Sweden: The Swedish Shareholders’ Association Proposes 200 Policy Changes to Strengthen the Voice of Small Shareholders

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Corporate governance; Minority shareholders; Sweden

Abstract

The Swedish Shareholders Association (SARF) presents the organisation’s 2017 revised Ownership Policy. It covers demands on corporate governance, nominations of directors, takeover rules as well as rights issues and activities during the annual general meeting (AGM). With 70,000 members, the SARF is the largest non-profit private investor organisation in Europe. It remains committed to voicing the needs of the smaller individual shareholders.

Introduction

This article presents the main ideas in the 2017 revised Ownership Policy of the Swedish Shareholders’ Association (Sveriges Aktiesparares Riksförbund—SARF). With a membership of 70,000 individual shareholders, the SARF is the largest non-profit private investor organisation in Europe, and an active member of organisations such as Better Finance and the World Federation of Investors (WFI). The SARF wrote the first Swedish Ownership Policy addressing listed companies in 1993. This is the organisation’s fifth Ownership Policy.

The text focuses in particular on six issues where change is desired:

(1) the need to make Swedish self-regulation more accessible to smaller individual shareholders;

(2) a clear stand against general mandates for the board to decide on rights issues of cash without first offering all shareholders a right to participate;

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amendments to the Swedish Companies Act (Aktiebolagslagen—Abl.), to clarify that the board’s primary mission is to create sustainable profits;

that the members of the Swedish version of the external and shareholder-led nomination committee (NC) to suggest independent directors to the board should be elected at the AGM;

enhanced status of independent non-executive directors that are independent of both the company and larger shareholders; and

clearer alignment of the Swedish takeover rules with both domestic regulations and regulations applicable in other European countries.

Ägarboken (the Ownership Book) (2017) covers, in all, more than 200 ideas and recommendations that can be summarised in 37 clear suggestions. The SARF’s opinions should be of interest to a broader European shareholding public. Across Europe, there has been an ongoing discussion among policy-setters and academics related to different ways to enhance shareholder engagement, especially of institutional investors, manifested by, e.g. the Kay Review. On the Stockholm Stock Exchange (SSE), also known as Nasdaq Stockholm, domestic institutional investors are in general more engaged in corporate governance than elsewhere in Europe. However, as shown in this article, the role of the individual small investor community receives less attention.

This article includes comments related to the Swedish institutional framework from both a historical and a theoretical perspective. This highlights the importance of including particular features of a national governance framework when developing protective measures for individual European shareholders that frequently act as small investors in domestic markets.

The policy describes the growth of EU regulations and codes that in many countries have been driven by actions taken by the institutional investor community. Despite good intentions, these new regulations sometimes set aside the interest of the individual investors. Rules and regulations such as the Market Abuse Directive and Market Abuse Regulation (MAD I; MAD II; and MAR 2014), Audit Rules, Sustainability and Diversity Reporting and the Shareholders’ Rights Directive

3 Aktiebolagslagen Svensk Författningssamling (SFF) 2005:551, as amended.

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address many important issues but also fall short of handling a number of specific governance differences that affect particularly individual shareholders. New regulations in certain parts lack compatibility with national companies’ acts, soft law and norms, and the specific ownership structure of national capital markets. Thus, the SARF perceives, from both an educational and a policy perspective, the need for a comprehensive review of its position on Swedish corporate governance.\(^7\)

Sweden has, like the other Nordic countries, a tradition of a shareholder-friendly governance system supportive of voice, often referred to as the Nordic model.\(^8\) Mechanisms that both mitigate the level of information asymmetries and align the long-term interest between large and small owners stand at the core of Swedish corporate governance. The Swedish corporate governance framework is often described as having worked to promote an environment of high trust between major and minor shareholders.\(^9\) A particular Swedish feature is the presence of an external NC for board enrollment led by shareholders, which was recommended by the SARF already in 1993.

The rest of this article is structured as follows: the second section is a background review of the particularities of Swedish and Nordic corporate governance framework. This includes a description of the Swedish stock market and the special position assigned to individual investors. The third section highlights six demands of special interest in the reviewed policy. These subsections in the policy are discussed from both a theoretical and a contextual perspective. This article ends with concluding remarks in the fourth section.

