Circular No. 2/2014

To: Issuers of financial instruments listed on Oslo Børs, Oslo Axess and Nordic ABM

Unofficial translation
3 September 2014
Our ref: 945393
http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Circulars

The equal treatment rule in securities legislation

1 Introduction and summary

The Securities Trading Act ("STA") sets out at Section 5-14 the principle that issuers of financial instruments admitted to trading on a Norwegian regulated market must treat the holders of their financial instruments on an equal basis. The section does, however, envisage that differential treatment may be acceptable if it has a factual basis in the common interest of the issuer and the holders of its financial instruments. Oslo Børs has included provisions on equal treatment in the Continuing Obligations for companies with shares and equity certificates listed on Oslo Børs and Oslo Børs Axess at Section 2.1, in the Bond Rules at Section 3.1.1, and in the ABM Rules at Section 3.1.1.

This Circular addresses a number of themes related to the duty of issuers to treat investors equally. The objective of the Circular is to give issuers guidance in respect of the content and scope of the equal treatment rule. Section 2 explains the background to the Circular and its objective. Section 3 provides a general overview of the provisions on equal treatment and the legal issues involved, while section 4 deals specifically with the application of the equal treatment rule when carrying out private placements.

The main points addressed by the Circular can be summarised as follows:

- The principle of equal treatment applies to all issuers of listed financial instruments and to their corporate bodies, and means that differential treatment of the holders of an issuer's securities is only permitted if it has a factual basis in the common interest of the issuer and the holders.

- The criteria for a factual justification of differential treatment require that the purpose of the action taken must be relevant and likely to promote the common interests of the issuer and the holders. In addition, any such action must be proportionate - the benefit that can be achieved for investors as a whole and for the issuer must be considered in the light of the disadvantage it represents for specific parties. The assessment of alternative actions plays a central role in this respect.

- Private placements represent a dilution of shareholders' rights, and require a factual justification. The requirement for factual justification will be applied more strictly in the following situations:

    - Large share issues representing very significant dilution, particularly where this leads to a change in the balance of power.

- Issues where there is a sizeable difference between the issue price and the market price (discount).
- Issues that involve differential treatment of existing shareholders.

- Subsequent repair issues may be significant for the evaluation of factual justification, including the requirement for proportionality. The actual extent of the repair effect must be evaluated. Carrying out a repair issue does not replace the issuer's duty to evaluate alternative sources of financing that might result in a lesser degree of differential treatment.

- The Financial Supervisory Authority of Norway is responsible for supervision of compliance with the equal treatment rule. Oslo Børs has included equivalent provisions in its Issuer Rules, and accordingly also monitors compliance. When investigating such compliance, Oslo Børs takes into account the way the issuer has handled the case, including its rationale for carrying out the transaction it has chosen and its assessment of alternative courses of action in the circumstances in question.

- Oslo Børs has observed trends in behaviour that would seem to indicate that there is a need for greater awareness in the market of the equal treatment rule. Oslo Børs now intends to place particular emphasis on issuers' compliance with the duty to treat investors equally.

2 More on the background to the Circular

The provisions on equal treatment set out in STA Section 5-14 reflect the well-established principles of equal treatment of shareholders in both company law and securities legislation. The effects of the provisions mentioned include providing protection against unjustified differential treatment of minority shareholders. Effective protection for minority interests plays a central role in facilitating efficient and trustworthy markets for securities trading. It must be the case that when companies invite small shareholders to invest risk capital by listing their securities on a regulated market, they also accept a particular responsibility not to subsequently marginalise the interests of such shareholders.

Oslo Børs has recently observed trends in behaviour that would seem to indicate that there is a need for greater awareness by issuers and their corporate bodies in respect of the duties that arise from the equal treatment rule. These observations relate not least to a trend for greater use of private placements as a source of financing by both Norwegian and foreign issuers.

A sizeable majority of the issuers listed on the Oslo Børs marketplaces operate in capital intensive sectors and industries, and for such issuers private placements represent an opportunity to raise capital through a speedy and flexible process. Many issuers consider the ability to raise capital relatively quickly through such transactions to be a particular advantage of listing on the Norwegian market. It is often the case that a speedy, flexible and cost-effective inflow of capital through a private placement will be in the common interest of the issuer and its shareholders in general. However, it is the case that this type of transaction will routinely raise questions about the equal treatment of shareholders, and it is important that issuers and their corporate bodies pay proper attention to these considerations. Through this Circular, Oslo Børs aims to provide some guidance in respect of the assessment that issuers must carry out in relation to the equal treatment rule when carrying out this type of transaction.

