

To issuers and members of Oslo Børs' marketplaces, and other relevant parties

Your ref:

Our ref:

Date:

19 April 2017

## Guidance relating to carrying out repair issues

### 1 Background

Oslo Børs oversees compliance with the principle of equal treatment in the securities legislation (Section 5-14 of the Norwegian Securities Trading Act) through the identical provision in the exchange's continuing obligations for issuers of equities and bond rules.

The purpose of this letter is to provide guidance in addition to that contained in Circular 2/2014 concerning Oslo Børs' understanding of the principle of equal treatment, with a particular focus on the use of private placements.<sup>1</sup> Questions concerning equal treatment arise particularly in connection with private placements, which are extensively used in the Norwegian market. This means that issuers as well as their governing bodies and advisors need to be particularly conscious of the obligations imposed by the equal treatment rule.

Oslo Børs wishes to highlight the fact that these obligations also apply when deciding the terms and conditions for and when carrying out a repair exercise, where the objective often is to rectify the dilutive effect and any financial disadvantage that the private placement causes for existing shareholders who were not given the opportunity to subscribe for shares in the private placement.

Oslo Børs has recently noticed an increased use of criteria and methods that exclude certain groups of shareholders from participating in repair issues, and it is particularly shareholders with smaller holdings who own shares through nominees who are regularly being prevented from participating in such issues. Oslo Børs' view is that this practice challenges the equal treatment rule.

Oslo Børs is of the view that it is important that the Norwegian market does not develop a practice that is based on a perception that standard criteria that de facto exclude certain groups of shareholders from participating in repair issues, represents a factually justified differential treatment that is permitted under the equal treatment rule. Oslo Børs therefore wishes to provide guidance for issuers listed on our market places, as well as for the advisors that regularly assist these, on principal challenges associated with certain selection criteria and the equal treatment principle.

---

<sup>1</sup> In this context, the concept of a "private placement" applies to increases in share capital by listed companies that are made available for subscription to named persons only, or increases in share capital with minimum subscription towards a wider group.

## **2 Brief overview of the equal treatment principle and the requirement of equal treatment in private placements and subsequent repair issues**

Section 5-14 of the Norwegian Securities Trading Act requires issuers of financial instruments admitted to trading on a Norwegian regulated market to treat the holders of their financial instruments on a non-discriminatory basis. Oslo Børs has included an identically worded provision in the exchange's continuing obligations for issuers of equities and bond rules.<sup>2</sup>

The principle of equal treatment applies to all issuers of listed financial instruments, and means that differential treatment of the holders of an issuer's instruments is only permitted if it has a factual basis in the common interests of the issuer and the holders. The criteria for a factual justification require that the purpose of the action that involves differential treatment 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 condition that any action must be proportionate means that 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 the individual holder. When making this assessment, it is of relevance which alternative actions that are available for the issuer.

Circular 2/2014 contains a detailed discussion of the equal treatment rule and the legal considerations involved. The Circular sets out that questions surrounding equal treatment often becomes an issue in connection with private placements. By nature, private placements represent a dilution of shareholders' organisational rights, and therefore require a factual justification. If the subscription price is below the market price, a private placement can also involve a financial disadvantage.

A subsequent repair issue may be of significance for the evaluation of factual justification in relation to the private placement, including the requirement of proportionality. What is required in order for the repair effect of a repair issue to be sufficient has to be evaluated on a case-by-case basis. Section 4.3 of Circular 2/2014 includes a particular discussion of repair issues and detailed guidance in relation to how they should be designed.

A basic prerequisite when carrying out a repair issue is that it should ensure the largest degree of equal treatment possible for the company's shareholders. In order for a repair transaction to attain its purpose, it is absolutely key that those shareholders who were not given a real and actual opportunity to participate in the private placement can participate in the repair issue on such conditions which do not entail a differential treatment or discrimination for which there is no factual justification.

## **3 Oslo Børs' assessment of certain types of cases**

As mentioned in the introduction, Oslo Børs has noticed an increased use of criteria and methods in repair issues that exclude certain shareholder groups from participating in such issues. In Oslo Børs' view, the equal treatment principle risks being infringed if the criteria and methods used when carrying out a repair issue de facto involve shareholders being treated on a differential basis that is not factually justified.

---

<sup>2</sup> Section 2.1 of the Continuing Obligations for companies with shares and equity certificates listed on Oslo Børs and Oslo Axess; Section 2.1 of the Continuing Obligations of companies admitted to trading on Merkur Market; and Section 3.1.1 of both the Bond Rules and the ABM Rules.

