

Consent Requirements for Share Acquisitions in Limited Liability Companies According to Norwegian Law

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1 The Topic

According to Norwegian law, shares in Norwegian limited liability companies have traditionally always been freely negotiable.¹ This is because the shareholder is regarded as having secondary importance for the company; it is the company, not the shareholders, that is liable for the company's obligations.² Furthermore, the free negotiability of shares has been considered as a prerequisite for natural persons and legal personalities to subscribe to and acquire shares; the shareholders are thus free to leave the company by selling the shares or transferring them in other ways. The free negotiability of shares is also a basic prerequisite for a well-functioning stock market.³

One of the most important reasons why natural persons as shareholders have not been regarded as important for the company, is that company legislation traditionally has assumed that a limited liability company can be a large organization with many members.⁴ The general attitude has been that the individual shareholder has invested capital in the company as a favourable capital investment, and that the shareholders neither have the interest nor the competence to take an active part in the actual management of the company.

However, there are several arguments in favour of shares not being absolutely freely negotiable.⁵ The fact that any purchaser whatsoever may acquire the shares may be regarded as a threat against a company's ability to obtain or maintain the optimal shareholder structure. Limitations in the negotiability of shares may also contribute to continuity in the company's management and business policy. If the company's

¹ Cf. Bråthen, *Personklausuler i aksjeselskaper* (Oslo 1996) at 164-165.

² Cf. Bråthen, *Personklausuler i aksjeselskaper* at 167.

³ Cf. e.g. NOU 1999:3 at 92 comp. at 24 and following; Normann Aarum in Lau Hansen (ed.), *Nordisk børserett* (Copenhagen 2003) at 137-138.

⁴ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 167.

⁵ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 45 and following.

shares are freely negotiable, the company will be hindered from protecting itself against persons who for various reasons are unwelcome as shareholders.

In companies with few shareholders there are additional reasons why shares should not unconditionally be freely negotiable. A shareholder's participation in the company may be a capital investment as well as an investment in his/her own job. The company may also be a family business. In such cases there may be good reasons for not letting just anybody have influence over the company. Moreover, it is conceivable that shareholders are expected to play a more active role in developing the company than solely making a capital investment.

The regulations in the Private Limited Companies Act (1997) are based on such considerations.⁶ Shares in private limited liability companies ("aksjeselskap", abbreviation "AS") essentially have limited negotiability, cf. ASL § 4-15. As a rule, shares can only be acquired if the company grants its consent to the acquisition. If a share is to be sold or change owner in other ways the other shareholders have a pre-emption right to purchase. In addition, other types of negotiability limitations may be laid down in the articles of association. The Private Limited Companies Act (1997) stipulates specific rules for personal provisions laid down in the articles of association, cf. ASL § 4-18.

For limited liability companies that have been formed before the Private Limited Companies Act (1997) entered into force on 1 January 1999 specific provisional rules apply for the negotiability of shares, cf. ASL § 21-2 no. 25.⁷ These rules will not be discussed in detail in the following.

For public limited liability companies ("allmennaksjeselskap", abbreviation "ASA"), however, the law essentially stipulates that the shares are freely negotiable, cf. ASAL § 4-15.⁸

The reason why the legislation permits two different general rules for these two types of companies is due to the fundamental differences between them.⁹ The legal rules for public limited liability companies are adapted to companies with many shareholders while the Private Limited Companies Act (1997) is designed for companies with few shareholders. However, provisions on required consent for share transfers can also be laid down in the articles of association in a public limited liability company (ASA).¹⁰

The consent requirement for share acquisitions in private limited liability companies (AS) regulated by the Private Limited Companies Act (1997) will be

⁶ The Private Limited Liability Act (1997) = lov om aksjeselskaper av 13.juni 1997 nr. 44 (aksjeloven), abbreviation "ASL". See "www.lovdata.no". There is no official translation of the Norwegian Company laws. The text below is based upon a translation published by The Norwegian Institute of Public Accountants (ISBN 82-7082-144-6). Cf. NOU 1992:29 at 94-97; NOU 1996:3 at 69-73, 118-119; Innst. O. 80 (1996-97) at 22-23; comp. Ot. prp. 36 (1993-94) at 101; Ot. prp. 23 (1996-97) at 97.

⁷ For details, see Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* (2nd edition, Oslo 2000) at 837 comp. at 212.

⁸ The Public Limited Liability Act (1997) = lov om allmennaksjeselskaper av 13.juni 1997 nr. 45 (allmennaksjeloven), abbreviation "ASAL". See "www.lovdata.no".

⁹ Cf. Bråthen, *Selskapsrett* (Oslo 2002) at 34-36.

¹⁰ Cf. Larsen, *Adgangen til samtykkenektelse ved aksjeoverdragelse i allmennaksjeselskaper*, Jussens Venner 2001 at 205 and following.

discussed in the following. A comparative analysis of the rules will not be the focus of this paper, although the Danish and Swedish rules are briefly covered in section 2 below. Section 3 will address the types of share transfers requiring consent according to Norwegian law. The closely related issue concerning which shareholders require consent is discussed in section 4, while section 5 covers the decision-making procedure for granting consent to share acquisitions. The material requirements for refusing consent will be dealt with in section 6, while the consequences of refused consent will be described in section 7.

2 Required Consent in Scandinavian Law

The Scandinavian laws on companies with limited participant liability have a common origin¹¹ and the rules are completely or partially similar. With regard to regulating share negotiability, however, these countries have chosen different general rules and solutions. The Norwegian rules are influenced by French, German and English law.¹²

In Denmark, both “aktieselskabsloven” (the Public Limited Companies Act) and “anpartsselskabsloven” (the Private Limited Companies Act) are built on the principle that shares/interests are freely negotiable.¹³ However, the articles of association may stipulate any type of negotiation restriction, including a required consent for share transfers.¹⁴

A restrictive attitude to negotiability limitations has been prevalent in Sweden, however. In general, shares have been freely negotiable, and the articles of association may only stipulate negotiability restrictions such as the right of redemption (“hembud”).¹⁵ However, the proposed new “aktiebolagslag” recommends that “publika aktiebolag” (Public Limited Companies) also can stipulate provisions on pre-emption rights, while “privata aktiebolag” (Private Limited Companies) can apply both the pre-emption and consent provisions.¹⁶ Articles of association regulations on consent requirements must address several different issues that are to be listed expressly in the act, according to the draft legislation.

Thus, in Danish law negotiability restrictions may be established by means of a required consent. The regulation by the articles of association will in many ways be quite similar to the Norwegian legal rules. The same applies to the “privata aktiebolag” (Private Limited Companies) in Sweden, if the proposed “aktiebolagslag” is adopted. Nevertheless, there are also important differences, e.g. neither Denmark nor Sweden has the same rules as in Norwegian law regarding the consequences of a refused consent.

¹¹ Cf. e.g. Bråthen, *Personklausuler i aksjeselskaper* at 73-76.

¹² Cf. *Innstilling om lov om aksjeselskaper* (1970) at 83-84.

¹³ Cf. e.g. Gomard, *Aktieselskaber og anpartsselskaber* (4th ed., Copenhagen 2000) at 145.

