



Comments regarding the Ministry of Justice Memorandum on Gender Balance on Company Boards (Ds 2016:32)

The Swedish Corporate Governance Board, ("the Board"), was invited to submit comments to the Swedish Ministry of Justice on its memorandum entitled Gender Balance on Company Boards, Ds 2016:32. The Board has limited its response to the proposal's consequences for stock exchange listed companies.

Summary

The Board rejects the proposal. The Board shares the ambition to achieve a more equal gender distribution on the boards of listed companies, but opposes the proposed method. Legislation on quotas means that each listed company must have a particular gender balance on its board. This is a serious breach of ownership rights that could damage the way that the market economy functions and thus the dynamics and competitiveness of Swedish listed companies. Against the background of well-functioning self-regulation in this area, the current gender balance on boards of listed companies and ongoing improvements, the proposal is disproportionate and should not be implemented. The memorandum also fails to discuss the other constitutional aspects of the proposal.

The Code rule on striving to achieve gender balance

Since its introduction in 2005, the Swedish Corporate Governance Code, ("the Code") has stipulated that boards should be characterised by diversity and breadth with regard to competence, experience and background, and that listed companies should strive to achieve gender balance on their boards. Additionally, there has long been a requirement that nomination committees provide a written statement explaining their actions in this respect.

The Board's activities to support development towards improved gender balance

Since its formation, the Swedish Corporate Governance Board has taken a number of initiatives to accelerate progress towards improved gender balance on company boards. In the spring of 2014, the Board announced that it wished to see owners act more quickly to move towards an average 40 per cent share of seats for the least represented gender, (i.e. not for each individual company), on boards of listed companies by 2020, which corresponds to the requirements specified by the European Commission in its draft directive in 2013. The Board also set an intermediate level of ambition that large companies as a whole should achieve a level of approximately 35 per cent and smaller companies should be approaching a level of 30 per cent of seats on boards for the least represented gender by 2017.

At the same time, more clearly defined principles were introduced into the Code stating that good corporate governance means that companies are to be run on



behalf of their owners in a sustainable and responsible manner in order to maintain the confidence of legislators and the general public's confidence, as well as in an effective and efficient manner in order to attract investment capital. In this way, the corporate sector will safeguard its freedom to grow and its supply of risk capital and competence. A broader recruitment base provides good conditions for companies to develop in the best possible way. The Code rules were also made stricter.

Nominating committees were required to analyse the evaluation of the company board in the perspective of gender balance; to clearly explain their nominations to positions on the board of directors in the light of the Code's requirement to strive for gender balance on the board in connection with the notice of the shareholders' meeting; and to report to the shareholders' meeting on its efforts to achieve gender balance on the board. In autumn 2014, the Corporate Governance Board contacted a large number of major shareholders, nomination committee chairs and other nomination committee members to discuss its ambition to achieve greater gender equality on the boards of listed companies.

Changes gender distribution

Gender distribution on the boards of listed companies has been changing rapidly since 2014. On average, the proportion of female directors on listed companies' boards has increased from 25 per cent in 2014 to 32 per cent in 2016 when measured in "the Swedish way", i.e. all board members elected at shareholders' meetings, including elected CEOs. When measured according to European Union norm, the proportion of female board members stands today at 34 per cent. The rate of change has even surpassed the level of ambition set by the Corporate Governance Board in 2014. The intermediate level of ambition that large companies should on average have reached around 35 per cent, and smaller companies be approaching 30 per cent in 2017, was reached this year, 2016, with figures of 36 and 30 per cent respectively.

Perhaps the most obvious change, however, is not the increase in percentages, but how gender balance looks for newly elected directors. At elections of new directors to the boards of listed companies in the last two years, the proportion of each gender has been around 50 per cent on average. If this trend continues, it means that, altogether, the shareholders of listed companies will have achieved a level of around 40 per cent for the least represented gender on the boards of listed companies by 2020. These changes are a result of the corporate sector's active work on the issue of diversity on the boards of listed companies over several years. All the figures are available on the Corporate Governance Board's website, www.corporategovernanceboard.se.

