SWEDISH
CORPORATE
GOVERNANCE BOARD

Comments regarding the European Commission's draft directive on improved gender balance on the boards of listed companies

The Swedish Corporate Governance Board, ("**the Board**"), has been invited by the Ministry of Justice to comment on the European Commission's draft directive on improved gender balance on the boards of listed companies, ("**the Draft Directive**").

The Board is critical of the Draft Directive, regarding bot hits material content and its concrete design. The Board has previously submitted comments to the European Commission regarding quotes – see Appendix 1.

General comments

The Board shares the view of the Commission taht there is a need to improve the gender balance among society's decision makers, including the corporate sector, but regards the introduction of quota rules for the boards of listed companies as the wrong way to go. Such a measure may instead lead to a number of negative consequences for listed companies, and, by extension, for society as a whole.

Restriction of proprietary rights
First and foremost, quota rules infringe significantly on the rights of owners, one of the keystones of the market economy. It is the right of the owners to appoint the people to whom they entrust the management of their property, as it is the owners who bear the consequences of their choices. If the right of owners to appoint those they deem most appropriate is restricted, their responsibility for the company will be reduced. Any such step should be taken only after considerable deliberation, as the number of corporate governance rules introduced by the European Commission is slowly but surely shifting responsibility for companies from the shareholders to the state, which will have far-reaching effects on the workings of the free market economy.

Reduced competitiveness
Another consequence that needs to be considered is the competitiveness of listed companies compared to that of non-listed or non-European companies. Every new rule brings with it costs, and the benefit of any individual rule must be weighed against these costs. With recession looming in Europe, the proposal of new rules which are likely to increase costs for listed companies is a risky undertaking. The burden of proof that the benefits for listed companies are greater than the costs weighs heavily, and in the opinion of the Board, the current proposal does not fulfil this requirement.

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In breach of EU legislation

Finally, the Draft Directive conflicts with both the principal of subsidiarity and the principal of proportionality within EU law. There are also question marks over whether the proposal rests on an appropriate legal foundation, as a board directorship is neither paid employment nor a profession. The differences in the ratios of female board representation between different EU member states do not create any obstacle to the workings of the internal market. It does not restrict the right to choose a trade or profession, and it does not restrict the right to engage in business activity. Nor do the national differences in board representation lead to the restrictions in proprietary rights that the Commission claims. It is, rather, as stated above, quota rules that lead to such restrictions. The Commission also claims wrongly that non-executive board members' role and function is merely to monitor, not participate in the executive work, which is not true in the case of the boards of Swedish listed companies. The intrusive nature of such regulation, not least that a country like Sweden is required to make fundamental changes to its company legislation in order to adapt to the stipulations in the proposal, renders the Draft Directiveunproportional.

Comments on the structure of the proposal

The Draft Directive disregards the fact that the assignment of a company director is that of a trustee, which requires both competence and the confidence of the owners. Nor is it possible to produce a detailed specification of the requirements each individual member of the board should fulfil, as it is the board as a whole that is to contain sufficient competence and experience. For that reason alone, the Draft Directiveis impossible to apply in a meaningful way.

The Draft Directivealso ignores the fact that in most countries, including Sweden, the shareholders of a company propose and elect its board members. In Sweden, every shareholder has the right to propose the candidates they deem most suitable for positions on the board, regardless of the number of shares held in the company. It should also be borne in mind that the term a board director is elected for in Sweden is one year, providing that longer periods, up to a maximum of four years, are stipulated n the company's articles of association – see Chapter 8, Section 13 of the Companies Act (2005:551). Rule 4.7 of the Swedish Corporate Governance Code ("the Code") states, however, that the maximum term for a Swedish board director is no more than one year, which is a rule that has been embraced by every listed company. This means that all members of the board, with the exception of those appointed in accordance with the Board Representation for Private Sector Employees Act, are elected annually.

This is not compatible with the Draft Directive for a number of reasons. If there is to be a reasonable opportunity to evaluate proposed candidates before they are elected at the shareholders' meeting, there must be a rule stating that all nominations to the board are to be

presented a certain time before the meeting. Additionally, it would be difficult to appoint board directors by election, as the company cannot guarantee that the shareholders have a shared view of which director is the most competent (or elect directors according to competence). Since elections take place every year, all board members must also be ranked annually, which would be very complicated. There must also be some consultation with the employee representatives. Overall, this would result in a significant step backward in Swedish corporate governance, primarily with regard to shareholders' rights.

The Corporate Governance Code rules on nomination committees are insufficient to fulfil the requirements of the Draft Directive, as they do not prevent shareholders from presenting their own proposed candidates before or at the shareholders' meeting and it is not the nomination committee that elects the board. Nor would a modified version be sufficient, since the kind of self regulation found in the Code is not normally regarded as fulfilling an EU directive's requirements for mandatory regulation.

A further risk posed by the structure of the Draft Directive is the potential for abuse. Swedish company legislation gives a shareholder the right to present an unlimited number of board candidates. Each one of these proposed candidates would then have the right to bring legal action against the company if she or he is of the under-represented gender and the company does not fulfil the 40 per cent gender distribution requirement. The company would then have the burden of proof that the most competent directors had been elected. There is a major risk that the company would rather settle with those who bring legal action than attempt to provide this proof.

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THE SWEDISH CORPORATE GOVERNANCE BOARD

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