In the sections below, Oslo Børs wishes to comment on certain types of cases in which compliance with the equal treatment principle may come into question.

### **3.1 Shareholding thresholds as a basis for exclusion**

It has come to Oslo Børs' attention that from time to time conditions are set whereby participation in a repair issue is contingent on a shareholder's holding of shares not exceeding a given threshold. Such thresholds typically correspond to the minimum holding set as a condition for being invited to participate in the preceding private placement. Such thresholds may be used as a tool in the issuer's efforts to avoid having to produce a prospectus. Oslo Børs' assessment is that excluding shareholders on the basis of a defined maximum holding is not necessarily problematic in relation to the equal treatment principle. This is the case provided that shareholders who are excluded from participating in the repair issue were given a real and actual opportunity to participate in the private placement.

Oslo Børs has, however, seen examples of the condition for participating in the repair issue not only being linked to a shareholder's holding of shares being below a maximum defined level, but also to the registered holding of shares in the VPS. When such a condition is applied, it implies that shareholders with a holding of shares which qualifies for participation in the repair issue, but who hold their shares through a nominee that has a combined holding in excess of the defined threshold, are excluded from participating in the repair issue. Oslo Børs' assessment is that this creates a potential differential treatment for such shareholders that may not be factually justified. In general, the conditions set for participation in private placements and repair issues must be designed in such way that they ensure compliance with the requirement of equal treatment. This should as a minimum imply that it is possible to make a proper consideration of which shareholders who meet the conditions for participation in the relevant share issue, regardless of whether or not they own their shares through a nominee.

Oslo Børs is of the view that it would be problematic if there is established a market practice which entail that shareholders who own shares in listed companies through a nominee on such grounds are prevented, directly or indirectly, from participating in share issues in the Norwegian market.

### **3.2 Invitation to participate or allocation of shares in a private placement as a basis for exclusion**

A condition normally set for participation in a repair issue is that the shareholder must either (i) not have been invited to participate in the private placement, or (ii) not have been allocated shares in the private placement. The second of these alternatives is an objective criterion that is easy for issuers to control, and rarely leads to complaints from shareholders wishing to participate in the repair issue.

Oslo Børs' experience, however, is that a selection criterion based on which shareholders that were *invited* to participate in the private placement may challenge the equal treatment rule. Oslo Børs' view is that an invitation to participate in a private placement is not a sufficiently objective criterion for identifying which shareholders who were not given a real and actual opportunity to participate in the private placement. There may, for example, be cases in which a shareholder is telephoned by the manager of the private placement but either misses the call or does not return it, or where the manager contacts a nominee with an invitation to participate in the private placement but the underlying shareholders themselves are not invited.

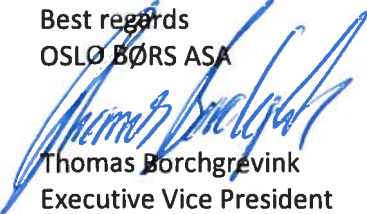
Oslo Børs' view is that there is not as a matter of course a factually justifiable reason for a shareholder to be excluded from participating in a repair issue where the private placement manager has not managed to contact the shareholder or has not communicated an invitation to participate in the private placement to the shareholder. In Oslo Børs' opinion, this implies i.a., that shareholders who own shares via a nominee should not generally be prevented from participating in a repair issue where only the nominee has been invited to participate in the private placement.

To avoid disagreements and uncertainties relating to whether a shareholder has actually been invited to participate in a private placement or not, Oslo Børs expects companies to ensure they have appropriate routines and documentation for the invitation process. This to secure that they can easily provide evidence of which shareholders that were given a real and actual opportunity to participate in the private placement in the event that *invitation* is used as a condition for selection. As mentioned in section 3.1 above, Oslo Børs is of the view that where conditions are set for participation in private placements and repair issues, these must be designed in such a way as to ensure compliance with the equal treatment requirement, which also requires companies to be in a position to properly verify that the conditions for participation are satisfied.

\* \* \*

In view of the above considerations, Oslo Børs finds it necessary to emphasise the importance of issuers paying attention to the problems that can be caused by how the conditions set for participation in repair issues are designed. Oslo Børs asks issuers to take due care to ensure that shareholders who are for formal reasons or in practice prevented from participating in a private placement are not excluded from subscribing for shares in a subsequent repair issue without a factual justification for such exclusion.

Best regards  
OSLO BØRS ASA



Thomas Borchgrevink  
Executive Vice President  
Surveillance and Operations



Lars-Erik Oppi  
Lawyer  
Surveillance and Operations