While this Circular pays particular attention to private placements, the question of equal treatment also applies to a number of other situations. Section 3 provides an overview and general explanation of the equal treatment rule and the questions involved in assessing how it is applied, and this explanation may also provide guidance for other areas where actions can be restricted by the principle of equal treatment. However, it is important to stress that the evaluation of the factual justification for differential treatment that is envisaged by the equal treatment rule necessarily involves balancing different and conflicting interests, and is accordingly by its character very much a matter of judgement. This makes it essential that each situation is evaluated in its own right on the basis of its particular circumstances.

The Financial Supervisory Authority is responsible for supervision of compliance with the equal treatment rule in STA Section 5-14, cf. STA Section 15-1. Oslo Børs also enforces compliance with the equal treatment rule by including equivalent provisions in its rules on continuing obligations and the rules for issuers of fixed income instruments. Oslo Børs has submitted this Circular to the Financial Supervisory Authority.

3 The principle of equal treatment in securities legislation, STA Section 5-14

3.1 Overview of the provisions

STA Section 5-14 states:

> *(1) Issuers of financial instruments admitted to trading on a Norwegian regulated market must treat the holders of their financial instruments on an equal basis. The issuer must not expose holders of its financial instruments to differential treatment that lacks a factual basis in the common interest of the issuer and the holders.*
>
> *(2) In connection with the trading or issuance of financial instruments or rights to such instruments, the issuer's corporate bodies, elected officers or senior employees must not adopt measures which are likely to confer upon themselves, certain holders of financial instruments or third parties an unreasonable advantage at the expense of other holders or the issuer. The same applies to the trading in or issuance of financial instruments or rights attached to such instruments within the group to which the issuer belongs.*

The first sentence of the first paragraph imposes a duty on all issuers of financial instruments listed on a regulated market in Norway to treat holders of their financial instruments on an equal basis. However, the absolute and unconditional requirement for equal treatment is qualified by the second sentence of the first paragraph: differential treatment may be acceptable if it is factually based in the common interest of the issuer and the holders of its financial instruments.

The second paragraph includes a prohibition against the issuer's corporate bodies etc. adopting measures in connection with trading or issuing financial instruments in a way that is likely to provide them, individual holders of financial instruments, or third parties, with any unreasonable advantage at the expense of other holders or the issuer. The inclusion here of the concept of 'unreasonable' also introduces the need for a factual evaluation to form a view on whether the measures in question can be factually justified as being in the common interest of the issuer and the holders of its

financial instruments.[1] The concept of 'unreasonable' also implies a proportionate assessment of the advantages the measures in question are likely to confer on the issuer and the holders of its securities on the whole as compared to the disadvantage that may be caused for individual holders of the securities.[2] The factors that are relevant for this assessment are the circumstances as they existed at the time the measures in question were decided upon, cf. 'likely to'. It is accordingly not a condition that the decision actually causes some disadvantage, and the provision applies if the decision is 'likely to' have such an effect.[3] In addition to applying to breaches of the equal treatment principle, i.e. differential treatment of holders of securities with no factual basis, the second paragraph of the section extends to unreasonable advantages that benefit third parties.

The provision applies to all Norwegian and foreign issuers that have financial instruments listed on Oslo Børs and Oslo Børs Axess, and the corporate bodies of such issuers. In the case of Norwegian limited companies and public limited companies, there are equivalent restrictions in company law through the provisions on abuse of authority at Section 6-28 (Abuse of position in the company by the board of directors etc.) and Section 5-21 (Abuse of the general meeting's authority) of the Limited Companies Acts. Shareholders can seek redress for breaches of these company law restrictions on abuse through civil law remedies on the basis of the provisions in question. In the first instance this can be done by using a mechanism for referring objections to the Ministry of Finance (objections to corporate decisions registered with the Register of Business Enterprises)[4] or by issuing legal proceedings to challenge the validity of corporate decisions which may include a claim for damages, including the possibility of applying for a temporary injunction to prevent a transaction being carried out in anticipation of a ruling on the question of factual justification. The equal treatment rule in the Securities Trading Act applies regardless of whether the issuer is or is not subject to an equivalent requirement for equal treatment of shareholders under the company law of the country in which it is registered, which makes it possible to pursue a civil legal action in the issuer's home state.