**Background**

**The Swedish corporate governance framework**

Directors’ fiduciary duties of loyalty and accountability to the corporation and/or shareholders as a whole (while paying due respect to creditors) exist in company law in most jurisdictions. This puts the long-term owner perspective centre stage rather than the voice of either current (sometimes) short-term shareholders’ or managements’ interests (which might be tied to incentive programmes). However, as highlighted by many academics, there are national institutional differences; rules regarding governance differ across jurisdictions, reflecting both the historical undertakings and groups \([2014]\) OJ L330/1 (Sustainability and Diversity Reporting); Directive 2017/828 amending Directive 2007/36 as regards the encouragement of long-term shareholder engagement \([2017]\) OJ L132/1 (Shareholders’ Rights Directive).


structure of the ownership of the national stock market and prevalent political systems.\textsuperscript{10}

In Anglo-American governance, found in countries that early on relied on the public capital markets for financing—i.e. an external system—there is strong focus on the principal–agent conflict originally described by Berle and Means (1932/1968).\textsuperscript{11} The “agency problem” is then defined as a struggle to align the interests of board and managers with those of their external shareholders, i.e. the shareholder value discourse.\textsuperscript{12}

In contrast, Continental European and German governance systems are often supported by banks for financial resources and crossholdings for voice; thus, there is an internal governance system. This has followed the principles offered in the stakeholder discourse. Here, managers owe duties not only to shareholders but also to other constituencies and should be allowed to balance the needs of those constituencies in the operation of the corporation.\textsuperscript{13} The classic German governance system emphasises both stakeholder protection and employee rights. Minority shareholder protection is often described as weak and the tradition of individual shareholders as stock-owners is limited. Germany’s oldest and largest association for private investors, Deutsche Schutzvereinigung für Wertpapierbesitz eV (DSW), has 30,000 members, less than half the size of the SARF.

However, the agency problem may also be related to conflicting interests between a large blockholder, with active participation on the board, and minority shareholders with both less influence and information. This is the principal–principal conflict.\textsuperscript{14} To ensure that the board can be held accountable to all shareholders, these minority shareholders must be legally protected. Guarding the relationship between major and minor shareholders stands at the core in Nordic company law.

The Abl. allows a single shareholder or group of shareholders in control of more than 50% of the votes at the AGM the decisive influence over the election of all directors nominated to the board. The strength of large shareholders may be enhanced by shares with greater voting power (Series A shares assigned 10 votes and B shares assigned 1 vote). Despite a trend to initial public offering (IPO) with only one series of voting shares, over half of the listed companies still have stocks with differentiated voting power.\textsuperscript{15}


\textsuperscript{15}Lekvall, The Nordic Corporate Governance Model (2014).
The Abl. offers extensive minority shareholder protection and rights. For example, one or more shareholders representing at least 10% of the stocks may have a minority auditor or special examiner appointed, as well as call for an extra general meeting. There is a strict board neutrality rule (BNR) during takeovers that allows shareholders to decide on takeovers. Concentrated activities among shareholders are encouraged rather than explicitly restricted as in the UK. Any single shareholder may both talk at the AGM and nominate directors to the board.

The influence of minority shareholders (likely to be institutional investors) is enhanced by the 2004 formalisation of a shareholder-appointed NC made up of representatives of the largest shareholders. Inspired by the Cadbury Code in 1993, the Swedish external NC was developed by the SARF with support of a group of the leading domestic institutional investors. It was put into practice for the first time in 1993 after the failed merger between the Swedish vehicle conglomerate Volvo and French Renault, which left Volvo without a board of directors. However, as incumbent owners in general were negative towards adopting a corporate governance code, it took until 2005 before the NC became standard Swedish procedure.

The structure of the ownership of the Swedish stock market

Private investors, large as well as small, historically played an important role in the Swedish business sector’s ability to access capital and long-term ownership. In the 1960s, Swedish households held 40% of the market capitalisation of the Stockholm Stock Exchange, today Nasdaq Stockholm. Following the liberalisation of capital markets in the 1980s and 1990s, including opening up for foreign investors and regulations supporting institutional investors’ shareholdings, direct household investors’ shareholdings fell. In 1986, five years before the currency deregulation, households’ share of the capital market was still 25%. By the year 2000, it was 13%. In 2017, the share is down to 11%. At the same time, the classic Swedish closed-end investment funds (the so-called CEIFs with the Wallenberg sphere and the Handelsbanken sphere) lost ground, from 13% of market cap in 1986 to 5% in 2016.

