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Comments on the European Commission's proposed directive on revisions to the Shareholder Rights Directive

The Swedish Corporate Governance Board, ("the Board") was invited to submit comments to the Swedish Ministry of Justice on the subject of the European Commission's proposed directive on revisions to the Shareholder Rights Directive. The Board has limited itself to comments on the proposals regarding remuneration policy and remuneration reports (Articles 9a and 9b).

1 Remuneration policy and remuneration reports

In the opinion of the Board, it is the role of the shareholders' meeting to decide on the remuneration of company directors and the role of the company board to decide on the remuneration of the chief executive officer. The Board's view is that the trend towards increased transfer of decision making rights concerning the remuneration of a company's chief executive officers and other executives from boards to shareholders' meetings encouraged by the Commission is unfortunate for a number of reasons. For example, it would reduce the company board's responsibility for the approved remuneration levels, and it is debatable whether the executive management's remuneration would be constructed in the optimal way for the company.

The Board doubts whether it is really necessary that the shareholders' meeting should vote on both remuneration guidelines and a remuneration report. This would entail an unnecessary administrative burden for companies. If the European Commission demands that shareholders' meetings set remuneration guidelines, there is no need for a vote on a remuneration report. In countries where shareholders are to vote on remuneration reports, the reason for this regulation was that the regulators did not want to take the step of requiring mandatory votes on remuneration guidelines. The requirement to vote on remuneration reports was therefore a compromise solution. The Board's view is that it is sufficient that companies are obliged to report remuneration levels in their annual reports, which is already

a requirement today, and that a mandatory vote on the report is therefore unnecessary. The requirement stipulated in Article 9b(3), that if the shareholders vote against the remuneration report the company is to explain in the next remuneration report whether or not and, if so, how, the vote of the shareholders has been taken into account, is very hard to apply. How is a company to know which parts of a report the shareholders do not support? Different shareholders can obviously have different opinions on different parts of the report.

The European Commission's view, as stated in Article 9a(1), is that remuneration is not to be paid unless it is in accordance with either an approved remuneration policy or the exception specified in the second paragraph of the rule. It is therefore misleading to use the term remuneration policy, as this would be more in the nature of an actual decision on remuneration, where the decision-making right has been shifted from the company's board to its shareholders' meeting. The opinion of the Board is that it will prove impossible to set such detailed guidelines for companies to apply for the following three years as those required by the proposal. The criteria for fixed and variable remuneration are to be included, for example, in whatever form, the total amount of all remuneration, all terms and conditions for share-based remuneration etc.

Article 9a(3) contains a number of clear policy criteria for the award of fixed and variable remuneration. For variable remuneration, for example, the policy is to indicate how the performance criteria contribute to the long-term interests and sustainability of the company, which can be seen as a clear indication that the criteria should be set with this objective in mind. In the view of the Board, any development in which the European Commission determines the make up of individual companies' remuneration systems gives rise to serious concerns. The Commission's role is not to regulate in details how companies are to run their business.

The requirement that Member States ensure that a company's remuneration policy is clear, understandable, in line with the business strategy, objectives, values and long-term interests of the company, (Article 9a(2)), must also be removed from the Directive. It is the company's shareholders who are to set the remuneration policy and its contents. The European Commission must realise that it cannot order shareholders how to vote. It is up to the shareholders whether they choose, for example, to set a remuneration policy that contradicts the company's business strategy. That is one of the risks of shifting decision making powers to the owners: a shareholder in a company, unlike its board and the chief executive officer, has no responsibility to act in the interests of the company

In light of the opinions expressed above, it is the view of the Swedish Corporate Governance Board that Articles 9a and 9b should be removed from the proposed directive. The European Commission issued recommendations on remuneration in 2005 and 2009. There are no valid reasons for the Commission to now introduce mandatory legislation on these matters. If the Commission does present proposals on these matters, it is the opinion of the Board that the Government should limit their implementation as much as possible. This would mean, for example, that they would only apply to board directors.

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THE SWEDISH CORPORATE GOVERNANCE BOARD

Arne Karlsson
Chair of the Board

Björn Kristiansson
Executive Director

