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Co-Determination in Sweden: Functions for Boards with Employee Representatives

The new Swedish law—which came in force on April 1, 1973—concerning representation for employees of the boards of stock corporations etc., provides for two board members (employee representatives) to be appointed by the employees through their local trade unions. The law restricts the application to enterprises employing an average of at least 100 employees and having had three board members or more.

The law will focus attention on problems concerning the rules relating to the functions of the board, and the individual responsibilities of the board members. The law stipulates that the employee representatives have the same rights and obligations as the other board members. The new board members will thus not have a special status, which is astonishing considering the completely different basic conditions for the appointment, and also the limited scope of the actual functions, of employee representatives.

Within this article attention will be directed to the functions which the board must carry out in order to fulfill the requirements of the law, which information the board should make available, how the chairman shall carry out his obligations, which provisions governing confidential information apply to the board and its members, and finally the responsibility of the board members in matters relating to these questions.

I. The Forms of Board Functions

The law does not provide for explicit requirements or detailed rules in this respect. In practice there are considerable differences between very active boards, and boards with their functions concentrated on only one annual meeting, often combined with the general shareholders' meeting. One must start with the tasks with which the board is entrusted under the Company Law, *i.e.*, the main rule that the administration of the company is a matter for the

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board with the exception of the day-to-day routine business which is carried out by a general manager (GM).

This general function of the board is in some respects specified. Thus the board must see to it that the company has a satisfactory organization, that the GM fulfills his obligations and that instructions will be issued in relevant instances to the GM and to other employees of the company; and further that the board receives relevant information concerning the situation of the company at suitable intervals and by suitable means. The control of accounting and the use of funds is, in the last instance, a matter for the board.

The law presumes that the board fulfills its functions at board meetings at which necessary decisions are made under the participation of the GM. The scope of such board meetings is not specified in the law, nor is the number of meetings. The forms of functions which shall be applied in individual cases have been left open—for the board to decide. This could lead to the belief that no organized board meetings need be held under the provisions of the Company Law. Many companies would also seem to have applied the law in this manner.

It is obvious that the law has a different meaning. The law does not, however, contain compulsory rules in order to secure the proper execution of the functions of the board. Impliedly it is clear that a board that does not fulfill the obligations mentioned in the law, cannot expect any sympathy from the legislator. Thus the chairman of the board may not refuse to comply with a request from a board member or of the GM for convening the board.

In order to comply with the duties provided for in the law, or which can be inferred from the law, the board must itself decide which forms of functions it shall apply. It is not possible to indicate any particular method for functioning, since great differences prevail in different cases. The board must therefore take into account the special circumstances in the individual enterprise, and on this basis try to determine the optimum conditions for a satisfactory functioning of the board. This includes among other things:

- a. the evaluation of information to be continuously received by the board from the management.
- b. maintenance of a continual contact with the enterprise.
- c. convening of the board in accordance with a special timetable which will permit decision making in ordinary circumstances.

It must also be noted that the board must have the opportunity of making quick decisions in extraordinary circumstances where any delay may endanger its operations.

As a summary it is suggested that the board drafts a list of such matters which might be of relevance to the board, and indicates a working routine for decision making in these instances. This should include a determination as to the information flow, its evaluation and decision making in ordinary circumstances. In extraordinary circumstances—if such are conceivable—an emergency

routine is set forth, and here the chairman has a prominent role.

II. The Functions of the Chairman of the Board

In the company law it is made clear that the chairman has a central position only in the convening of the board. With this exception, the law has failed to indicate any provisions concerning the functions which the chairman is to exercise. From other provisions, *e.g.*, concerning information from the management to the board, it is possible to infer that the intention of the legislator has been to accord the chairman a strong position, not only as the head of the board, but also as a decision maker in matters of particular importance, in which it is not possible to await a decision of a board meeting, and where the board subsequently has to decide on the actions of the chairman and the GM.