The presence of foreign and Swedish institutional investors developed in the opposite direction. Foreign investors, mainly institutional, control 40% and domestic institutional investors around 22%. Although part of an international trend, the

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19 Statistics Sweden (2017); 18 large domestic institutional investors control 20%. These belong to three groups: National Pensions Funds (SNPFs or often called Allmänna Pensionsfonder, AP1–AP4), life insurance and mutual funds, of which four are controlled by the large retail banks SEB, Nordea, Handelsbanken and Swedbank.
dominance of institutional investors on Nasdaq Stockholm has developed further than in many other continental European countries. For a full picture of the changed Swedish ownership landscape, it should be added that the stock market’s central role in Swedish business and industry is diminishing and family ownership plays a small role. The foreign-controlled business sector in Sweden is the largest in Europe. The private-equity-controlled sector ranks third in size in Europe.  

Despite this trend, the Swedish households’ ownership of 11% of Nasdaq Stockholm remains of importance. This holds in particular for small and medium-sized companies (SMEs) which also play an important role in employment. Nasdaq Stockholm, alongside a number of Exchange Traded Facilities, has more than 800 listed companies, of which 500 are smaller, with thousands of private shareholders and often no institutional investors.

The changing ownership landscape since the 1990s has had implications for Swedish corporate governance. The legacy of the actively involved blockholders has historically been supported by a combination of differential voting stocks, the CEIFs and a web of cross-holdings, all of whose influence has diminished over the course of the last 20 or 30 years. To this was added strong trade unions and a social democratic government committed to enhancing a free market economy combined with stable labour laws and taxation favouring the corporate sector rather than private wealth creation. However, with the emergence of globalisation and foreign ownership, the (Swedish) blockholders have diminished, thus reducing the voice of small private shareholders.

The Swedish Corporate Governance Code (the Code) highlights the importance for the Swedish business community of maintaining influence among different constituents:

“Shareholders provide the business sector with risk capital, but they also contribute to the efficiency and dynamism of individual companies and the business sector in general by buying and selling shares, as well as by participating in and exercising influence at shareholders’ meetings. Active shareholder participation promotes a healthy balance of power between owners, the board and the executive management.”

Thus, incumbent Swedish block owners have, despite their decreased capital holdings on the stock market (and an active market for corporate control and takeovers), been able to remain in the driver’s seat, supported both by both the Companies Act and regulation limiting both investments and voting activities by domestic institutional investors.

Until the end of the financial boom year 2008, Swedish institutional investors typically were fairly passive when they participated in NCs for director enrolment to the board, either supporting larger shareholders (Hellman, 2005) or selling at

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times of takeovers.\textsuperscript{24} For a long time, activism by institutional investors was limited to a few high-profile cases where media outcries were highly effective.\textsuperscript{25}

Notably, activities by Swedish institutional investors are changing. This author has found that in the post-financial crisis period, they now commit more capital to larger stakes and evaluate those investments with a longer time horizon. In the process, the domestic institutions claim to leverage on both home bias and an owner-friendly governance model.\textsuperscript{26} This change of behaviour has developed over the period 2008–17 and has involved 80% of the 18 institutional investors studied. The change is related to a new approach to risk-allocation mandates, where active and focused asset mandates are evaluated over a longer period than previously, thus enabling more risk taking and return.

But this increased engagement does not cover all listed companies. SMEs often lack large institutional investors with the financial strength and competence to take up a role as lead or anchor investor, challenge a dominant blockholder or voice concerns related to governance issues. The media pays little attention. Thus, in almost 500 companies, the private shareholders are more or less left to themselves.

It is within this context that the SARF’s revised Ownership Policy should be understood. As the individual shareholder has historically been a legitimising factor for the Swedish corporate governance framework, in relation to both the blockholders and the domestic institutional investor community, to remain resilient and efficient, Swedish corporate governance must continuously be developed to maintain the support from the private shareholders.