¹⁴ Cf. e.g. Neville, *Samtykkeklousuler i aktie- og anpartsselskaber*, in *Hyldestskrift til Jørgen Nørgaard* (Copenhagen 2003) at 935 and following, particularly at 943-946.

¹⁵ Cf. e.g. Rodhe, *Aktiebolagsrätt* (21st ed., Stockholm 2002) at 158-163.

¹⁶ Cf. SOU 1997:22 at 205-212; SOU 2001:1 at 40-44.

3 What Types of Share Transfer Require Consent?

3.1 *The General Rule*

As a general rule, all persons who acquire shares in an AS must be granted consent in order to become a shareholder, cf. ASL § 4-15 (2).¹⁷

On the other hand, consent is not required to remain as a shareholder, even though the shareholder no longer has the qualifications he/she possessed when consent was granted.¹⁸ If the company is to intervene when shareholders no longer have specific qualifications, a personal provision must be established in the articles of association, cf. ASL § 4-18.¹⁹ Another possibility is to stipulate that the company or the shareholders have a right of redemption in connection with a reduction in the share capital, cf. ASL § 12-7.²⁰ Furthermore, the other shareholders or others may have redemption rights according to a shareholder agreement, cf. Rt. 1927 p. 896 and Rt. 1931 p. 454.²¹ Such a provision may probably also be included in the company's articles of association.²²

The issue of whether consent is required according to the general rule of the Private Limited Companies Act (1997) must be resolved, based on whether a "share acquisition" has taken place, cf. § ASL § 4-15 (2). According to practice and legal theory the implications are very uncertain in some aspects.²³ It is not a share acquisition when shares are seized by the shareholder's estate in bankruptcy.²⁴ Nor is it a share acquisition when after the owner's death the share or shares are included in the deceased's estate.²⁵ However, a transfer that takes place in connection with inheritance or the administration of an estate requires consent pursuant to ASL § 4-15 (2). The same applies to a share transfer in a forced sale.²⁶ On the other hand, consent is not required when an agreement on a transfer of shares is cancelled at the demand of the transferee, cf. ASL § 4-17 (1) no. 1 comp. section 7.2 below.

As a rule, it is also not considered an acquisition if a company that is a shareholder, gets new owners, cf. e.g. Rt. 1989 p. 1198.²⁷ In general, a limited liability company keeps its identity even though the shares change owners. However, a lifting of the corporate veil may in principle be considered here, e.g. if the shares are the

¹⁷ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 218.

¹⁸ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 518.

¹⁹ For details, see Bråthen, *Personklausuler i aksjeselskaper* at 286-332.

²⁰ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 628.

²¹ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 565.

²² Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 248.

²³ Cf. however M.H. Andenæs, *Aksjeselskaper og allmennaksjeselskaper* (3rd edition., Oslo 1998) at 141-142 who is doubtful about whether and to what extent a consent requirement may be practised in relation to the creditors' seizure of the shares.

²⁴ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 218; Lilleholt, *Aksjeeigaravtale, vedtekt og kreditorbeslag*, in *Hyldestskrift til Jørgen Nørsgaard* (Copenhagen 2003) at 925.

²⁵ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 218.

²⁶ Cf. Lilleholt, *Aksjeeigaravtale, vedtekt og kreditorbeslag*, in *Hyldestskrift til Jørgen Nørsgaard* (Copenhagen 2003) at 925.

²⁷ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 514; Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 218.

company's most important asset.²⁸ There are no precedents that directly relate to the lifting of the corporate veil with regard to the consent rules, but there are precedents in other legal areas that probably would allow this in such cases as well.

One example is given in Rt. 1989 p. 1198, where the transfer of all shares in a limited liability company which leased premises for its business was considered a transfer of the company's leasing rights. This was therefore a breach of the contract, which stipulated that the lessee's entitlements could not be transferred without the approval of the lessor. Another example is given in RG 1992 p. 753 (Agder), where a transfer of shares in a company was regarded as a sale of the actual business.

It is perhaps more doubtful whether a merger or a demerger can be regarded as an acquisition that requires consent. Because of the continuity perspective on which the merger and demerger rules are based, the interpretation should be that consent is not required.²⁹

3.2 Information Stipulated in the Articles of Association on the Applications of the Consent Rule

The company's articles of association may give more detailed information on the type of share transfer that initiates a consent requirement, cf. ASL § 4-15 (2).

Whether consent is necessary in this case must be determined by an interpretation of the company's articles of association. The general principles of interpretation of the articles of association apply in such instances as well.³⁰ This implies that the wording of the articles of association is the natural starting point, but there may also be reasons to depart from an objective interpretation principle.

4 Which Purchasers of Shares Require Consent?

4.1 The General Rule

As a general rule, all purchasers of shares in a limited liability company must be granted consent, cf. ASL § 4-15 (2). Thus, even a transferee that is already a shareholder in the company must in principle be granted consent in order to increase his/her ownership interest in the company.

However, the articles of association may provide exceptions, e.g. so that certain transferees of shares are exempted from the consent requirement. Who is to be included in this exemption must then be established by an interpretation of the articles of association.

²⁸ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 218 comp. at 217 and 216.

²⁹ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 514; Aarbakke, Skåre, Knudsen, Ofstad, Aarbakke, *Aksjeloven og allmennaksjeloven* at 218. Concerning the continuity views on mergers and demergers, see Giertsen, *Fusjon og fisjon* (Oslo 1999) at 28-30.

³⁰ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 148-159 on interpreting the articles of association.

Furthermore, according to the Private Limited Companies Act (1997), the close relatives of the shareholder are provided a certain protection against a refusal by the company to grant consent to their share acquisitions, cf. section 4.2 below.³¹

4.2 Share Transfers to a Party Personally Related or a Relative in the Direct Line of Ascent or Descent

As a rule, consent may not be refused “for a change of ownership by inheritance or in some other way if the transferee is a party personally related to the former owner or a relative in the direct line of ascent or descent”, cf. ASL § 4-16 (2) second sentence.³²

The question of who is included in this exemption is based mainly on the definition of “personally related parties” in ASL § 1-5 (2). The exemption is thus more restricted than if the law had made exceptions for “closely related parties”, cf. ASL § 1-5 (1).

The term “personally related parties” includes a spouse or cohabitant, dependent children of the shareholder and of his/her spouse or cohabitant, companies in which he/she or any of the above mentioned parties have a controlling interest (cf. ASL § 1-3 (2)). As a rule, consent is thus not required for transfers from a shareholder to any of the mentioned persons. The rule includes transfers to a shareholder’s wholly owned subsidiary. Even though it is perhaps not natural from a linguistic point of view to describe the company as the shareholder’s “personally related party”, the parent company generally requires consent.

Secondly, it depends on an interpretation of the term “relatives in the direct line of ascent or descent”. A transfer to parents or grandchildren does not usually require consent.