Intrusion on the rights of owners

The proposed legislation on quotas means that each individual listed company must have a particular gender distribution on its board or risk having to pay a large fine to



the state. A quota rule for boards of directors of listed companies constitutes a serious interference with the rights that come with owning shares, which could damage the way the market economy functions and thus the dynamics and competitiveness of Swedish listed companies. Appointing a director to the board of a company is a matter of confidence and competence. The board is responsible for the organisation and management of the company's affairs, and by extension for safeguarding the interests of the owners. Therefore, the decision on who should sit on the board is one of the most important that a company's shareholders have to make. It must be the owners of each company who decide who will represent them on the board and manage their property. The Swedish model of corporate governance depends on the shareholders exercising their ownership role actively and taking responsibility for the company, primarily by engaging themselves in the work of the board. Participation in the nomination committee, a special feature of the Swedish corporate governance model, gives the major shareholders the opportunity to be involved in the nominating process for the board and the auditor.

A rule governing quotas means that the individual listed companies may be forced to break up well-functioning boards or refrain from electing directors of their own choosing. Such a rule may reduce the attractiveness for companies of being or becoming listed in Sweden compared with operating the business in a private environment. It may also reduce Sweden's attractiveness as a listing country, given that the proposed Swedish quota rule would be more intrusive than comparable rules in all other European countries, with the exception of Norway,

The principal of proportionality

Neither Ministry Report Ds 2006:11, the predecessor to this memorandum, nor the current memorandum, contain any real assessment of proportionality, i.e. an analysis of whether the public interest of bringing forward by one year the likely increase in the proportion of female directors on boards of listed companies from the current level of over 30 per cent to a more desirable level of 40 per cent, and the requirement that each individual company have such a balance rather than the collective of listed companies as a whole, is a sufficiently compelling public interest to justify the restriction of ownership rights that the measure entails.

No evidence is presented to show that gender quotas on the boards of listed companies would lead to the target set by the government, namely increased gender equality in the Swedish corporate sector. The Norwegian example provides no support for the conclusion that female representation on the executive managements of listed companies would increase as a result of regulations specifying quotas for their boards.

The memorandum also fails to mention the new statutory provisions that require the absolute majority of listed companies to disclose in their corporate governance reports their diversity policy for the board with respect to criteria such as age, gender,



education and professional background. This rule change was brought about by European Parliament and Council Directive 2014/95/EU amending Directive 2013/34/EU regarding certain large firms' and groups' provision of non-financial information and information on diversity policy. From the spring of 2018, listed companies are to state in their corporate governance reports how their diversity policy has been applied. A new Instruction regarding the Swedish Corporate Governance Code issued by the Corporate Governance Board (Board Instruction 3-2016) clarifies the role of the nomination committee with regard to the implementation of diversity policy. The Instruction stipulates that the nomination committee is to issue a statement before the shareholders' meeting describing the diversity policy that it has applied. It would be appropriate to defer a proposal on quotas until the impact of these rule changes has been evaluated.

Other constitutional aspects

The memorandum contains no analysis of the issues regarding fundamental rights impacted by the proposal. The proposal's compatibility with the existing form of government, the European Convention or EU law regarding proprietary rights and commercial freedom are all ignored completely. The same applies to consideration of the individual's right to equal treatment regardless of gender. This right is in itself not applicable to directors of company boards, but is a factor taken into account by the European Commission in its proposed directive on gender balance on the boards of listed companies, which has not been implemented. In view of the constitutional legal developments taking place in Sweden and at European level, not least with regard to proprietary rights and discrimination issues, such an analysis would have been essential.

Conclusions

It is difficult to understand why the government is proposing restrictive quota legislation when there is no urgent need to do so. There is no reason to use such a powerful instrument as quotas when the corporate sector has already taken the issue on board and made substantial progress, at the same time as other legislation regarding to the composition of company boards composition is about to be introduced. The mere absence of an investigation into the constitutional aspects of the proposal means that the proposal cannot be a basis for legislation. The Board therefore rejects the proposal and advocates that the issue continues to be handled within the framework of self-regulation.



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THE SWEDISH CORPORATE GOVERNANCE BOARD

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