



## COMMENTS ON EACH QUESTION

**Question 1.** *Should EU corporate governance measures take into account the size of listed companies? How? Should a differentiated and proportionate regime for small and medium-sized listed companies be established? If so, are there any appropriate definitions or thresholds? If so, please suggest ways of adapting them for SMEs where appropriate when answering the questions below.*

The question of whether differentiated regimes for small and medium sized companies should be established is an issue that the Board examined carefully in its work with the revision of the Swedish Corporate Governance Code (“**the Swedish Code**”) in 2008, ahead of the Swedish Code’s expansion to cover all listed companies. The Board decided not to make any such differentiation, and is of the opinion that the same principle should apply at EU level.

First, at an international level it is difficult to draw general lines between what should be regarded as small, medium sized and large companies, as this varies hugely between different markets. Second, there are no reasons in principle to place lower requirements on the corporate governance of small listed companies than that of large ones. The Board’s view is that a better strategy would be to formulate rules in the form of principles, which could be applied proportionately with regard to the size and complexity of each organisation, thus allowing companies to choose the solutions most appropriate to their specific circumstances by applying the comply or explain principle. The latter presupposes that the comply or explain principle is regulated and monitored in such a way that companies do not need to be reluctant to choose other, and for the company better, solutions than those recommended as long as these solutions are reported and explained clearly. Unfortunately, however, this precondition does not seem to be generally prevalent within the EU today.<sup>1</sup>

**Question 2.** *Should any corporate governance measures be taken at EU level for unlisted companies? Should the EU focus on promoting development and application of voluntary codes for non-listed companies?*

The Board welcomes the development in recent years of governance codes for unlisted companies, not least the development in Sweden through the work of the Swedish Academy of Board Directors<sup>2</sup> and the work done at European level under the direction of the European Confederation of Directors’ Associations (ecoDa).<sup>3</sup> At the same time, the Board regards this issue as outside its remit and therefore refrains from commenting on it in detail. Regulation at EU level, however, appears to be both unjustified and difficult to implement in practice. It should also be noted that owners of unlisted companies are always free to apply the rules contained in a national governance code or any other set of rules that the owner considers appropriate. This happens in Sweden, for example, in many state owned enterprises.

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<sup>1</sup> See the EU Commission’s Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States, September 2009.

<sup>2</sup> Guidelines for Good Board Practice, StyrelseAkademien (the Swedish Academy of Board Directors) 2003 and 2009.

<sup>3</sup> Corporate Governance Guidance and Principles for Unlisted Companies in Europe. ecoDa 2010.

**Question 3.** *Should the EU seek to ensure that the functions and duties of the chairperson of the board of directors and the chief executive officer are clearly divided?*

The mandatory division of the roles of chair of the board and chief executive officer is regulated in Sweden by the Companies Act. The need for such a rule may exist in countries that apply the unitary board model, but would at best be ineffective in, for example, Germany. Even though the Board is positive to the principle inherent in the rule as such, the Green Paper does not contain any evidence of the need of a rule at EU level.

**Question 4.** *Should recruitment policies be more specific about the profile of directors, including the chairman, to ensure that they have the right skills and that the board is suitably diverse? If so, how could that be best achieved and at what level of governance, i.e. at national, EU or international level?*

First, the question pre-supposes that there are requirements or practices of using a specific recruitment policy in relation to nominating board directors. Such a detailed administrative requirement does not exist in all EU countries and should not exist - this level of detail is far beyond what the EU should try to harmonise. The practices in relation to nominating directors of the board - as well as the duties and responsibilities of board members - differ among the different countries based on their individual corporate governance systems. The Board cannot see any need for EU regulation on this highly detailed issue.

Second, as stated in more detail below, the owners are responsible for electing a suitable board, and in the Swedish system, a detailed recruitment policy would only risk enshrining this.

**Question 5.** *Should listed companies be required to disclose whether they have a diversity policy and, if so, describe its objectives and main content and regularly report on progress?*

**Question 6.** *Should listed companies be required to ensure a better gender balance on boards? If so, how?*

The Board shares the opinion that it is good from some points of view to have more diversity of professional background, skills and gender on boards, but strongly believes that the primary criterion is always that the members of the board have the right competence. The Board does not believe that it is up to society to dictate to which people the owners should entrust the management of their property. In the long term, such regulation risks diluting private proprietary rights and thus the owners' responsibility for their companies.

It should instead be made clear that it is the owners' responsibility to ensure that the company has an appropriate board composition. If there are jurisdictions within the EU in which shareholders do not have sufficient power or influence regarding board composition to bear this responsibility, it is that issue that should be resolved. The Swedish system, in which a nomination committee appointed and led by the shareholders has a clearly stated mission to nominate the most suitably composed board for the company, could serve as a model.

