qualifications associated with such position and the person in question's prerequisites to hold such position.

The Committee's proposed reverse burden of proof in cases with inherent conflicts of interest related to agreements entered into between the financial company and management members will, in our opinion, result in increased liability and will there-fore entail that management members must carefully consider the risks of entering in-to agreements with such inherent conflicts of interest.

We will continue to monitor the possible effects and implications of the proposals set forth by the Committee. We also recommend that the management of financial companies follow the development closely in particularly because of the increasing focus on the liability of management members.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:

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