The equal treatment rule applies to issuers of listed 'financial instruments', and operates to prevent differential treatment of holders of the 'financial Instruments' where there is no factual justification. The meaning of 'financial instruments' is defined in STA Section 2-2, and in addition to shares includes bonds, units in securities funds, rights to shares etc. This means, for example, that issuers of bonds that have bonds listed on Oslo Børs must comply with the equal treatment rule when trading in their own bonds and when increasing the size of a bond issue. The equal treatment rule will also impose restrictions in connection with the issue of convertible bonds and other rights to shares, equity certificates etc.

The equal treatment rule applies to differential treatment by the 'issuer' and to decisions made and steps taken by the issuer's 'corporate bodies'. The question of which bodies are included in the concept of 'corporate bodies' will depend on the issuer's form of incorporation and which holders of

[1] Cf. Ot.prp. (Government Bill) No. 19 (1974-1975) on the Limited Companies Act and comments on pages 111-112 in relation to the equivalent concepts in Section 6-28 of the Public Limited Companies Act in force at the time.
[2] Cf. The interpretation of the rules on exercise of authority in the Public Limited Companies Act Sections 6-28 and 5-21, in Gina Bråthen, «Myndighetsmisbruk ved styrets beslutning om rettet emisjon*», NTS 2012-3/4*, page 37 and page 38, also Filip Truyen, *Aksjonærenes myndighetsmisbruk – en studie av asl./asal. § 5-21 og uskrevne myndighetsmisbruksprinsipper*, Oslo 2005, page 345. Oslo Børs assumes that the legal content of the Public Limited Companies Act Sections 6-28 and 5-21 to a significant extent coincide with the legal content of STA Section 5-14.
[3] Cf. Aarbakke and others, Aksjeloven og allmennaksjeloven Kommentarutgave 3rd edition, Oslo 2012 page 398.
[4] Cf. The Register of Business Enterprises Act 9-1, cf. § 5-1.

financial instruments are affected by the measures in question. In the case of public limited companies, 'corporate bodies' will typically include the general meeting, the board of directors and the corporate assembly, while for issuers of fixed income instruments the concept will also include meetings of bondholders, and for savings banks with listed equity certificates the concept will include the committee of representatives, the board of directors etc. In addition, the provision also extends to decisions made and steps taken by the issuer's 'officers' and 'senior employees'. Oslo Børs interprets the provision to address the actions taken by such persons in their capacity as participants in the company's decision-making processes.[5]

The inclusion of the equal treatment rule in securities legislation dates back to 1994 when such a rule was included in the Stock Exchange Regulations, and the rule was carried over into the Securities Trading Act in 2007. These provisions were not subject to a preparatory drafting consultation process prior to their inclusion in legislation, and there is accordingly no further guidance on the intended purpose and scope of the rule. In addition, there is only limited precedent for the application of the provisions. At the time the rule was transferred to the Securities Trading Act in 2007, responsibility for supervision was transferred to the Financial Supervisory Authority, cf. STA Section 15-1. The Financial Supervisory Authority does not have legal capacity to impose sanctions for breaches of the provisions.[6] However, Oslo Børs has included equivalent provisions in its Continuing Obligations for issuers of shares at Section 2.1 and in its Bond Rules at Section 3.1.1, and is accordingly able to impose violation charges for material breaches of the provisions, cf. Continuing Obligations Section 15.4 and Bond Rules Section 8.4. Breaches of the equivalent equal treatment rule in the ABM Rules at Section 3.1.1 may be sanctioned by public criticism, cf. ABM Rules Section 8.1.

3.2 Further comments on the assessments associated with the equal treatment rule

As explained above, the first and second paragraphs of STA Section 5-14 must be considered in combination, and in practice the issues associated with assessment will be as follows: 1) Whether measures have been adopted that are likely to result in differential treatment of holders of the company's financial instruments or to confirm a benefit for one or more holders or other parties at the expense of the company or of other holders, and if this is the case, 2) Whether there is a factual and defensible basis for such treatment in the common interest of the issuer and the holders of financial instruments.