**Question 7.** *Do you believe there should be a measure at EU level limiting the number of mandates a non-executive director may hold? If so, how should it be formulated?*

The Board does not believe that it is possible to create a detailed rule limiting the number of mandates a non-executive director may hold; neither can the Commission be regarded as having shown the need for such a rule - neither in general nor in detail. The Swedish Code requires that directors devote the necessary time to the assignment.

**Question 8.** *Should listed companies be encouraged to conduct an external evaluation regularly (e.g. every three years)? If so, how could this be done?*

A current Commission recommendation states that boards should evaluate their work each year, which was included as a rule in the Swedish Code with a requirement that the evaluation take place through “a systematic and structured process”. In the opinion of the Board, further detailed regulation at EU level of this issue is unwarranted and unnecessary.

**Question 9.** *Should disclosure of remuneration policy, the annual remuneration report (a report on how the remuneration policy was implemented in the past year) and individual remuneration of executive and non-executive directors be mandatory?*

**Question 10.** *Should it be mandatory to put the remuneration policy and the remuneration report to a vote by shareholders?*

This section illustrates the problems that arise when detailed regulation based on the Anglo-Saxon corporate governance system, with boards composed of a mixture of executive and non-executive directors, is to be applied in countries with other board models.

The Board is not in favour of further regulation of the remuneration of company executives. The Swedish Companies Act already fulfils part of the requirements concerning members of the board and the CEO raised in questions 9 and 10. According to the Act, the shareholders decide on all remuneration to each director of the board individually through a resolution at the shareholders’ meeting. In addition, shareholders also hold a decisive vote at the shareholders’ meeting on a remuneration policy for the company’s management.

There are no special remuneration report requirements, but information on all remuneration to each director and the CEO is to be included in the annual report, which is approved by the shareholders at the shareholders’ meeting.

It can also be said as a general reflection that delegating issues upward from the board to the shareholders’ meeting does not always lead to better corporate governance. The power of majority shareholders at the shareholders’ meeting is limitless on most issues, i.e. the shareholders are allowed let self-interest decide how they cast their votes, whereas the board is obliged to consider the interests of all shareholders in all its decisions. Also, it is impossible in practice to hold a shareholder majority accountable for a bad decision at the shareholders’ meeting. Furthermore, it is not to the company’s benefit if more and more time at shareholders’ meetings of shareholders is taken up by these types of administrative issues to the detriment of discussions pertaining to the business.

**Question 11.** *Do you agree that the board should approve and take responsibility for the company’s ‘risk appetite’ and report it meaningfully to shareholders? Should these disclosure arrangements also include relevant key societal risks?*

**Question 12.** *Do you agree that the board should ensure that the company’s risk management arrangements are effective and commensurate with the company’s risk profile?*

It is surprising that the Green Paper brings up the issue of whether boards should take responsibility for companies’ risk management. It is obvious that the board has responsibility for a company’s risk management, including its “risk appetite” (question 11), and for ensuring that the company’s risk management arrangements are effective and commensurate with the company’s risk profile (question 12). In fact it is one of the core responsibilities of the board to take calculated risks and balance these against potential benefits. The exact manner in which this responsibility is fulfilled should be left to each board to decide.

Regarding the issue of disclosure of the company's risk profile, this seems to be based upon an analogy from the financial sector that the Board considers generally unwarranted. It may be possible in that sector to identify, quantify and limit different kinds of risk with reasonable precision, primarily credit risks. For other types of companies, however, where risks are more related to markets, customers, business, goodwill etc, it is considerably more difficult, if not impossible, to describe, quantify and place a value on their various risks and report them meaningfully. There is also the question of how far it is reasonable to take demands for disclosure of a company's risk profile in a competitive market. At a more substantive level, which is probably what would be required if reporting is to be meaningful to shareholders, there is the risk that reporting would verge on the disclosure of trade secrets.

For these reasons, the Board is opposed to further regulation of these aspects of corporate governance.

### **Questions 13-17.**

The issues discussed in the section on shareholders do not primarily concern the governance of listed companies but the internal governance of institutional investors, i.e. how these are to be run in the interests of their own investors/financiers and how to remove obstacles that prevent these investors from expressing their opinions. This section also discusses conflicts of interest between institutional investors and the exercise of their shareholder rights.

Such issues are outside the remit of the Board, and the Board therefore refrains from commenting on questions 13-17.

**Question 18.** *Should EU law require proxy advisors to be more transparent, e.g. about their analytical methods, conflicts of interest and their policy for managing them and/or whether they apply a code of conduct? If so, how can this best be achieved?*

**Question 19.** *Do you believe that other (legislative) measures are necessary, e.g. restrictions on the ability of proxy advisors to provide consulting services to investee companies?*

A number of Swedish listed companies recognise the problems of proxy advisors, as described in the Green Paper. The Board therefore encourages better transparency and uniform rules in this respect. However, since this is not an issue of corporate governance in listed companies, it should be dealt with separately, i.e. not in the context of this Green Paper.