The issue has been raised whether an exemption from the consent requirement for the former owner’s closely related parties or relatives in the direct line of ascent or descent could be regulated in the articles of association.³³ Certain statements in NOU 1996:3 could indicate that it is not possible to depart from the wording of the law on this matter.³⁴ The majority of the committee in the Norwegian Parliament dealing with the law emphasizes, however, that the articles of association may limit or eliminate the privileged position of the former owner’s closely related parties etc. pursuant to the law’s standard rule. Thus, the report of the committee states: “The majority will stress that relatives etc. by the articles of association may be refused the special

³¹ Comp. Bråthen, *Personklausuler i aksjeselskaper* at 513-514; Marthinussen, Aarbakke, *Aksjeloven* (2nd. ed. by ASLe and Magnus Aarbakke, Oslo 1996) at 139-140 concerning the exception for enforced sale and inheritance according to the companies act (1976).

³² Comp. to the definition of “personally related parties” in ASL § 1-5 (2). According to asal § 4-16 (2) the protected circle is “a party closely related to the previous owner”, compared to the definition of “personally related party” in ASL § 1-5 (1). The difference implies that the protected circle is somewhat larger in an ASA than in an AS. The preparatory works provide no reasons why the protected circle is different in the Private Limited Companies Act (1997) and the Public Limited Companies Act (1997), *see* Ot.prp. 23 (1996-97) at 188. However, this difference makes an ASA a more open type of company than an AS.

³³ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 220.

³⁴ NOU 1996:3 at 120.

protected position provided by the wording of the law.”³⁵ This should be a guideline for how the law is to be interpreted.³⁶

As a result, it is necessary to examine the interpretation of a provision in the articles of association that regulates consent in the case of inheritance and the administration of an estate. One typical formulation is that the articles of association require that “the person who inherits shares” must be granted consent, or that “heirs” are exempted from this obligation. As a general rule this provision includes inheritance devolved through intestate succession, inheritance under a will, and covenant of right to succeed.³⁷ The formulation must normally also include an acquisition in a compound administration of estate.³⁸ It is probably not customary among others than lawyers to apply the term compound administration of estate as a particular type of estate administration, distinct from the administration of a deceased’s estate. However, the articles of association may distinguish between intestate succession and inheritance under a will, comp. U 1954 p. 712 H.³⁹ If this is a settlement concerning the distribution of an estate after the shareholder is deceased, acquisitions in this context can also be included in a provision on inheritance in the articles of association.⁴⁰ Rt. 1973 p. 559, which involved the question of whether a right of redemption was triggered by the transfer of a farm, may provide certain support for such an interpretation. Acquisitions of shares in connection with the administration of an estate after a separation or divorce is not generally included in a consent requirement in the articles of association, which according to the wording is concerned with inheritance.

5 The Procedure

5.1 Overview

When a share acquisition is reported to the company, a decision on whether consent shall be granted must be made as soon as possible, cf. ASL § 4-16 (1) first sentence. As a rule, the decision-making authority lies with the board of directors, cf. ASL § 4-16 (1), second sentence. If consent is refused, the transferee shall always be given an explanation for the refusal, cf. ASL § 4-16 (3). The requirement to justify a refusal is intended to help the transferee of shares and incite the consent authorities to consider the matter before a decision is made.⁴¹

³⁵ Comp. Innst. O. 80 (1996-97) at 23.

³⁶ The fact that heirs can be refused the protection against a consent requirement was new in relation to the Limited Liability Act (1976) § 3-4 cf. § 3-2, comp. e.g. Marthinussen, Aarbakke, Aksjeloven at 140.

³⁷ Comp. Olsson, *Aktieförvärvares rätt i förhållande till bolaget* at 187; Giertsen, *Generasjonsskifte* at 82; Bråthen, *Personklausuler i aksjeselskaper* at 285.

³⁸ Comp. Olsson, *Aktieförvärvares rätt i förhållande till bolaget* at 187; Bråthen, *Personklausuler i aksjeselskaper* at 285.

³⁹ Comp. Bale & Knudsen, *Vedtekstfestet løsningsrett til aksjer*, in Bugge, Arentz-Hansen & Rasmussen, *Næringslivsjus* at 585.

⁴⁰ Comp. Giertsen, *Generasjonsskifte* at 82.

⁴¹ Cf. Ot. prp. 19 (1974-75) at 45.

If the transferee has not been notified of a refusal to grant consent within two months after the company received notice of the acquisition, consent shall be regarded as having been granted, cf. ASL § 4-16 (4). Hence, passivity can have major consequences.

Until consent has been granted or refused, the transferor may exercise his or her rights as a shareholder, cf. ASL § 4-2 (2). Thus, it is the transferor who has voting rights at the company's general meeting.⁴² Voting rights at the general meeting are transferred to the transferee when the acquisition has been reported and documented for the company and the acquisition is not prevented due to negotiability restrictions, cf. ASL § 4-2 (1).

More details on the procedural rules will be discussed in the following.

5.2 *The Decision to Grant or Refuse Consent*

The authority to grant consent to a share acquisition lies in general with the board of directors, cf. ASL § 4-16 (1), second sentence. Thus, the tasks of the board of directors are not limited to providing for the company's interests in a narrow sense, but also involve taking decisions on who will become the owners of the company. As will be mentioned in section 6 below, the board's deliberations on a refusal to grant consent shall give particular emphasis to the company's interests. One question to consider in this context is whether the company's business may be harmed if the transferee is granted consent.

The decision to grant consent to a share acquisition requires a board decision in accordance with regular procedural rules, e.g. the rules on disqualification of board members due to incompetence, cf. ASL § 6-27 comp. Rt. 1929 p. 503, Rt. 1935 p. 27, RG 1981 p. 720 (Frostating).⁴³ As a rule, a board member may not participate in the decision to refuse or grant a share acquisition in which he/she is a share transferor or transferee.

The board is also not entirely free to make self-governing decisions on matters concerning consent to share acquisitions. In this case as well, the board members operate under the threat of being sued for damages.⁴⁴

Even though this does not follow from the articles of association, the decision to grant or refuse consent cannot be made by the person empowered to sign for the firm, a board member or the general manager, cf. Rt. 1928 p. 70. If a person empowered to sign for the firm, a board member or the general manager was to notify a share transferee that consent has been granted, this act would not have any authoritative effects. Nor can a person who is aware that the board is unauthorized to make decisions due to disqualification claim to have authority to acquire shares, cf. Rt. 1929 p. 503. On the other hand, an authorized acquisition may occur even though the board has acted in breach of guidelines stipulated in the articles of association regarding when consent may be granted, cf. Rt. 1935 p. 27 and (presumably) Rt. 1999 p. 1682 (AS Østlendingen).

⁴² Cf. Bråthen, *Selskapsrett* at 51-52 about the shareholders' financial, administrative and disposition rights.

⁴³ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 438.

⁴⁴ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 225 (conditionally).

In its position as the company's highest authority (cf. ASL § 5-1) the general meeting may influence the board's exercise of its consent authority, even though this is not laid down in the articles of association. One possibility is that the general meeting elects a new board of directors that enforces the articles of association in line with the opinion of the general meeting, cf. Frostating case 99-00614A (AS Bøndenes Hus).