If the answer to question 1) is affirmative, it will also be necessary to assess whether the assumptions on which the decision has been made have a factual basis, i.e. whether they have a 'factual basis in the common interest of the company and the holders of financial instruments'. In the case of an issue of shares, the common interest of the company and its shareholders as a whole will be a long-term interest in the company's financial performance, and the objective of a return for shareholders on their investment in the company.[7] In other cases the question of what is a legitimate objective may depend on the nature of the financial instruments to which the measures adopted relate.

In any case, it will not be sufficient to evaluate only whether the measures in question are motivated by the relevant objective. The assessment must also identify whether there is a sufficiently

[5] Cf. See also Knut Bergo, *Børs- og verdipapirrett*, Oslo 2008 page 126.
[6] The Financial Supervisory Authority can however impose sanctions for breach of the prohibition of unreasonable business methods set out in STA Section 3-9, cf. STA Section 17-3 (2), which depending on the circumstances may apply to actions taken in breach of the equal treatment rule.
[7] Cf. Aarbakke and others, page 484.

proportionate balance between the advantage the measure will represent for the issuer and the holders of its financial instruments as a whole on the one hand, and the disadvantage that the measure may represent for specific holders on the other hand. Factors that are relevant in this connection would include evaluating which alternative measures may be available to the issuer. A decision can scarcely be said to have a factual basis if other measures that represent a lesser adverse effect on the rights of some holders of financial instruments could achieve virtually the same advantage for the company.[8]

3.3 Supervision by Oslo Børs of issuers' compliance with the equal treatment rule

Oslo Børs currently carries out supervision of compliance with the requirements for equal treatment in the securities legislation at STA Section 5-14 through equivalent provisions in its Continuing Obligations for issuers of shares and through its rules for issuers of fixed income securities. Pursuant to its current rules, Oslo Børs is able to impose sanctions in the form of violation charges in response to material breaches of these rules. The Board of Directors of Oslo Børs has on two occasions imposed sanctions for breaches of the equal treatment rule as previously included in the Stock Exchange Regulations, cf. Oslo Børs Board decision of 25 June 2003 Choice Hotels Scandinavia ASA (Decisions and Statements 2003 page 78) and Stock Exchange Appeals Committee Case 2/2006 Opticom ASA (Decisions and Statements 2006 page 49).

In enforcing the equal treatment rule, Oslo Børs takes a cautious approach to allowing its own judgement to take precedence over the commercial judgement and industry-specific knowledge that provides the basis for the issuer's financial and operational targets.[9] In applying this approach, Oslo Børs has in previous cases expressed the view that it will in principle not seek to re-examine the company's assessment of what constitutes a reasonable and factual basis, and will only act in cases where differential treatment clearly lacks a factual basis, is grossly unreasonable or has been carried out without proper consideration of the circumstances.

In a situation where questions arise over equal treatment, Oslo Børs may contact the issuer with a request for supplementary information on the background for the transaction and the related circumstances, together with a request for the issuer to explain its assessment in relation to the duty of equal treatment. To the extent that the situation relates to decisions taken by the company's board of directors, Oslo Børs will normally also ask to see board minutes and other documentation from the board's consideration in respect of the transaction in question. This information will put Oslo Børs in a better position to assess the way in which the matter has been considered by the company's board, including the extent to which the board, at the time the relevant decision was made, was properly aware of the equal treatment issue and carried out a thorough and proper assessment in this respect, the extent to which the board took into account the relevant considerations, the board's evaluation of alternative courses of action, the board's awareness of the question of conflicts of interest[10] etc. An important element in assessing whether the steps taken

[8] Cf. Truyen, «Myndighetsmisbruk i aksje- og allmennaksjeselskaper», *Jussens Venner*, 39/2004 page 318.
[9] Cf. Ruling on the right of courts to override the company's commercial decisions in Rt. 2003 page 335 (item 14).
[10] See, for example, comments by Oslo Børs on the significance of evaluating conflicts of interest in a letter dated 22 November 2013 concerning a private placement by Norwegian Energy Company ASA (Decisions and Statements 2013 page 75).

complied with the equal treatment rule will be whether the question of equal treatment was subject to thorough and satisfactory investigation within the company. [11]

Following the transfer of responsibility for the approval of prospectuses to The Financial Supervisory Authority in 2010, supervision by Oslo Børs has concentrated on cases where it is apparent that there are significant differences in the treatment of existing shareholders, and to cases where Oslo Børs has received complaints. In the light of matters observed over recent years, Oslo Børs now intends to place greater focus on compliance by issuers with the equal treatment rule.