**Question 20.** *Do you see a need for a technical and/or legal European mechanism to help issuers identify their shareholders in order to facilitate dialogue on corporate governance issues? If so, do you believe this would also benefit cooperation between investors? Please provide details (e.g. objective(s) pursued, preferred instrument, frequency, level of detail and cost allocation).*

Many listed companies experience practical difficulties when trying to reach major foreign (non-EEA) shareholders to discuss issues such as raising of capital, incentive programmes etc. ahead of a shareholders' meeting. Instead, companies often have to engage in dialogue with intermediaries such as proxy advisors and other third parties. Greater opportunities for direct communication with shareholders are therefore welcome. However, the solution should rather be a part of the securities regulations within the EEA together with agreements with non-EEA regulators than of the regulation of corporate governance in listed companies.

**Question 21.** *Do you think that minority shareholders need additional rights to represent their interests effectively in companies with controlling or dominant shareholders?*

**Question 22.** *Do you think that minority shareholders need more protection against related party transactions? If so, what measures could be taken?*

Effective protection of minority shareholders is fundamental to the company legislation of all national systems. The form of such protection depends on how national company law is structured, the regulation in other fields, access to justice, etc. In some American states, for example, minority shareholders' rights are protected by allowing them to take legal action against the company's executive management and receive a swift verdict. In some other countries, such as Sweden, minority shareholders are mainly protected by mandatory qualified majority requirements for certain decisions at shareholders' meetings. With regard to rules for related party transactions, Sweden has effective protection mechanisms in place through the Companies Act and the regulatory frameworks of the stock exchanges.

Against this background, it is not advisable to experiment with increased minority shareholder rights – which are always to the detriment of the majority – without first defining the abuses or abuse-like situations that need to be rectified or the other convincing reasons that may exist for regulation. Second, introducing new rules at EU level implies that the problem to be solved is common for all or most all EU countries. No convincing arguments are presented by the Commission in either case.

**Question 23.** *Are there measures to be taken, and if so, which ones, to promote at EU level employee share ownership?*

Incentive programmes that involve issuing shares to employees form part of many companies' remuneration systems. The aim is not to ensure that employees have particular influence in the company as shareholders, but rather to create a remuneration system that leads to an increased commonality of employees' and shareholders' interests.

In the Board's opinion, attempts to support such systems with the aim of building up a cadre of shareholders with a particularly long term focus seem rather far-fetched. There is no hard evidence that employees in their role as private investors would have a more long term focus than other investors, and their combined share of the company's capital and voting rights would always be fairly limited. Furthermore, attempting to influence the ownership structure of privately owned companies using such measures cannot be regarded as a matter for society as a whole to engage in. The Board therefore opposes ideas of this type.

**Question 24.** *Do you agree that companies departing from the recommendations of corporate governance codes should be required to provide detailed explanations for such departures and describe the alternative solutions adopted?*

**Question 25.** *Do you agree that monitoring bodies should be authorised to check the informative quality of the explanations in the corporate governance statements and require companies to complete the explanations where necessary? If yes, what exactly should be their role?*

In principle, the Board supports the Commission's thinking with regard to the application of the comply or explain approach. More informative explanations are needed, and companies should, as prescribed by the Swedish Code, not only justify every instance of non-compliance but also describe the solution chosen instead (where such an explanation is appropriate).

On the subject of monitoring explanations, the Board also shares the Commission's opinion that this should focus solely on their informative quality, not on to what extent the chosen explanation is justifiable from a business or stock market perspective.

In Sweden, the Board conducts an annual review of all corporate governance reports and publishes its conclusions in its annual report. However, the Swedish Corporate Governance Board does not have a supervisory or adjudicatory role regarding how individual companies apply the Code. On request, the Swedish Securities Council, whose role is to promote good practice on the securities market, issues statements on how the Code should be interpreted. Furthermore, the stock exchanges monitor the reports of listed companies and can pursue cases of non-existent or sub-standard explanations in their

disciplinary committees. Whether an explanation is justified from an investor perspective is ultimately a question for the owners of the company and other actors in the market. Those actors have to determine to what extent a company's compliance or non-compliance of code rules is satisfactory from an investor perspective. The Board strongly endorses this system of self-regulation and opposes any notions of empowering of national governmental authorities to check and enforce certain standards on the individual companies' explanations. It would risk destroying the "comply or explain" mechanism that is proven to function well in Sweden and other EU member states.

There is in Sweden no *ex ante* assessment of explanations with the aim to request complementary information when deemed justified, but there are no legal obstacles for the relevant stock exchanges to introduce such assessment should they consider the cost and effort justifiable compared to the improved information quality obtained. However, this would not be consistent with Swedish traditions and requirements in relation to other information requirements for listed companies, for example regarding financial information.

In the Board's opinion, the development of solutions to the problem of unsatisfactory information quality would be better facilitated by the different national code monitoring bodies and regulators themselves. Therefore, the Board sees no need for further regulation in this area.

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