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Rights of Minority Shareholders

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National Report of Sweden

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1. Current scenario at Swedish jurisdiction:

1.1 How and to what extent are *minority shareholders* protected in publicly and privately held corporations in your country, either as to legal or firm level protection?

Answer: The Swedish Companies Act is based on the principle that it is the majority that has the power to make decisions. Decisions concerning the company's affairs are in general taken by majority decisions at general meetings. In order to prevent the majority to oppress the minority, the Swedish Companies Act contains several specific rules that limit the majority's freedom of action. These specific rules can be divided into five different types, or groups, of rules: (1) fair-play rules (the rule of equal rights in the company and the general clause), (2) rules concerning insight in the company, (3) the minority's right to make principal decisions for the company, (4) the minority's right to stop certain decisions and (5) the minority's right to be bought out of the company, involuntary liquidation and buy-out due to fraud of the majority.

A fundamental company law principle is that all shares enjoy equal rights in the company. If nothing else is prescribed, all shares carry an equal right in the company´s profit and equal voting rights at general meetings. This rule works as a counterweight to the general rule that the majority makes the decisions at the general meeting. Further, the so called general clause states that neither the general meeting, the board of directors, nor a managing director may take a decision that is likely to provide an unfair advantage to a shareholder or any other person, to the disadvantage of the company or any other shareholder.

As to the rules concerning the minority's insight in the company, every individual shareholder has the right to have a matter addressed at the general meeting. A problem in this context is that the request must be received by the board in such time that the matter can be included in the notice convening the general meeting. A shareholder may not know when a general meeting will be held before receiving the notice. In companies with not more than 10 shareholders, the Swedish Companies Act also gives the shareholders a right to review accounts (more extensive than the annual accounts) and other documents which relate to the company´s operations.

The company´s board must convene an extraordinary general meeting if so requested by a minority of the shareholders that together hold 10 per cent or more of the shares. Another important rule is that a shareholder at the general meeting may present a proposal that the company shall appoint a minority shareholders auditor who participates in the audit of the company. If the proposal is accepted by shareholders that hold 10 per cent or more of the shares, the County Administrative Board is obliged to appoint a minority shareholders' auditor. Further, a shareholder may also submit a proposal for an examination through a special examiner. The examination may relate to the company´s management during a certain period of time, or certain measures or circumstances within the company. A proposal regarding a special examiner shall be submitted at the general meeting, and if accepted by shareholders of at least 10 per cent of the shares in the company, or one third of the shares

represented at the general meeting, the County Administrative Board is obliged to appoint one or several special examiners. To protect minority shareholders from being "starved out" by the majority (referring to a refusal of the majority to decide on distribution of dividends), the Swedish Companies Act entitles a minority who together holds at least 10 per cent of the company´s shares to demand distribution of a dividend at the annual general meeting. The general meeting shall then resolve upon the distribution of one-half of the remaining profit for the year, following certain deductions. This situation may exist e.g. if the majority decides to take its compensation through high board fees whereas the minority receives no, or a very small dividend, on their shares.

Another important set of rules grants a minority that controls more than 1/3 of both the votes cast and the shares represented at the meeting, a veto against some of the decisions that the majority wishes to put through. Acceptance of no less than 2/3 is demanded in decisions concerning:

- Change of the articles of association ("AoA"), where an even smaller minority has been given a veto regarding certain changes. Examples of such certain changes are reductions of the shareholders' rights to the company's profits or other assets by changing the object of the company and changes in the legal relationship between shares, such as giving existing shares different rights to dividends.
- Reduction of the share capital.
- Certain directed issues of new shares.
- A merger with another company, or a demerger.
- Whether the company shall convert from a private to a public company and the other way around.
- Whether the company shall acquire or transfer its own shares.

As to the last group of rights, the Swedish Companies Act provides a shareholder that controls less than 10 per cent of the company's shares with the right to demand that the majority shareholder purchase their shares. The rule gives a minority owner who does not reach the limit of 10 per cent ownership, which is normally necessary to enjoy the minority protection according to the Swedish Companies Act, the chance to leave a company where he or she has no power. In the event that the majority is misusing his or her authority in the company in a way that constitutes a breach to the Swedish Companies Act, the AoA or other specific legislation, a minority that controls at least 10 per cent of the shares enjoys the right to demand compulsory liquidation of the company. On request of the company, the court may oblige the company to buy off the shares of the minority as an alternative to the compulsory liquidation.