Three perspectives are at the core of the SARF’s Ownership Policy:

- **equal treatment of all groups of shareholders:**
  small private investors must feel included and treated equally as large and influential shareholders during capital increases, have access to equal information and be able to exercise voting rights at the AGM;

- **a long-term commitment to value creation:**
  small private investors must be able to have trust that the board and executive management are focusing on sustainable value creation; and

- **that the company has engaged and active owners:**
  small private investors must be able to trust that there is a healthy balance between the influence from the shareholders’ general meeting, the auditor, board and executive management (CEO). Large owners such as an entrepreneur, family, trust, institutional investor or private equity actors have a special responsibility to ensure this.


\textsuperscript{25} Among high-profile cases are the halted Volvo-Renault deal (1993), the crash of the insurance company Skandia (2001), the ABB scandal (2000) and, lately, the criticised cross-holdings between Industrivärden and Handelsbanken (2015).

\textsuperscript{26} Nachemson-Ekwall, *A Sustainable Ownership Architecture for Sweden* (2016).

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Six highlights from the Ownership Policy

Highlight 1: self-regulation perceptive and accessible to private shareholders

According to the Ownership Policy (Ch.1.4, pp.26–27):

- the SARF’s opinion is that the legitimacy of the Swedish self-regulation will be strengthened if more stakeholders participate. There is a need to include foreign owners, private equity and other stakeholders such as academia and the workers’ representatives who today sit on the boards. The SARF demands that a representative of the smaller shareholders is included in all the bodies that make up the Swedish self-regulation (see further below); and

- the SARF wishes that the Swedish Financial Supervisory Authority (SFSA) and the self-regulatory bodies facilitate private and smaller shareholders, but also smaller companies, to turn to the Securities Council for guidance and statements (see further below). As of today, it is too expensive. The SARF should be able to receive guidance free of charge.

Sweden has a long tradition of self-regulation through which the stakeholders of the capital market, besides obeying statutory law, follow a set of generally accepted practices for the stock market. Its roots go back to 1968, when NBK (the Swedish Industry and Commerce Stock Exchange Committee) was founded by the Confederation of Swedish Industry and the Stockholm Chamber of Commerce. From 1971, NBK produced recommendations concerning takeover rules, modelled on the London City Code on Takeovers and Mergers. But the involved constituents differ. Members of the UK City Panel for takeovers originate from different professions and interest groups such as investment banks and institutional investors. The first Swedish NBK board was made up of representatives from the owner and private industrial sector alone, including professionals affiliated to the two then dominant business groups in Swedish industry—the Wallenberg and Industrivärden “ownership spheres” with the banks SEB and Handelsbanken. US self-regulation relies on a third model, where the power centre has instead been the corporate sector, as reflected in the Business Round Table. 27

Since 2005, the European system of self-regulation has changed in line with EU regulation that allows a local financial authority to delegate to a private body the responsibility for monitoring the self-regulation of private sector companies. The SFSA and Nasdaq Stockholm have delegated the oversight of the Swedish securities market to three bodies, organised by the Association for Generally Accepted Principles in the Securities Market. 28

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27 An association of chief executive officers of leading US companies started in 1972 with the aim to promote a good business environment. It is associated with the conservative party and has extensively worked to hinder strengthened shareholder rights. See “Business Roundtable”, Wikipedia available at: https://en.wikipedia.org/wiki/Business_Roundtable [Accessed 3 November 2017].

28 The association has nine principal members, among others, Nasdaq Stockholm, the Confederation of Swedish Enterprises, FAR (the Institute for the Accounting Profession in Sweden), the Institutional Owners Association for Regulatory Issues and the Swedish Securities Dealers Association. The webpage of the Association offers an overview of how Swedish self-regulation is organised. Available at: http://www.godsedpavpmarknaden.se/Userfiles/BROSCHYR_engelsk_Sjalvregleringen_i_Sverige_Turkosbla_ENG_201312.pdf [Accessed 3 November 2017].

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Board oversees the Code, developed in accordance with the EU comply-and-explain model and the takeover rules. The Securities Council delivers statements, advice and information in order to promote best practices in the Swedish stock market. Finally, there is the Swedish Financial Reporting Board, which deals with regulation from the International Accounting Standards Board (IASB), International Financial Reporting Interpretations Committee (IFRIC) and the Commission.