It is more uncertain whether the general meeting in its position as the company's highest authority also can give instructions concerning the board's exercise of authority in refusing consent. In legal theory it has been assumed that the general meeting "both when the board's authority is based on the law and on the articles of association may, by a regular majority, instruct or refuse consent, or reverse the board's decision".⁴⁵ It is also possible that Rt. 1999 p. 1682 (AS Østlendingen) is based on a similar assumption. However, the wording in ASL § 4-16 (1) which states that the authority to decide whether consent shall be granted lies with the board of directors "unless otherwise provided for by the articles of association", would be contrary to this interpretation. The closest interpretation of the wording of the law is that the general meeting cannot intervene in the board's exercise of its consent authority, except for decisions that are made pursuant to the rules regarding changes in the articles of association.

However, if it is assumed that the general meeting nevertheless may intervene in the board's exercise of its consent authority, then the general meeting must be able to grant consent or instruct the board to grant or refuse consent. The decision of the general meeting is nevertheless only an instruction to the board. However, the board can oblige the company based on its authority.

5.3 Regulation by the Articles of Association of the Authority to Grant or Refuse Consent

On the other hand, the company's articles of association may decide that the authority to grant consent lies with the company's general meeting, with one or more board members or with the general manager.⁴⁶

If the authority lies with the general meeting, then it must make a decision in accordance with customary procedural rules. This entails that a proposal to grant consent to a share acquisition must have the majority of the votes cast, unless the company's articles of association have more stringent requirements, cf. ASL § 5-17 (1).

However, the articles of association probably cannot make a share acquisition contingent on the consent of parties outside the company.⁴⁷ It follows directly from the law that the consent authority may not be placed with the corporate assembly, cf. ASL § 6-35 comp. ASAL § 6-37 (6).⁴⁸

⁴⁵ Cf. M.H. Andenæs, *Aksjeselskaper og allmennaksjeselskaper* at 145. To the same effect: Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 221.

⁴⁶ Comp. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 221.

⁴⁷ Cf. *Innstilling om lov om aksjeselskaper* (1970) at 83.

⁴⁸ The corporate assembly is a distinctively Norwegian company organ, established in 1972 in connection with the development of industrial democracy.

5.4 *Grounds for Refusing to Grant Consent*

If consent is refused, the reasons for this must be given, cf. ASL § 4-16 (3). It is therefore not enough to provide the reasons upon demand only.⁴⁹

The reasons shall be given to the transferee, as mentioned earlier. The transferor is therefore not by law entitled to an explanation.

The law does not specify how the explanation is to be given, however it is assumed in legal theory that an oral as well as a written explanation may be used.⁵⁰

It is perhaps not entirely clear whether the explanation may be given by means of electronic communication. ASL § 18-5 (1), which permits the company to use electronic communication for announcements, notices, documents, information, etc., applies only for notices to “shareholder”, according to its wording. A person who has not been granted consent to a share acquisition cannot be considered a shareholder by this rule, cf. ASL § 4-2 (1) comp. § 4-7 (1). When the law permits both an oral and a written explanation it can hardly be understood to the effect that it excludes notices by means of electronic communication.

The law also does not specify the contents of the explanation. A precise explanation which covers the actual situation according to the company will be sufficient, cf. Rt. 1999 p. 1682 (Østlendingen).

5.5 *Notice on what is Required to Remedy the Matter*

If consent is refused, ASL § 4-16 (3) states that the transferee shall also be notified on what is required to remedy the matter. This can probably be done by a direct reference to the relevant statutory provision in ASL § 4-17, comp. section 7 below.

5.6 *The Deadline for Refusing to Grant Consent*

As mentioned earlier, ASL § 4-16 (1) states that when a share acquisition is subject to consent, the decision on the matter must be made as soon as possible after the acquisition has been reported to the company.

However, in legal theory it is assumed that the board must await possible claims of pre-emption rights after a share has changed owners.⁵¹ For cases where pre-emption rights can be exercised, the maximum deadline for refusing consent may cause special problems, cf. section 5.7 below.

Another question is if the board can be obliged to decide whether consent is to be granted before a share acquisition has occurred and been reported to the company. The wording of the law connects the obligation to grant consent with the acquisition of shares. The law thus implies that the board cannot be obliged to make a decision before the acquisition has occurred. And even if the general meeting as a rule is the company’s highest authority (cf. ASL § 5-1), a simple majority resolution from the general meeting cannot have this effect. This is because a provision in the articles of

⁴⁹ Comp. NOU 1992:29 at 101.

⁵⁰ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 223.

⁵¹ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 235.

association is required to establish another arrangement than that of the law. The law also assumes that the deadline for approving a share acquisition starts to run from the date that the share acquisition is reported to the company.

Yet another matter is whether the board has the authority to grant consent to share acquisitions that have not occurred so far. The issue was touched on in Rt. 1999 p. 1682 (Østlendingen). The Supreme Court did not accept that the company's articles of association were to be interpreted to the effect that consent should always be granted in cases that were not explicitly stipulated in the articles of association. This implies that the board is usually obliged to exercise discretion in connection with each share acquisition. Such an interpretation can also be justified by the fact that it is difficult to make a final decision on approving a share acquisition even before the identity of the transferee is clear. The obligation to exercise discretion probably does not apply to the extent that the board is not allowed to grant consent in advance to a particular transferee, even before the final transfer agreement has taken place.

If the transferee is not informed that consent has been refused within two months after the company was notified of the acquisition, then consent shall be regarded as having been given, cf. ASL § 4-16 (4). The rule shall prevent the company from playing for time before consent is granted or refused.⁵² The deadline can therefore not be extended by a provision in the articles of association. However, should the company wish to limit the scope of the consent requirement rule, this may be accomplished by a provision in the articles of association stipulating that consent is regarded as having been given after less than two months.

When the deadline of the law or articles of association has expired, the transferee is to be regarded as a shareholder, cf. ASL § 4-2 (1). The company is then obliged to register the new owner in the book of shareholders, cf. ASL § 4-7 (1).

The two-month deadline starts to run when the company has received notification of the acquisition.⁵³ Since the board is not obliged to decide on a share acquisition before it has occurred, the deadline cannot start running from an earlier point in time.

In order for the consent refusal to be made in time before the two-month deadline, it must be dispatched at the latest before the deadline.⁵⁴

The two-month deadline is interrupted when the transferee is notified that consent has been refused. According to the preparatory works, an unsubstantiated consent refusal is sufficient to prevent the passivity effect.⁵⁵

If consent is refused, the transferee must also be notified on what is required to remedy the situation, cf. ASL § 4-16 (3). According to ASL § 4-17 (2) the transferee has two months to remedy the situation. In legal theory it is assumed that this time limit does not start to take effect if the refusal notice is given without the inclusion of such information.⁵⁶

⁵² Cf. *Innstilling om lov om aksjeselskaper* (1970) at 83.

⁵³ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 223.

⁵⁴ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 223.

⁵⁵ NOU 1996:3 at 120-121.

⁵⁶ Cf. M.H. Andenæs, *Aksjeselskaper og allmennaksjeselskaper* at 226; Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 226.

5.7 Exercise of Consent Authority when a Pre-emption Right is Applicable

A notice to make a claim for pre-emption rights must have been received by the company within two months after the company was notified of the change of ownership, this constitutes the maximum cut-off date for exercising a pre-emption right, cf. ASL § 4-23 (1). If this is a genuine pre-emption right, then this deadline is the same day as the deadline for refusing consent. The law has no particular rule for this case. If the person with a pre-emption right wants to use the deadline in order to fully exercise this right, the board may be forced to refuse consent without knowing whether the pre-emption right will be exercised.