In addition, the Act of public takeover-bids on the stock market states that when a person, alone or together with a related person, achieves a stockholding representing at least 30 per cent of the votes in a listed company, the obligation to leave a public takeover-bid arises. The purpose of the

rule is to give the other shareholders a possibility to leave the company, when a shareholder with other priorities or prospects for the company, takes control.

1.2 Do they have in essence real choices, or are the ones that are in the hands of the dominant group, either managers or major shareholders, or are they restricted to those that do not challenge the majority power, representing the status quo?

Answer: As the Swedish Companies Act is based on the principle that it is the majority that has the power to make decisions, it is not motivated to give the minority too vast rights of active nature. The right to demand distribution of dividend stated in chapter 18, section 11 is the only right of such active nature as the other minority protection rules are more of passive nature, *maintaining status quo*.

1.3 Has the law and precedents of your country evolved in ways that increase *minority shareholders* ability to defend against expropriation by those in control (misuse of assets, reallocation of profits, transfer pricing, etc.?)

Answer: An extensive modification of the Swedish Companies Act was made in 2005. There were no modifications as to the minority protection and the question is only briefly discussed in the preparatory work. However, one important change in the direction of increasing minority protection in the way referred to in this question is the incorporation of the so called *Leo-law*, initially a certain law, which today is incorporated in the Swedish Companies Act, Chapter 16. The rulings in Chapter 16 gives that a new issue of shares, transfer of shares, warrants or convertible instruments or certain types of loans that is directed to a member of the board of directors, the managing director, employees of the committing company or those closely related to the persons just referred to, has to be accepted of a qualified majority of 90 per cent, both of the votes cast and the shares represented at the general meeting, to be valid. Worth noticing are further rulings concerning pay and other compensation to the senior management, which were incorporated in Chapter 7 and 8 of the Swedish Companies Act in 2006. In a company whose shares are listed on an authorized marketplace, the annual general meeting shall adopt resolutions regarding compensation to the management. The general meeting shall also resolve upon compensation for board assignments to each and every member of the board of directors.

1.4 Is the legal dimension the prevalent one in the Corporate Governance (CG) atmosphere, or is the firm level CG the common manner to protect minorities?

Answer: The fundamental protection of minority shareholders is found in the Swedish Companies Act. The Swedish Companies Act gives, as described above, a comparatively broad set of rights. However, it is common that the shareholders of a company agree on further-reaching minority protection in the shareholders´ agreement. Eg, the agreement often include a list of decisions that can be voted through at the general meeting only if all, or a certain percentage of, the shareholders are in agreement.

1.5 What is the role of ownership concentration in the protection of minority?

Answer: In the practical application of minority shareholders protection the right to propose a minority shareholders´ auditor is very important. The County Administrative Board shall appoint a minority auditor if the proposal is supported by owners of at least 10 per cent of all the shares in the company or at least one third of the shares represented at the meeting. If the minority proposes a certain person, this person shall be appointed if that is appropriate. This means that one minority shareholder in a company with dispersed ownership can deprive another minority shareholder of the right to propose an auditor of their choice, as there can only be one minority shareholders auditor.

1.6 Is benchmarking used as a mechanism for minorities to select the country or firm better suited to risk profile and protection from rights deprival?

Answer: According to our experience, this is not commonly occurring in Sweden.

1.7 Is the formation of group dynamics among dispersed shareholders working in your country?

Answer: The Swedish Shareholders' Association is an independent organization working in the interests of private individuals who invest in stocks, mutual funds and other stock related securities. The organization works at defending small shareholders´ rights, keeping track of matters concerning individual stock ownership and provides the (minority) shareholders with important information and education and is producing the magazine *The Shareholder* with 130 000 readers/edition.

1.8 What is the role of market liquidity in the *minority shareholders* exit option?

Answer: The process of buy-out of minority shares is rather unusual and there have been no signs of market liquidity being a problem. However, perhaps the amount of buy-out processes would increase with better market liquidity.

1.9 Have legal reforms in your country given tools to majority to use compliance as an instrument to somehow "legalize" minority expropriation?

Answer: As described in the answer of question 1.1, the Act of public takeover-bids on the stock market states that when someone achieves a stockholding representing at least 30 per cent of the votes in a listed company, the obligation to leave a public takeover-bid arises. This is not minority expropriation in the true sense of the word but the result may very well be the same.

2. Looking forward at Swedish jurisdiction:

2.1 What is the way to avoid minority shareholders from suffering mayor shocks, -if applicable in your country- due to restrictive visions as to minority rights, without falling into abuses of minority rights?