4 Further comments on private placements

4.1 General

Questions in relation to equal treatment arise particularly frequently in connection with private placements. In this context, the concept of a 'private placement' includes increases in share capital by listed companies that are made available for subscription only to named individuals, or increases in share capital with minimum subscription amounts intended for a somewhat wider group. In the case of Norwegian companies, a private placement of shares for cash will represent a waiver of the pre-emption rights of existing shareholders pursuant to Section 10-4 of the Public Limited Companies Act. Such a waiver of shareholders' pre-emption rights requires approval by the general meeting, cf. Public Limited Companies Act Section 10-5. In the case of Norwegian companies, a decision to carry out a share issue can be made by the board of directors acting in accordance with a mandate granted by the general meeting. It is typically the case that such mandates also permit the board to waive the pre-emption rights of existing shareholders, cf. Public Limited Companies Act Section 10-14.

In the case of companies registered in countries outside the EEA, it is often the case that the board of directors can authorise increases in share capital subject to the overall limit of what is termed 'authorised share capital'. Such companies will not necessarily be subject to rules on pre-emption rights for existing shareholders. For these companies, the equal treatment rule will not impose the same degree of restriction on private placements, and will only stipulate that there must be a factual basis to justify the disadvantage that an issue may represent for existing shareholders through the dilution of their shareholding interest in the company. This will also be the case for Norwegian companies that issue shares for consideration other than cash that are not subject to the statutory requirement for pre-emption rights pursuant to Section 10-4 of the Public Limited Companies Act.[12]

In principle, the equal treatment rule applies both to resolutions passed by a general meeting in respect of private placements and to decisions of the board of directors in respect of such transactions, including decisions by the board made under the terms of a mandate granted by the general meeting. Even though such a mandate may give the board authority to waive pre-emption rights, it remains the board's responsibility to carry out a factual assessment of whether the principle of equal treatment permits a specific private placement to be carried out, and if so on what basis and terms this should be done.

[11] See also comments by Oslo Børs on the question of equal treatment in connection with the division of Rem Offshore ASA, (Decisions and Statements 2010, page 89), which emphasises this point.

[12] For further information on the requirement for factual justification in respect of a private placement where the consideration is other than cash, see for example Gina Bråthen, «Myndighetsmisbruk ved styrets beslutning om rettet emisjon», *NTS 2012-3/4*, page 39 and page 40

In practice, it will often be the board of directors that takes a decision on whether capital should be raised through a private placement, acting either on the basis of a mandate from the general meeting or by taking a decision where the final completion of the transaction is conditional on approval by a general meeting. The equal treatment rule deals with the 'measures' adopted by corporate bodies in connection with the issue of financial instruments. Oslo Børs takes the view that a proposal by the board of directors to a general meeting for a private placement represents the adoption of such a 'measure' by the board. Since the board is the first corporate body to consider the matter, and since the board will normally consider more extensive documentation regarding the rationale and assessment in relation to equal treatment than will be the case for a subsequent decision by a general meeting, Oslo Børs will in such cases generally elect to focus its consideration of whether there has been any breach of the equal treatment rule in the board's consideration of the case.

The assessment of whether the equal treatment rule has been breached by a private placement must be based on the specific circumstances of the case in question, including the nature and degree of the differential treatment, balancing the considerations that speak for and against carrying out the transaction, and the way in which the issuer has handled its consideration of the case. However, the following section provides some starting points that may provide guidance for assessing a transaction in relation to the equal treatment rule.

4.2 The requirement for factual justification

It is likely that a private placement will give certain shareholders or third parties an advantage at the expense of other shareholders through the dilution of their shareholder rights. In addition, where the private placement is carried out at a discount to the market price, the transaction will also represent a financial advantage to subscribers at the expense of other shareholders. Accordingly, a decision to carry out a private placement requires proper factual justification, which means that it must be based on the objective of maximising value for shareholders as a whole over the long term.[13]

The requirement for factual justification also requires that a decision is based on a factual and defensible basis, and that there is proportionality between the advantages the private placement is likely to represent for the company and shareholders as a whole and the disadvantage it represents for some shareholders through dilution of their shareholder rights. In relation to proportionality, the parties making the decision must consider whether virtually the same advantage for the company could be achieved by using other financing alternatives that would have less of an adverse affect on the other shareholders. The strictness of the test applied in determining the factual basis will vary to some extent depending on the nature and degree of preferential treatment that the private placement will represent.