In practice the circumstances differ so greatly between different companies that it is impossible to speak of a common attitude or principle, concerning the functions of a board chairman. As the situation is now, the personal relations between those corporate officials: GM—chairman—the board, are totally decisive. A strong chairman will naturally assume many functions which in other companies are exercised either by the GM or the board as a body.

The new law on employee representation will, to a greater extent than before, focus the attention on the question of the functions and position of the chairman of the board. Even the function of the chairman to convene the board will in the future become more significant. In addition it can be stated that the chairman is responsible for ensuring that the flow of information between board meetings gives him sufficient opportunities continually to follow the development of the company in its main lines, and to convene the board if any information received by the chairman gives reason for assuming that decisions should be taken by the board.

The chairman of the board will assume a much greater personal responsibility in related circumstances. This responsibility might be particularly relevant when the company is suffering losses or is subjected to extraordinary strains—occasions in which one has the right to expect an intervention by the chairman for decision making and for issuance of instructions to the management.

In the long run it seems unavoidable to lay down in the Company Law, clear and detailed guidelines for the functions of the chairman covering at least companies where employee representatives are appointed.

III. Information to the Board

In representing the board, the chairman has not only the right but also the duty to ensure that the management supplies information necessary for the board to fulfill its tasks. For the individual board member, however, no such

right is prescribed. Accordingly, confidential information about the company may not be obtained directly from the GM or other personnel in the company.

A board member who fails to obtain information requested from the GM may refer the matter to the board, which then decides on whether such information shall be released or not. Should the board uphold the GM's refusal to pass on the requested information, the member of the board can not force it to be released, but may only register his protest in the minutes of the meetings of the board, or note the matter in the annual report, or appeal to the annual meeting of the shareholders. Naturally it is always open to the board member in such a case to resign if he believes that the board fails to function in accordance with the provisions of the law.

When deciding what information the management shall make available, the board could issue an instruction as to the release of pertinent information at certain times. The instruction should mention whether other board members than the chairman shall receive the information. The chairman has to gather such information between board meetings, so that he will be able to inform the board and prepare its decision-making.

At board meetings information in the form of financial reports etc., may be handed over to board members on an individual basis. Nothing, however, prohibits such information being made available only to the chairman, who presents to the other board members what he considers to be necessary for decision making. Considerations of secrecy may often be so important that the information given to the board at meetings will be concentrated only to a few important facets.

Normally financial reports, marketing analyses, manpower forecasts, etc., are presented to the board members in an abbreviated form. In addition short and long range investment plans are of great interest to the board, and should be reported by the GM or the chairman to the extent it seems required for proper decision making.

IV. Secrecy Rules

The board members' secrecy obligation is not directly prescribed in the Company Law. Such an obligation may, however, be inferred from general rules concerning agents, who act on behalf of a principal protecting the interests of the principal, including a duty to preserve secrecy on his behalf concerning circumstances which might damage the principal. Circumstances of this kind may be defined by the board either in a general way, or in the board's manual, or also from case to case. When in doubt, the board member should immediately ask for the board's decision as to whether he may or may not disclose to others, information he has received in his capacity of director.

Financial reports and other internal papers should not be shown to unauthorized persons, with the exception of documents which already are

available to the public, such as annual reports and audit reports to be presented at the annual general meeting of shareholders.

If a director, on purpose or by negligence, commits a breach against the secrecy obligation, by transferring secret information to unauthorized persons, and it may be presumed that the director is aware of, or should have been aware of, the danger of damage to the company—compensation for the damages the company has suffered may be claimed. In certain cases, criminal action may be taken against the violating board member.

Under these circumstances, it is of special importance to draw a clear line between secret information which may not be disclosed outside the board of directors, and other information. One method is to include in the manual or instructions for the board of directors, a list of matters which normally fall under the secrecy obligation.

If a matter is listed as secret there is a clear presumption against the board member who is neglecting his duties, and thereby causing damage to the company whose interests he should protect and promote.