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Comments regarding the European Commission's recommendation on corporate governance

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 recommendation on corporate governance and the Board's opinions are summarised below.

1 General comments on the Commission initiative

The preamble to the recommendation makes it clear that the European Union is to be the coordinating regulatory body for the Board and the Board's various sister organisations that issue corporate governance codes. Established principles within self-regulation are to be incorporated as if they were created by the Union. It is a therefore small step from this recommendation to a directive and therefore national legislation on the terms, form and content of self-regulation.

The recommendation means that the independence of self-regulation will no longer be on a level playing field. "Legislative self-regulation" is a paradox. If such a development is allowed to continue, in a matter of years the concept of self-regulation as we now know it will no longer exist and will have been replaced by a set of industry-based associations that implement the Commission's regulatory initiatives. It is the view of the Board that the European Union should not expand its field of competence so as to become a regulatory body for self-regulation.

2 Rule 4

Rule 4 in the recommendation states that companies should describe how they have applied the relevant corporate governance code recommendations on the topics of most importance for shareholders. This rule should not be included in the recommendation. The rule is extremely difficult to understand and apply.

The Swedish Corporate Governance Code (“the Code”) is relevant to shareholders in its entirety. The rules on shareholders’ meetings are relevant on the subject of shareholders’ meetings; the rules on board elections are relevant on the subject of board elections; the rules on remunerations are relevant when remuneration levels are to be set; and so on.

Furthermore, all stock exchange listed companies have a large number of shareholders, all of whom have or may have different perceptions of which Code rules are of most importance – institutional and private investors, major and minor shareholders, founders, hedge funds, states, municipalities, state agencies and others. Even shareholders within the same category can obviously have differing opinions. It is therefore impossible for a company to assess which Code rules are of particular importance to the shareholders of the company.

The Swedish Corporate Governance Board is in danger of losing its credibility among the companies that are obliged to apply the Code if this rule is incorporated into the Code text, not least because it would place an incomprehensible administrative burden on companies without being able to explain the justification for introducing the rule.

3 Rule 8

According to rule 8(d), if a departure from a code rule is limited in time, the company is to explain when it envisages complying with the rule again. There is a danger that this will be seen as urging companies not to utilise the possibility to deviate from the Code, even if they believe they have a better solution on a particular issue. Furthermore, it is usually impossible for a company to know whether in instance of non-compliance is permanent or not, as this can depend on the composition of the shareholders, the composition of the board or many other factors. It is also debatable whether this information is of any genuine value to the shareholders. There is also the question of what happens if a company is unable to fulfil its stated obligation, as well as when and how this is to be communicated.

Rule 8/e) states that a company that deviates from a code rule must not only describe the measure taken instead of compliance, but also explain how that measure achieves the underlying objective of the specific code rule or of the code as a whole, or clarify how it contributes to good corporate governance. There is a danger that this will create an unnecessary administrative burden for companies to little benefit for the shareholders. It is neither easy nor the job of an individual company to specify the underlying aims of different rules within a corporate governance code or of the code as a whole. It is also extremely difficult for a company to provide a clear explanation of how its chosen solution contributes to improved corporate governance. By deviating from a rule and providing an appropriate explanation, the company has implicitly stated that in this particular circumstance it regards its own measure as a better solution than that stipulated in the Code.

4 General comments on the proposed rules

The Board wishes to avoid creating unnecessary administrative burdens for listed companies when the EU recommendation is introduced. The Swedish Corporate Governance Code is a component of self-regulation in the Swedish securities market. It has achieved a high degree of acceptance and credibility among listed companies, their owners and other market actors as a result of its well balanced regulatory framework. This credibility can soon evaporate if the rules are no longer perceived as fulfilling this requirement.

The Code stipulates what the Board regards as a set of norms for good Swedish corporate governance. There are, however, other solutions than those presented in the Code, and these may result in better corporate governance for individual companies. That is the basic philosophy underlying the comply or explain principle, which is built on transparency rather than strict adherence to individual code rules. The EU recommendation, however, contains elements that imply that it is not good corporate governance to deviate from the Code. The increased administration caused by the EU recommendation in the event of any non-compliance sends the same signals. The danger is that the new rules will lead to further reduction in the numbers of deviations from the Code and explanations of non-compliance in the future, which is a trend that the Board is actively trying to counter.

Rules that all companies must always follow should be incorporated into binding legislation or other regulations, not the Code. The Swedish Corporate Governance Code provides a corporate governance framework that companies can apply, but offers flexibility by allowing companies to deviate from the rules if they are transparent in doing so.

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THE SWEDISH CORPORATE GOVERNANCE BOARD

Arne Karlsson
Chair of the Board

Björn Kristiansson
Executive Director