6 Material Conditions for Refusing Consent

6.1 Review of the Conditions

In general, consent may only be refused on reasonable grounds, cf. ASL § 4-16 (2).⁵⁷ The Private Limited Companies Act (1997) does not specify what constitutes reasonable grounds for refusing consent to a share acquisition. However, in legal theory with support in case law it is assumed that the decisive factor will primarily be whether the acquisition is in conflict with the company's interests, cf. Rt. 1999 p. 1682 (AS Østlendingen).⁵⁸

More comprehensive conditions for refusing or granting consent may be stipulated in the company's articles of association, either directly through a regulation of the consent authority or more indirectly through an objects clause for the company.

Other resolutions of the general meeting may also have a certain relevance for decisions on whether consent shall be refused.

6.2 The Sources of Law

The sources of law for deciding whether "reasonable grounds" are applicable for refusing consent to a share acquisition are not particularly extensive. The preparatory works provide little guidance, for instance Ot. prp. 19 (1974-76) only states that "Thus, it is at least clearly stated that not any grounds whatsoever can be accepted".⁵⁹

Nevertheless, Rt. 1999 p. 1682 (AS Østlendingen) provides a pointer; this is the only recent Supreme Court judgment that directly addresses the issue. The judgment concerns a consent clause stipulated in the articles of association established under the Limited Liability Companies Act (1976), but it also provides guidance on the permission to refuse consent according to ASL § 4-17.

⁵⁷ Cf. the requirement for reasonable grounds, Bråthen, *Personklausuler i aksjeselskaper* at 514-518; Marthinussen & Aarbakke, *Aksjeloven* at 142-143; Bruland, *Kravet til 'saklig grunn' for at styret skal kunne nekte å samtykke til overdragelse av aksjer*, *Jussens Venner* 2001 at 56 and following.

⁵⁸ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 222.

⁵⁹ Ot. prp. 19 (1974-75) at 44; comp. NOU 1996:3 at 120.

In Rt. 1999 p. 1682 (AS Østlendingen) the Supreme Court acknowledged that the company's board of directors was entitled to refuse approval of two share acquisitions. In 1991 the two transferees had purchased shares that would give them 28.2 percent of the shares in the company. The board's decision was based on a consent clause in the company's articles of association. In connection with the board's refusal to approve the share acquisition, reference was made to "the company's ownership strategy, which also emphasizes local and dispersed ownership."

In its judgment the Supreme Court made an interpretation of the consent clause in the articles of association. It was argued that the company, according to its objects clause, could not be regarded in the same way as companies with a purely commercial objective. In the view of the Supreme Court, AS Østlendingen remained "an enterprise with local ownership and a practice in business that reflected a conscious supervision of which persons were allowed to have ownership status in the company at all times, and also how they should constantly balance the various ownership groups among the shareholders against each other, e.g. small shareholders vs. investors and media operators". In spite of these particular conditions, the judgment sheds light on the right of limited liability companies to refuse approval of a share transferee. Even though the judgment concerns the Limited Liability Companies Act (1976), it also provides guidelines for the right to refuse consent according to ASL § 4-17.

Before this judgment, the sources of law included a few judgments from the courts of first instance, some older Supreme Court judgments and legal theory.⁶⁰

6.3 The Essential Considerations in Determining Whether there are Reasonable Grounds for Refusing Consent

When the board shall decide whether there are reasonable grounds for refusing consent to a share acquisition, there are above all two opposing considerations.

On the one hand, there is the concern for the free negotiability of shares, which includes more general concerns for the stock market, the transferee, and – in particular – the concern for the party that wishes to get out of the company on business-related terms.

On the other hand, it may be in the interest of the company that certain transferees are not permitted to become shareholders and thus gain access to the company.

The implications of these conflicting concerns require a particular analysis.

The preparatory works for the previous Limited Liability Companies Act (1976) § 3-4 emphasized the importance of the principle of free negotiability of shares.⁶¹ However, this concern is considered less weighty in the Private Limited Companies Act (1997), where the issue was expressly discussed in the preparatory works. In Ot. prp. 23 (1996-97) the Ministry of Justice recommended that the non-mandatory main rule in the Private Limited Companies Act (1997) was to be free negotiability of shares. The Ministry "strongly emphasizes the free negotiability of shares as an instrument to rationalize the use of resources in the business sector, statutory negotiability restrictions would then be a negative signal to give".⁶² However, the

⁶⁰ Cf. the discussion in Bruland, *Kravet til 'saklig grunn' for at styret skal kunne nekte å samtykke til overdragelse av aksjer*, Jussens Venner 2001 at 58.

⁶¹ *Innstilling om lov om aksjeselskaper* (1970) at 83-84; Ot. prp. 19 (1974-75) at 42-45.

⁶² Cf. Ot. prp. 23 (1996-97) at 97.

committee in the Norwegian Parliament dealing with the law took as their point of departure that the Private Limited Companies Act (1997) was intended for companies with a close ownership structure, where the prevailing practice was to have negotiability restrictions stipulated in the articles of association.⁶³ A more general concern for the capital market is thus not considered particularly important in AS-companies.

Furthermore, the preparatory works of the Limited Liability Companies Act (1976) called attention to the risk of abuse. However, the preparatory works provide little guidance on this aspect, since the Private Limited Companies Act (1997) includes several new rules that are intended to prevent abuse of the consent authority.

As for the interests of the individual transferee of shares, they appear not to be emphasized very strongly. Becoming a shareholder in any limited liability company is not a general human right.⁶⁴ And if the company does not wish to acquire capital that requires free negotiability of shares, then it should focus on other – perhaps more expensive – methods to acquire capital.

In contrast, the interests of persons wishing to leave the company could indicate that shares should be freely negotiable. In Ot. prp. 23 (1996-97) this concern was emphasized as one argument for the general rule that shares should be freely negotiable.⁶⁵ This aspect has also been stressed in other contexts.⁶⁶ The line of reasoning is that in a limited liability company there are often few suitable purchasers of the shares, and a refusal from the board will mean that negotiability is restricted to a considerable extent.⁶⁷ True, the shareholders have the option of claiming redemption for their shares, cf. ASL § 4-24.⁶⁸ The conditions are strict, however; the redemption rule is a limited, exclusionary provision.

On the other hand, there is the company's need to control the ownership structure. The Supreme Court has in principle acknowledged the validity of this concern. Thus, Rt. 1999 p. 1682 states that "I find it obvious that an assessment of which shareholders the company wants as owners may in certain circumstances constitute reasonable grounds for rejecting transferees when such rejection is actually in the company's interest". Thus, the consent authority may be used to get shareholders that can play an active part in an optimal development of the company. If the shareholders are expected to contribute more than capital, then the shareholders' ability and will to make such a contribution must be emphasized.

A more comprehensive evaluation of the fundamental concerns must entail that the concern for the company's need for control is the most important, cf. section 6.1 above.