Self-regulation and codes have advantages compared with statutory regulation; they are easy to change, flexible and resilient. Hard law is more unwieldy but has the advantage of being predictable and subject to sanctions. Consequently, self-regulation needs to be proactive and responsive to society’s change of values. If that is missing, the legitimacy of self-regulation will deteriorate and hard law will appear more favourable.

Swedish self-regulation has shortcomings which as time passes have become clearer. First, not everyone has a voice. Private and small shareholders are not included in any of the organs, nor are trade unions who in line with Swedish co-determination have appointed employee representatives to the board, the private equity sector or foreign investors. The absence of a small-investor representative is partly due to historical reasons. When the Commission instigated national competent authorities across the EU (through the SFSA) and the national departments of justice (through Nasdaq Stockholm) to take responsibility for enhancing stakeholder trust on capital markets, the SARF’s expectation was that the Governance Board and Securities Council would suffice as guardians of the interests of the private and smaller investor. However, as time has passed, disappointment has grown. Self-regulation has, in the view of the SARF, taken more of a narrow legal perspective on decisions and recommendations, rather than taking proactive stances on activities that might damage trust among stakeholders and society. Lawyers dominate among the advisers of the Securities Council. Also, it is expensive to turn to the Securities Council, effectively hindering the voice of interests other than those of insiders, the large actors and those that are well connected.

Secondly, the absence of foreign investors reveals limitations in the efficacy of self-regulation. Foreign investors are: (1) usually unfamiliar with the Swedish corporate governance framework; (2) tend to rely on legal expertise rather than the unwritten (consensus) rules of proper behaviour; and (3) are willing to take the risk of being “shamed” and “damned” as they don’t plan return investments anyway. There are a high number of cases of circumventions of the self-regulatory guidelines related to both the takeover rules and the corporate governance code that have been instigated by foreign parties. Among suggestions in the Ownership Policy is a special Code of Conduct for intermediaries acting on the Swedish market, such as lawyers and investment bankers.

29 The Association for Generally Accepted Principles in the Securities Market supervises three specialist bodies: the Swedish Securities Council; the Swedish Corporate Governance Board; and the Swedish Financial Reporting Board. The Principals of the Association are: the Swedish Association of Listed Companies; FAR (the Institute for the Accountancy Profession in Sweden), the Swedish Investment Fund Association; the Institutional Owners Association for Regulatory Issues in the Stock Market; Nasdaq OMX Stockholm; Insurance Sweden; the Swedish Bankers’ Association; the Swedish Securities Dealers’ Association; and the Confederation of Swedish Enterprise. The statutes of the Swedish Governance Board state that the board shall include representatives of the international capital market. This has never been the case. See at: http://www.godsedpavpmarknaden.se [Accessed 3 November 2017].

30 The starting fee for consultation is SEK 75,000 (€7,500), preparatory work from own legal counsel not included.

31 Ownership Policy, Ch.1.6, p.31.
Thirdly, the last 10 years have seen a massive growth of smaller companies and start-ups listed on a number of unregulated capital markets, offering lighter listing requirements than the main stock exchange, Nasdaq Stockholm. These include Nasdaq First North (run by Nasdaq), Nordic MTF (run by Nordic Growth Market NGM) and Aktietorget. These lists cover 500 listed companies, besides the 300 medium-sized and large companies listed on the Nasdaq Stockholm main market. Corporate governance in these companies is often less developed. Self-regulation, with its focus on best practice, naming and shaming, is less effective, given the lack of media coverage and absence of institutional investors among the owners. Thus, governance recommendations that might work well for the companies listed on the Nasdaq Stockholm main market work less well for smaller shareholders in smaller companies or companies listed on other trading platforms. This emphasises the need for the self-regulatory bodies to pay special attention to the needs of the smaller shareholders.

Finally, the massive flow of new regulation from the EU has during the last years worked to limit the efficacy of self-regulation altogether. It is very difficult for both small private investors and the listed companies to keep track of all the changes. The effect is unforeseeable and the cost of compliance high. The SARF worries that too much regulation limits the growth and prosperity of the business sector. In many areas, the discrepancy between the Companies Act, EU regulation, listing rules and self-regulation must be sorted out. In conclusion, there is a need for reform, where the inclusion of more stakeholders and the smaller shareholders in self-regulation in the SARF’s view is a starting point.