When carrying out a private placement, the responsibility for ensuring that there is sufficient evidence of a satisfactory factual basis will lie with the company carrying out the placement.[14] The company's justification for carrying out a private placement will play a major role in this connection. Oslo Børs encourages companies to publicly disclose their justification for carrying out a private placement. This course of action is also recommended by the Norwegian Code of Practice for

[13] Cf. Truyen, *Aksjonærenes myndighetsmisbruk – en studie av asl./asal. § 5-21 og uskrevne myndighetsmisbruksprinsipper*, page 388.
[14] Cf. Truyen, page 389.

Corporate Governance, which states that where the board of directors resolves to waive the pre-emption rights of existing shareholders on the basis of a mandate granted to the board, the justification for this decision should be publicly disclosed in a stock exchange announcement issued in connection with the increase in share capital.[15] In the case of transactions that give rise to the duty to issue a prospectus, the justification must be included in the prospectus.[16] When Oslo Børs carries out checks on compliance with the equal treatment rule set out in Section 2.1 of Continuing Obligations, it will ask for justification for the decision to deviate from the basic principle of equal treatment in connection with the transaction in question.

A lack of satisfactory justification in a particular case may serve to support the view that there was not a sufficient factual basis for differential treatment, which may include the view that the company did not give sufficient consideration to alternative structures for raising capital. The requirement for a factual justification will apply both to adverse effects on the rights of some shareholders through dilution of their proportionate ownership interest, and to any financial advantage conferred on subscribers by issuing shares at a special price. As previously mentioned, the circumstances that applied and the assessments carried out at the time the decision was made to carry out the private placement will be the main factors to be considered when assessing whether there has been a breach of the equal treatment rule.

4.2.1 Private placements intended for new shareholders and existing shareholders respectively

When carrying out a private placement of shares, the subscribers targeted may be existing shareholders, both existing shareholders and new investors, or solely new investors. The latter alternative may apply to private placements intended for employees and officers with a view to encouraging their commitment and loyalty, or to new investors who represent a type of shareholder that may help to strengthen the company over the longer term, including long-term, strategic and financially strong investors that can assist with future financing requirements, or parties that represent strategic alliances.

The equal treatment rule addresses both measures that are likely to confer an unreasonable advantage on selected existing shareholders, and measures that are likely to confer an unreasonable advantage on third parties at the expense of existing shareholders. In both cases, the action taken must have a factual basis in the common interest of the company and its shareholders as a whole. An issuer will normally have some degree of room for manoeuvre in relation to evaluating whether commercial transactions with third parties are in the common interest of the company and its shareholders. However, the test of a factual basis will apply more strictly if the issue of shares creates a financial advantage for the subscriber or subscribers at the expense of the company's shareholders by offering a significant price discount, or if the issue of shares causes a sizeable direct dilution of the rights of existing shareholders, particularly if this results in a change in the balance of power among the company's shareholders. In addition, the test of a factual basis will apply more strictly where the principle of equal treatment is not observed, i.e. where the issue of shares is targeted in full or part at only a selected current shareholder or shareholders rather than current shareholders as a whole.[17]

[15] Norwegian Code of Practice for Corporate Governance dated 23 October 2012, 7th edition, Section 4.
[16] Cf. Commission Regulation. 809/2004/EC (Prospectus Regulation), Annex III, item 5.3.3.
[17] Cf. Truyen, page 388.

A stricter application of the criteria for a factual basis in the situations mentioned above will include a stricter assessment of the anticipated financial benefit the transaction will create for the company, and a more rigorous evaluation of alternative decisions. When carrying out an issue of shares targeted at selected current shareholders, which accordingly represents a breach of the principle of equal treatment, the transaction will represent a breach of the provisions on equal treatment if the company could achieve the same advantages by an alternative that represented a more limited breach of the equal treatment principle (for example by raising external financing or by carrying out a rights issue), or where such alternatives did not apply, by instead carrying out measures to repair the disadvantage caused. In such a situation, the company should be able to demonstrate significant shortcomings in the availability of alternative financing solutions.[18]

4.2.2 Determining the issue price

Where a private placement is carried out at an issue price that differs from the share value, this may depending on the circumstances represent a transfer of financial value to the subscribers at the expense of shareholders who are not given the opportunity to subscribe for the shares issued. Such preferential treatment requires justification on a factual basis. In the case of an issue of shares for cash, the share price in the period prior to the issue that is publicly available in the market will in most circumstances represent a relevant and practical starting point for quantifying the scale of the preferential treatment.