⁶³ Cf. Innst. O. 80 (1996-97) at 23.

⁶⁴ Cf. Bråthen, *Personklausuler i aksjeselskaper* at 251 and following.

⁶⁵ Cf. Ot. prp. 23 (1996-97) at 97.

⁶⁶ *Innstilling om lov om aksjeselskaper* (1970) at 83-84; Ot. prp. 19 (1974-75) at 42-45.

⁶⁷ Cf. Bruland, *Kravet til 'saklig grunn' for at styret skal kunne nekte å samtykke til overdragelse av aksjer*, *Jussens Venner* 2001 at 59.

⁶⁸ Cf. Bråthen, *Innløsning og utelukkelse av aksjonær*, *Nordisk Tidsskrift for Selskabsret* 1999:4 at 86-107.

6.4 Clarification of Reasonable Grounds for Refusing Consent

It is difficult to give a complete description of what constitutes reasonable grounds for refusing consent to a share acquisition.

Rt. 1999 p. 1682 (AS Østlendingen) provides a starting point, however. Here the Supreme Court unanimously stated that it must be regarded as “well-founded that an assessment of which shareholders are wanted as owners by the company may be reasonable grounds for refusing transferees when such refusal is clearly in the company’s interest”. This statement emphasizes that the company’s interests must be the focus of the decision. It must also be understood to the effect that a rather strict application of the consent rule may be acceptable.

On the other hand, the board cannot enforce the consent requirement in an arbitrary fashion, cf. Rt. 1999 p. 1682 (Østlendingen) comp. RG 1992 p. 1223 (Nordre Sunnmøre, short summary). Moreover, the board cannot enforce the requirement to the extent that it is in conflict with the general abuse rule.⁶⁹ Abuse of authority may e.g. be the case if consent is refused because the board is interested in making the shares difficult to sell, so that board members or others that the board wishes to favour can buy the shares at an advantageous price, cf. Rt. 1957 p. 581 comp. RG 1981 p. 720 (Frostating). However, this can also be a question whether the members of the board are disqualified due to incompetence.

The same can also apply if the consent authority lies with the general meeting. If this would entail abuse of authority by the majority of the general meeting, there can hardly be reasonable grounds for refusing consent.

The question of whether there are reasonable grounds for refusing consent to a share acquisition must be based on the company’s objective, operations and identity.⁷⁰ In Rt. 1999 p. 1682 (Østlendingen) it was emphasized that the newspaper company was “a business that could not categorically be compared to companies organized as purely commercial businesses”. Furthermore, in a family business, for instance, there should be strict control concerning who should be allowed to be a shareholder, cf. Rt. 1999 p. 1682 (Østlendingen). In other types of company it is perhaps less important who the shareholder is, e.g. because the company has many shareholders who cannot be expected to make a special contribution to the company’s development. With regard to the company’s business objective and identity, more must be required for giving reasonable grounds for refusing consent.

If the share transferee is a competitor of the company, this may probably constitute grounds for refusing consent, cf. e.g. Rt. 1928 p. 807 (AS Holmenkollbanen) and RG 1991 p. 1158 (Eidsivating, “Periscopos”).⁷¹ Consent may e.g. be refused for the company to maintain its independent position.

In this connection, emphasis may be placed on the potential influence of the share transferee if consent is granted, cf. Rt. 1999 p. 1682 (Østlendingen) and RG 1991 p. 1158 (Eidsivating, “Periscopos”). The class of shares that the relevant shares belong to could also be relevant.⁷² It is easier to imagine a refusal to grant consent to a major

⁶⁹ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 221.

⁷⁰ Cf. NOU 1996:3 at 120, which states that it is not “a prerequisite that the reasonable grounds assessment should be identical for all kinds of companies”.

⁷¹ Cf. Ot. prp. 16 (1962-63) at 3; comp. Ot. prp. 19 (1974-75) at 43.

⁷² Cf. Sundby, *Stemmerettsbegrensninger på aksjer etter norsk rett*, *Nordisk Tidsskrift for Selskabsret* 2003:2 at 242-244.

shareholding in a class of shares permitting influence and control, than if the shares belong to a class of shares without voting rights.

If consent is refused in order to avoid the risk of unfortunate conflicts of interest between the shareholders, this must usually be regarded as reasonable, cf. Rt. 1999 p. 1682 (Østlendingen). Disputes between shareholders or disagreement on the company's operations may constitute a considerable threat to the company.⁷³ This is particularly true if there is a reason to fear such serious circumstances that there are grounds for redemption or exclusion of one or more shareholders.⁷⁴ However, the wording in Rt. 1999 p. 1682 (AS Østlendingen) indicates that there must not necessarily be such serious conflicts at stake for the decision to be reasonable.

In this assessment it will also be relevant to consider whether it is in accordance with the company's ownership policy to refuse consent, cf. Rt. 1999, p. 1682 (Østlendingen).

The courts will probably be reluctant to re-examine the company's decisions on whether consent should be granted. In Rt. 1999 p. 1682 (AS Østlendingen) the Supreme Court thus stated that the courts should be careful to perform a judicial review of corporate strategy considerations regarding who should own shares in the company. The unanimous Supreme Court judgment states that "relatively significant grounds" are needed to justify an overturning of a consent refusal. The decision on whether the company benefits from a consent refusal therefore rests largely with the company's consent authority, at their discretion. It has therefore been assumed that this decision only can be re-examined if it is clearly unreasonable or is otherwise in breach of the law's provisions or based on incorrect facts.⁷⁵

7 The Effects of a Refusal to Grant Consent

7.1 Review of the Consequences of a Refusal to Grant Consent

The rules on the effects of a refusal to grant consent focus on protecting the share transferee. If consent is refused, the transferee has four options, cf. ASL § 4-17 (1). The transferee may withdraw from the agreement with the transferor, dispose of the share, bring a legal action regarding the validity of the refusal to grant consent, or demand that the shares be redeemed. The implications of these options will be discussed in sections 7.2 to 7.5 below.

The transferee must exercise these rights within two months after he/she received notice of consent being denied, cf. ASL § 4-17 (2). The articles of association may stipulate a longer deadline, but they cannot reduce the transferee's rights by establishing a shorter deadline.

Failure to meet the deadline specified in the act or in the articles of association entails that the transferee loses his/her possibility to rectify the situation. However, the

⁷³ Cf. Neville, *Samtykkeklausuler i aktie- og anpartsselskaber*, in *Hyldestskrift til Jørgen Nørgaard* at 955.

⁷⁴ Cf. Bråthen, *Innløsning og utelukkelse av aksjonær*, *Nordisk Tidsskrift for Selskabsret* 1999:4, in particular at 93-95.

⁷⁵ Cf. Bruland, *Kravet til 'saklig grunn' for at styret skal kunne nekte å samtykke til overdragelse av aksjer*, *Jussens Venner* 2001 at 59-60.

board can probably grant an extension of the deadline.⁷⁶ Normal rules under contract law must be applied to determine whether the board has endorsed an extension of the deadline.