**Highlight 2: a Companies Act that is explicit about the board’s mission to create sustainable profits**

Ownership Policy (Ch.3.3, pp.40–43):

- the SARF demands that the profit motive as stated in the Companies Act be reformulated so as to more clearly state that the board’s mission is to create **sustainable** profits; and
- the SARF furthermore is of the opinion that the Companies Act should state that, in the board’s mission to focus on sustainable profits, it must secure that the company has and follows guidelines for socially responsible behaviour.

In recent years, more and more investors have begun to view sustainability, diversity and gender equality, as well as the company’s role in society, relationship to customers and employees, as prerequisites for a company’s success in pursuing its business. Expectations apply to all companies regardless of size. The SARF naturally considers sustainability issues an integral part of a company’s business strategy. This evolving role of the board’s duties has also been captured in recent revisions of the writings of both the Swedish Board of Directors’ *Guide to*  

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32 Ownership Policy, Ch.1.1, pp.22–23.
33 The meaning of “sustainable” varies. Here, it should be read as “stable” and “consistent” over a period of time. The Swedish text is “uthållig vinst”. This can be achieved through an amendment of the profit motive in the Companies Act (Ch.3.3).
34 Corporate Governance Code (Ch.1, p.7).
Governance (Styrelseakademien) and the Corporate Governance Code, as well as in various EU directives aimed at encouraging shareholders to engage with investee company in the long term, demands on companies to report both environmental sustainability and social considerations, as well as requirements for auditors to account for the company’s most important risks. However, as argued in the Ownership Policy, this is not sufficient from a Swedish governance perspective. The Companies Act does not capture this change. This relates to both the profit motive and directors’ duties.

Abl. Ch.3.3 reads:

“If all or part of a company’s operations are to have an object other than the generation of profit for distribution to shareholders, this must be stated in its articles of association.”

Leading Swedish authorities in the legal field argue for the value of retaining this one-dimensional goal as it makes it clear that the board remains responsible and fully attentive to the shareholders’ demands. However, finance theory often discusses profit in terms of profit maximisation. From a Swedish governance perspective, where the shareholders remain in the driver’s seat of governance, this has, during a time of globalised and liberalised market economies, highlighted a growing tension within the board related to the purpose of the board. The Companies Act lets the shareholders recruit the board and the profit-goals are communicated by the current (sometimes short-term) shareholders. The Code states that the shareholders set their own requirements for the companies in which they have invested. Thus, a board’s intentions related to sustainability or long-term value creation might just remain as intentions.

The Ownership Policy thus considers it important that the board and executive management receive clearer guidance related to the profit motive in the Companies Act and the sustainability expectations of the Code. The smaller shareholders wish the board and executive management to focus on sustainable value creation. To ascertain this, the Ownership Policy argues that the Companies Act needs a revision of the profit motive, where creation of sustainable profit is expressed in terms of uthållig vinst, i.e. “stable profit” or “a profit consistent over time”.

The SARF also argues that the board’s responsibility should be broadened to assure that the board makes sure that there are guidelines for responsible behaviour.


38 Code 2016, Ch.1, p.7: “The shareholders set their own requirements for the companies in which they have invested. In recent years, increasing numbers of investors have come to regard issues such as sustainability, diversity and gender equality, as well as the views of their customers, their employees and society in general, as conditions for the commercial success of their companies.”
This includes the company’s relationship to the broader society in terms of environmental, social and economic responsibilities—and that this is related to the companies’ ability to create economic value. Inspiration can be found in the British Companies Act 2006 on the role of the board in s.172(1).

Companies that wish to have sustainability goals included in the articles of association often meet opposition from their legal advisers. Consequently, the SARF wishes to open up a review of the Companies’ Act statements related to directors’ responsibility.39

**Highlight 3: at least three directors who are independent of both the company and larger shareholders**

Ownership Policy (Ch.8.2, pp.88–89):

“The Nasdaq Stockholm’s listing rules should state that a listed company shall have at least three independent directors who are independent of both the company and larger shareholders.”

While the Code mandates that a majority of the directors must be independent from the company, it currently requires only two of those directors to be independent from larger owners. In addition, co-determination demands that a company with at least 25 employees allows for the appointment of two directors and two deputy directors by the labour unions, usually one each from the blue- and white-collar workers. In larger companies, co-determination allows for three union directors and three deputies.