Answer: Swedish legislation is aiming at reaching that balance through the decision of giving a minority that holds at least 10 per cent a somehow wide minority protection, to avoid that they suffer major shocks. Minority shareholders of less than 10 per cent does not enjoy the same set of rights, as this could lead to abuse of minority rights, on the majority´s expense.

2.2 Is *minority shareholders* activism taking place in your country, and to what extent?

Answer: It occurs that single minority shareholders uses their right to have a matter addressed at the general meeting, to bring about a change in corporate performance or corporate governance practices. Commonly, the members of the board and the managing director are granted discharge of liability at the annual general meeting. However, every shareholder of course has the right to deny discharge of liability. This occurs from time to time, and can be seen as a kind of minority activism. As to more organized activity, the most active organization in working with the right of minority shareholders is the Swedish Shareholders' Association; see the answer of question 1.7. The organization Provocare may also be mentioned. Provocare "provide expert advice and an effective support network for frustrated minority shareholders" and represent minority shareholders in any matters relating to their interests. Provocare has been involved in a few court cases in Sweden recently.

2.3 What is the trend in your country for the protection of *minority shareholders*?

Answer: It is plausible that a change in Swedish legislation is demanded for as a result of the expected adjustments of Directive 2007/36/EC of the European Parliament on the exercise of certain rights of shareholders in listed companies. The expected changes are (1): Every listed company will have to decide on a remuneration policy regarding compensation to the company's management which demands for changes in the rulings referred to in the answer of question 1.3. (2) Stricter legislation concerning transactions to related persons. The details are still to be set by the Commission. Further, changes concerning declaration of acquisitions of shares are to be expected as a result of the implementation of the so called Transparency Directive (dir.2013:109). A remarkable change is that the time limit for declaring an acquisition is expected to be prolonged, which results in a deterioration of the information flow at the market compared to the current situation.

2.4 What is the impact of Sarbanes- Oxley Act (SOX) in your country, as a canon to regulate domestic capital markets and GC?

Answer: SOX is of much the basis to the Swedish Corporate Governance Code, which forms part of the system of self-regulation within the Swedish private sector and aims to improve the corporate governance of companies listed on the Swedish securities market. It acts as a complement to the Swedish Companies Act and other regulations by specifying a norm for what is generally regarded as good corporate governance at a higher level of ambition than the

statutory regulation. In that way, SOX has had an important impact as it comes to GC in listed companies, in distinction to unlisted companies.

2.5 Do you think it advisable to rescue the concept of "Popular Capitalism" as defined in the fifties by the great jurist Joaquin Garrigues, in view of the present circumstances regarding status of minorities?

Answer: We interpret this as a question of very political nature, which makes other persons more suited to answer it. However, there is no ongoing debate of such nature in Sweden.

2.6 What should be the role of minorities as to the flaws of executive pay packages that reflect structural problems in underlying governance agreements, as pointed out by Lucian Bebchuk, Harvard Law Professor?

Answer: Current Swedish legislation in the Swedish Companies Act, as well as self-regulation through the Corporate Governance Code (concerning listed companies), to some extent demands for disclosure of remuneration. As stated above, The Swedish Companies Act is based on the principle that it is the majority that has the power to make decisions and consequently the minority protection rights are generally of passive nature. We find the Swedish legislation with the 10 per cent-limit well-functioning.

3. Precedent cases at Swedish jurisdiction:

3.1 a. NJA 2013 p. 1250: A general meeting in a joint-stock Company has through a majority decision against a minority shareholder decided that that the company shall be liquidated. The decision has been deemed not to be not in breach of the so called general clause of the Swedish Companies Act.

From the judgment: A general meeting can decide that a company shall be liquidated. A decision of that nature demands for ordinary majority of more than 50per cent of the votes. The ruling has the result that a minority cannot force a majority to let the company continue its business, if the majority is of the opinion that the company's operations shall cease. One ground for the ruling, is that the minority shareholders in a situation where the majority wishes to liquidate the company, barely can have any justified interest of a continued running of the company. (Prop. 2000/01:150 p. 32).

b. NJA 2011 p. 429: A majority shareholder has the right to enjoy the possibility to buy-out the remaining shares of the other shareholders of the company, irrespective of whether the majority beforehand has given up such a right through agreement.

The Supreme Court concludes that the purpose of the rule as minority protection would be undermined if a shareholders´ agreement in advance could restrict the right to buy-out of minority shareholders that is stated in the Swedish Companies Act.