As stated in the law, the deadline for the transferee to exercise his/her rights starts to take effect when he/she “received” notice that consent was denied, cf. ASL § 4-17 (2). Hence, the deadline starts to run when the notice reaches the transferee.⁷⁷ The deadline is calculated on the basis of ASL § 18-4.

If the deadline has expired and an extension has not been endorsed, the board may demand that the share or shares be sold through the execution and enforcement authority, according to the rules on enforced sale, cf. ASL § 4-17 (2) second sentence. However, the coverage principle (cf. the Enforcement of Claims Act (1992) § 10-6 comp. § 8-16) does not apply.

If a judgment is delivered stating that the consent refusal is valid, a new 2-month deadline applies before an enforced sale can be demanded, cf. ASL § 4-17 (2) fourth sentence. Thus, the transferee is given a new deadline to employ one of the other options according to ASL § 4-17 (1).

If the transferee has claimed redemption without succeeding, a new 2-month deadline applies before an enforced sale may be demanded, cf. ASL § 4-17 (2) fifth sentence.⁷⁸

The wording in ASL § 4-17 (2) fifth sentence indicates that the transferee also has a deadline of two months to decide whether he/she wants to employ one of the other options if redemption has been claimed, and an appraisal performed, resulting in the fixing of a redemption value. Based on the preparatory works, however, the legal theory would indicate that the act may be interpreted strictly, so that the transferee does not have a deadline to change his/her mind if the redemption value has been established.⁷⁹

7.2 Reversal of the Agreement

The transferee’s first option is to demand a reversal of the agreement with the transferor, cf. ASL § 4-17 (1) no. 1. The Private Limited Companies Act (1997) presupposes that as a general rule the transferor of a share must accept a reversal of the agreement.⁸⁰ However, this may perhaps not apply in an enforced sale.⁸¹ It may be maintained that the rule then should be the same as when, for instance, the acquisition of real property requires a licence, etc. so that the transferee is barred from cancelling the agreement, with consequences for the creditor.

⁷⁶ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 224.

⁷⁷ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 226.

⁷⁸ Cf. NOU 1996:3 at 121.

⁷⁹ Cf. NOU 1996:3 s. 121; M.H. Andenæs, *Aksjeselskaper og allmennaksjeselskaper* at 161; Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 227.

⁸⁰ Comp. NOU 1996:3 at 121, Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 225. The starting point in relation to ASL 1976 § 3-4 was that the transferee carried the risk for obtaining consent, see Bråthen, *Personklausuler i aksjeselskaper* at 367; Marthinussen & Aarbakke, *Aksjeloven* at 143.

⁸¹ Cf. Lilleholt, *Aksjeeigaravtale, vedtekt og kreditorbeslag*, in *Hyldestskrift til Jørgen Nørgaard* at 925.

As a general rule, a cancellation must be claimed within two months, cf. ASL § 4-17 (2). As mentioned above, the board may nevertheless allow an extension of the deadline, which may also affect the transferor. Based on the rule that the transferee has two months to demand a cancellation after the judgment has been pronounced that the consent refusal was valid (cf. ASL § 4-17 (2) fourth sentence), a cancellation may be demanded after a relatively long period. Still, the transferor keeps his/her voting rights on the shares during this whole period, comp. section 5.1 above.

If the agreement with the transferor has been cancelled, the transferor is entitled to claim redemption of the shares by the company, cf. ASL § 4-17 (4) second sentence, comp. section 7.5 below. The transferor's deadline for claiming redemption expires one month after the cancellation, cf. ASL § 4-17 (4), second sentence.

One prerequisite for the transferor to accept a cancellation is that the agreement between the transferor and the transferee does not constitute a problem. If the transferor in the sales agreement has guarded against a cancellation of the agreement then this must be respected.

The transferee's right to withdraw from the agreement applies regardless of whether the consent refusal is reasonable.⁸²

The company cannot oppose a cancellation of the agreement. If the transferee demands cancellation of the agreement, the company cannot refuse this by referring to a consent requirement. A cancellation cannot be regarded as an "acquisition" of shares.

On the other hand, a cancellation may be precluded as a consequence of the exercise of pre-emption rights.⁸³ If pre-emption rights can be exercised in relation to shares that have been sold, the transferee is not entitled to cancel the agreement with the transferor. The option to cancel the share acquisition is generally precluded when the notice on the acquisition has been given to the company (or to The Norwegian Central Securities Depository), cf. Rt. 1980 p. 769.⁸⁴ If those who have preemption rights do not use them, the transferee will probably still be entitled to cancel the agreement if this occurs within the two-month deadline or later if an extension of the deadline has been endorsed.

When the agreement has been cancelled, the transferor is once again a shareholder with all the shareholder rights that he/she had before. If an issue of shares has occurred in the meantime in which the transferee has subscribed to shares or received bonus shares, the right to the new shares is also transferred to the transferor, without this being regarded as a transfer of shares.⁸⁵

⁸² Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 226.

⁸³ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 235.

⁸⁴ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 237.

⁸⁵ Cf. Ot. prp. 36 (1993-94) at 272; Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 225.

7.3 Sale of Shares

Secondly, the share transferee can resell the share to another party. Shares that are subscribed to in a share issue or assigned in a bonus issue are regarded similarly as shares that are subject to consent requirements.⁸⁶

The transferee's right to sell the shares applies regardless of whether the consent refusal is based on reasonable grounds.⁸⁷

There is also the question of whether the share transferee can resell the shares to anyone whatsoever. In this case one can imagine further resale to persons who all require consent.

In legal theory it has been assumed that there is a premise in the Private Limited Companies Act (1997) that the share can only be transferred to a party that the company can accept or that can acquire the share without consent.⁸⁸ This interpretation is supported by ASL § 4-16 (3) second sentence which refers to the share transferee's option to "remedy the matter", for instance by selling the share.

7.4 Civil Action

Thirdly, the transferee can file a civil action regarding the validity of the refusal to grant consent, cf. ASL § 4-17 (1) no. 3.

A civil action can be filed even though the transferee can cancel the agreement with the transferor. The transferee may have a clear interest in claiming that the company had no reasonable grounds for refusing to grant consent, even though he/she could have opted out of the agreement by cancelling it.⁸⁹ In this case the courts must decide on the legitimacy of the refusal to grant consent.

The question of whether a civil action should be filed is hence subject to normal procedural rules. A party that has cancelled the agreement with the transferor or resold the shares is probably disqualified from getting a declaratory ruling on the validity of the refusal to grant consent.

Rt. 1991 p. 21 concerned the question of whether the company had a legal interest in reviewing the appeal on a decision in the Court of Appeal, which judged that a refusal to grant consent was invalid (cf. RG 1991 p. 1158 (Eidsivating, "Periscopos")). In the meantime the transferee had resold the shares. The company's legal interest must thus be regarded as lapsed, cf. the Litigation Act (1915) § 53 and § 54. The company's need to clarify the terms for consent refusal with regard for future, potential share acquisitions could not justify a legal interest. The appeal committee stated that "a general wish to clarify the terms for consent refusal in such share purchases cannot justify a legal interest in making the appeal, must in my opinion be clear".

⁸⁶ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjelovent og allmennaksjelovent* at 225.

⁸⁷ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjelovent og allmennaksjelovent* at 226.