One of the criteria for satisfying the requirements for a factual justification of the decision to carry out a private placement will be that the decision was taken on the basis of maximising value for shareholders as a whole. This implies that the share price for a private placement is set at the maximum amount that it is possible to achieve in the light of the circumstances surrounding the issue and its objective.[19] Oslo Børs will accordingly attach particular importance to how the share price for a private placement was determined when evaluating compliance with the equal treatment rule. For example, in the case of an issue of shares for cash it will be more readily acceptable that there is a factual basis for a discount in the share price if the issue price was determined through a proper and broadly-based book building exercise that reflected the share price that market participants were willing to pay in order to subscribe for the issue.

In a situation where the company is in an acute financial situation, it will typically be necessary for the company to decide the share price through negotiation with individual potential subscribers, and in such circumstances a large discount may have a valid factual basis because the company did not have access to alternative sources of financing and because the discounted price may represent a risk margin. In such a situation, the board of directors must strive to achieve the best possible price based on the company's situation and the alternatives that are available.

4.2.3 The purpose of the share issue

A private placement that is carried out because of a company's wish or need to raise capital may include situations in which a company is in an acute liquidity crisis, situations where a company needs access to capital at short notice in order to finance a business opportunity, or where a

[18] Cf. See also Truyen, page 395.
[19] Cf. Truyen, page 383.

company wishes to take advantage of a window in the market to raise capital at an attractive price without any specific purpose at the time.

Where an issuer is in an acute liquidity crisis, and is in actual or imminent risk of defaulting on its borrowing commitments, the issuer will have some degree of flexibility in relation to justifying the measures that are necessary in order to avoid a liquidity crisis. Nonetheless, the board of directors will still have a duty to evaluate alternative measures both in relation to the dilution of the rights of existing shareholders that such a share issue may cause, and in relation to any share price discount/difference between the share price for the issue and the market value of the company's shares.

Oslo Børs is aware that companies in acute financial difficulties will typically refer to the terms and conditions imposed by investors and creditors as a condition for their involvement in an issue, with such terms and conditions involving the share price, the scope of subscription and share ownership situation following the issue, the opportunity for (other) existing shareholders to subscribe etc. Oslo Børs fully understands that issuers may face difficult dilemmas in situations where, for example, the company is dependent on meeting the requirements of a party such as a major existing shareholder in order to carry out a rescue operation with the support of the shareholder in question. Nonetheless, Oslo Børs is of the opinion that there must be a limit to the terms and conditions demanded by particular shareholders, creditors and other parties that the board of directors can accept on behalf of shareholders as a whole in relation to the requirements for equal treatment. Setting this limit must of necessity be based on a specific case-by-case evaluation. By way of example, in one case Oslo Børs took the view that an issuer's acceptance of a particular shareholder's demands for the allocation of shares in a new issue in advance of a shareholder meeting in order to secure approval of refinancing was in breach of the equal treatment rule.[20]

A private placement carried out to finance specific business opportunities may, dependent on circumstances, have a factual basis in the common interest of the company and its shareholders as a whole. However, in such circumstances the flexibility available for justifying differential treatment will normally be much more restrictive than in the situations mentioned above. This is because such situations will seldom be of an acute nature, the financial benefits will be less certain and/or the company will have access to a wider range of possible financing alternatives. Questions will quickly be asked as to whether the financial benefits of carrying out a private placement in such a situation can outweigh the adverse effects of a material change in the balance of power/and or beaches of the principle of equal treatment caused by only allowing selected shareholders to subscribe for the issue.

In relation to share issues that do not have a particular purpose for the finance raised but are carried out in order to take advantage of an attractive share price or favourable market sentiment, the flexibility available for justifying differential treatment will be even more restricted. Notwithstanding this, such a private placement may, depending on the circumstances, have a factual basis in the common interest of the company and shareholders as a whole if it is an effective and flexible source of capital with low transaction costs.