⁸⁸ Cf. M.H. Andenæs, *Aksjeselskaper og allmennaksjeselskaper* at 157; Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjelovent og allmennaksjelovent* at 225.

⁸⁹ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjelovent og allmennaksjelovent* at 226.

On the other hand, the share transferee can bring a damages suit against the members of the board.⁹⁰ If the board has exercised the consent authority in an unsound manner, the company may perhaps be held liable in damages.

7.5 *Redemption*

The transferee's fourth option is to demand that the company redeem the shares, pursuant to the rules on acquisition of the company's own shares or reduction of the share capital, cf. ASL § 4-17 (1) no. 4 comp. (3), first sentence. If the transferee instead has employed the option to withdraw from the agreement with the transferor (cf. ASL § 4-17 (1) no. 1), the transferor can demand redemption, as mentioned above in section 7.2, cf. ASL § 4-17 (4), second sentence.

The possibility to claim redemption was an innovation in the Private Limited Companies Act (1997). The explanation for this option in the preparatory works is that the "reasonable grounds" requirement is imprecise, so that in reality much of this decision is left to the board; there is therefore a need for a more effective protection of the contract parties.⁹¹

The share transferee's possibility to claim redemption entails that the law's consent requirement for share transfers does not have the same strict regulatory effect as a consent provision stipulated in the articles of association, pursuant to the Limited Liability Companies Act (1976). On the other hand, it also entails that a consent provision does not provide the same protection against unwanted share acquisitions as the Limited Liability Companies Act (1976). If the company cannot perform redemption of shares because the terms for acquisition of the company's own shares or reduction of share capital are not applicable, the company may be disqualified from refusing consent to share acquisitions.⁹²

Redemption can be claimed even though the refusal to grant consent has reasonable grounds.⁹³ It is not important whether the shares are acquired from someone who has owned them for a long time or only for a short period.

The transferee's redemption claim must be made within two months after the transferee receives notice that consent to the acquisition has been denied, cf. ASL § 4-17 (4).

The transferee's right to claim redemption is limited in several ways. First, redemption must be done in accordance with the rules on acquisition of the company's own shares and reduction of the share capital. The possibility of implementing a reduction in the share capital is limited in the usual way by the "approved income statement for the most recent financial year", cf. ASL § 8-1 (1).

Secondly, the company can meet the transferee's redemption claim by appointing another party who is willing to take over the shares on the same terms as the transferee, cf. ASL § 4-17 (3) no. 1. This will usually be sufficient to secure the transferee's interests.

⁹⁰ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 225.

⁹¹ Cf. NOU 1992:29 at 101.

⁹² Cf. NOU 1996:3 s. 121, M.H. Andenæs, *Aksjeselskaper og allmennaksjeselskaper* at 160; Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 228.

⁹³ Cf. NOU 1996:3 at 122.

The rule that the company can meet the transferee's redemption claim by appointing another party who is willing to take over the shares on the same terms as the transferee is not always applied, however,

One such case is when the redemption claim comes from an heir or a recipient of a gift, based on the provision in the articles of association that share acquisitions by inheritance or gifts also require consent. In legal theory it is then assumed that the company cannot employ the option to appoint another party to take over the shares on the same terms as the transferee.⁹⁴ The reason for this is probably that the terms that the transferee obtains may be so unique that they should not benefit just any purchaser of shares.

Another case may be when the acquisition has been made at a bargain price or there are particular circumstances that cause the price to be especially low. This is true even though NOU 1996:3 states that the rule of the company having the option of appointing another party also applies when the estimated price must be considered to be lower than the actual value of the shares.⁹⁵ However, in legal theory it is assumed that in such cases a test of reasonableness will be required, which may be based on the Conclusion of Agreements Act (1918) § 36.⁹⁶

The transferee is also not entitled to redemption if this "will result in considerable harm to the company's business or otherwise may seem unreasonable for the company".⁹⁷ The preparatory works indicate that it will be necessary to consider the transferee's/transferor's interest in having the shares redeemed, against the company's interest in preventing the reduction in equity that this will entail. The provision shall also take into account the company's capital.⁹⁸

7.6 The Articles of Association or the Law Determine how the Redemption Price is to be Established.

If the articles of association do not stipulate other rules, the general rule is that the redemption price is to be based on the actual value of the shares at the time that the claim was made, cf. ASL § 4-17 (5). As for the expression "the actual value of the share" the preparatory works refer to how this is understood in an accounting context.⁹⁹

The Supreme Court decision concerning compulsory redemption of the minority shareholders in Norway Seafood Holding ASA (case 2002/1347) also provides guidelines for establishing "actual value" in connection with a refusal to grant consent.¹⁰⁰ The decision involved the valuation principles in establishing the redemption price, pursuant to the Public Limited Companies Act § 4-25. The

⁹⁴ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 227.

⁹⁵ Cf. NOU 1996:3 at 122.

⁹⁶ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 227.

⁹⁷ Cf. NOU 1996:3 at 121.

⁹⁸ Cf. Ot. prp. 23 (1996-97) at 108 (general account on redemption).

⁹⁹ Cf. NOU 1996:3 at 122.

¹⁰⁰ Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 229, which presumes that practice related to a statutory provision on redemption or release pursuant to ASL §§ 4-23 to 4-25 also has an effect on valuation pursuant to another provision.

redemption price here was established on the basis of the company's underlying values divided by the number of shares.

This judgment stands out against the preparatory works, which in connection with the discussion of the consequences of consent refusal in limited liability companies base their estimates on the presumed market value.¹⁰¹ However, the preparatory works also state that the price agreed on between the parties may give an indication when there is so little turnover of the company's shares that it is difficult to establish a market value.

One consequence of the Supreme Court decision concerning compulsory redemption of minority shareholders in Norway Seafood Holding ASA will probably be that shareholders who are refused consent will be entitled to a higher redemption price than the market price. Because of the rule that the transferee is not entitled to redemption if this "will result in considerable harm to the company's business or otherwise may seem unreasonable for the company", it can perhaps be more difficult for the shareholder to succeed in his/her claim for redemption when consent is refused. The Supreme Court decision concerning compulsory redemption of minority shareholders in Norway Seafood Holding ASA can to some extent represent a limitation on a shareholder right. Still, in order to keep the right of redemption, the transferee can probably agree to the redemption price being fixed lower than a share of the company's underlying values.

If the articles of association determine how the redemption price is to be established then the Conclusion of Agreements Act (1918) § 36 can be applied, cf. ASL § 4-17 (5) second sentence. This entails that an unreasonable provision in the articles of association can be overturned or abated. The requirement is that there is a considerable difference between the price according to the articles of association and the share's actual value.¹⁰²

If agreement is not reached on the claim for redemption, this shall be determined by an appraisal, cf. ASL § 4-17 (6) comp. Appraisal Act (1917), Chapter 1. Another approach can also be agreed on, however. The law indicates here that the redemption claim may be established by arbitration, cf. the Litigation Act (1915), Chapter 32.

¹⁰¹ Cf. NOU 1996:3 at 122.

¹⁰² Cf. Aarbakke, Skåre, Knudsen, Ofstad & Aarbakke, *Aksjeloven og allmennaksjeloven* at 230.