Share issues in the last category mentioned are typically carried out as small issues where the number of shares issued represents less than 10% of the issuer's share capital in order to avoid the

[20] See Oslo Børs letter of 11 March 2014 in respect of a private placement by Songa Offshore SE.

requirement for a listing prospectus.[21] Experience indicates that the share price achieved by such transactions is close to the traded share price immediately before the announcement of the private placement. Both the fact that such a share issue is on a small scale and that there is only a small difference between the issue share price and the traded share price are relevant to the question of proportionality. In such circumstances the degree of dilution will be limited, and it will be relatively easy for existing shareholders to maintain their percentage ownership by acquiring shares in the market. However, this does not mean that the issuer can avoid the requirement to demonstrate a factual justification for the issue. The ability of shareholders to maintain their percentage ownership by acquiring shares in the market will be dependent on factors such as the market liquidity of the shares, and may be affected by subsequent events. In addition, the parties that are offered the opportunity to subscribe for shares through the private placement will be able to do this without incurring additional costs, and in addition the company will bear the costs of carrying out the transaction. This contrasts with the situation for shareholders who resort to carrying out transactions in the market to offset the effect of dilution, since such shareholders will be responsible for the transaction costs involved.

4.3 Further comments on repair issues

It is often the case that when companies carry out private placements of a certain size, they subsequently carry out a repair transaction where the objective is to rectify the dilution effect and any financial disadvantage that the private placement has caused for existing shareholders that were not given the opportunity to subscribe for the private placement.

When assessing whether a transaction has resulted in an unreasonable differential treatment, Oslo Børs will take into account whether the company carried out a repair transaction in the form of a repair issue. In a situation where the board of directors, at the same time as it proposes or decides to carry out a private placement, proposes to carry out a repair issue with the objective of repairing the effect of the private placement, this will be relevant to the assessment of proportionality. Such repair transactions may result in a reduction in the adverse affect on the shareholder rights and/or financial rights of existing shareholders, and this will in turn be material to the assessment of whether the company satisfies the requirement for a factual justification of its actions.

The question of whether a repair issue is a relevant and/or necessary measure, and consideration of what terms are necessary for a repair issue to have a sufficient restorative effect, must be assessed on a case-by-case basis. Repair issues are of particular importance as a repair measure in situations where a private placement has resulted in differential treatment of existing shareholders. The basic principle in such a situation must be that the repair transaction is carried out as quickly as possible following the private placement, and that the repair issue is at the same price and offers a sufficient number of shares for other shareholders to avoid any dilution in relation to the shareholders who were allowed to participate in the private placement. However, there may be factual justification to deviate from these basic principles in particular circumstances.

It may be the case in some circumstances that even a full repair issue at the same share price will not be likely and/or sufficient to avoid breaching the equal treatment rule. The fact that the two share issues are carried out at different times and using different methods may, depending on the specific circumstances, mean that one issue has advantages or disadvantages relative to the other issue in

[21] Cf. Securities Trading Act Section 7-5, item 1.

respect of features other than price and the number of shares. It will accordingly be necessary to carry out a case-by-case evaluation of the company's situation, its requirements and alternative sources of capital that do not involve differential treatment in order to evaluate whether a repair operation can deliver sufficient repair of the adverse effects of differential treatment of the shareholders in question.

As mentioned above, stricter requirements will apply to the need for a factual basis when measures involve differential treatment of existing shareholders, and this includes stricter requirements for the board's evaluation of alternative arrangements that represent a less extensive breach of the equal treatment principle. Oslo Børs is accordingly of the view that where a private placement with selected existing shareholders may be a defensible course of action in situations such as an acute liquidity requirement after evaluating alternative source of financing, the board will nonetheless have a duty to consider proposing/approving a subsequent repair issue in order to limit the adverse effects of differential treatment. In addition, if the board decides not to take such action, or decides upon any restriction of the repair operation in terms of its scope, speed of execution and identical share price, it must as a starting point provide a factual justification for such a course of action. It is important to note in this connection that carrying out a repair issue does not in itself replace the board's duty to evaluate whether there are satisfactory alternative methods of financing that will in overall terms represent a lesser degree of differential treatment of shareholders than will be involved in carrying out a private placement with a subsequent repair issue.