However, the independence of the shareholder-appointed directors may be questioned as a shareholder or group of shareholders with more than 50% of the votes at the AGM effectively controls the appointment of the entire board, including all the non-executive directors (NEDs). In many companies, a voting right of 15–20% of the company’s shares might be enough to control the majority of the votes at the AGM, the question of trust between majority and minority shareholders then being somewhat illusive and independent director’s integrity difficult to uphold.40

This apparent paradox of trust and power of NEDs has historical explanations. It has always been of importance that the voice of the minority shareholders be considered when appointing directors to the board. The Swedish Companies Act 1910 prescribed that no owner might vote for more than 20% of the votes present at the AGM, if not otherwise stated in the articles of association. This was restated and expressed more clearly in both the Companies Acts 1944 and 1975.41 As a matter of practice, however, a vast majority of Swedish companies—and by the mid-1990s, over 90% of all listed companies—had a clause in their articles of association removing this restriction, which is why the rule was abolished in the

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39 Ownership Policy, Ch.3.5.1, p.44.
current Companies Act 2005.\textsuperscript{42} Notably, there existed a number of protective measures, such as cross-holdings, multiple voting stocks and voting limits that could be both higher and lower so as to restrict shareholder influence. Together with the Swedish corporatist societal structure, many companies ended up in the control of the CEO, as Sweden formed its own form of managerial capitalism.\textsuperscript{43} This acted to weaken the control of the largest shareholders.

The 20% limit was abandoned during the 1990s as Swedish corporate governance policies adapted to the streams of liberalisation of Western market economies and most articles of associations were rewritten to include statements of full voting rights, within the system of multiple voting stocks.\textsuperscript{44}

Currently, any idea of voting limits at the AGM, as a means of enhancing minority shareholders’ influence over director nomination, is not discussed. It is fair to conclude that the historical worry of minorities’ lack of influence as expressed in Abl. 1945 and Abl. 1975 has been forgotten. The Code reads: “The preparatory documents to the Swedish Companies Act emphasise the importance of active ownership.”\textsuperscript{45} However, the SARF’s Ownership Policy brings attention to the above-described history of how Swedish corporate law has striven to find ways to ensure that directors have the power to act with integrity and the voice of the minority is respected.

Between 2005 and 2010, the election of two independent directors was both part of the Code and a Nasdaq Stockholm listing requirement, but was subsequently removed from the latter. The majority of listed companies do follow the Code’s recommendation but not all do and, among those that claim to follow the Code, the quality of independence is not always clear.\textsuperscript{46} Consequently, the SARF believes that to strengthen both the trust between majority and minority shareholders through empowering the independent directors, there should be at least three directors who are independent, not just from the company but also from larger owners. This should also be part of the mandatory Nasdaq Stockholm listing requirements, rather than in the Code, which is subject to the comply-or-explain principle.

**Highlight 4: time of electing the nomination committee at the annual general meeting**

Ownership Policy (Ch.8.3, pp.89–90):

- the rules regarding the NC should be included in the Nasdaq Stockholm’s listing rules rather than as now provided for in the Code:
  - it must always include at least one member independent of larger owners;
  - there must be an established working procedure, including routines for contacts with the board, especially of directors


\textsuperscript{43} Alfred D. Chandler Jr, “The Emergence of Managerial Capitalism” (1984) 58 Business History Review 473 describes the emergence of managerial capitalism in the late 19th and early 20th centuries in the US. Here, the CEO is the core of the corporation, rather than the owners.

\textsuperscript{44} Aktiebolaglagen 2005 does not mention any voting limits, except for the multiple voting rights; the last company to remove a voting cap, set at 5%, was the insurance company Skandia in 2001.

\textsuperscript{45} Swedish Code (December 2016), p.7.

\textsuperscript{46} An overview of research of the quality of independent directors is presented in Nachemson-Ekwall and Mayer, “Nomination Committees and Corporate Governance” (September 2017).
who are independent from larger owners, as well as from union representatives;
— there must be an established routine for appointing a new member on the NC in the case that a member resigns during the year; and
• the NC must be elected at the AGM as originally suggested by the SARF. This clarifies that the NC is to work for the interest of the company where shareholders at the AGM agree to the composition of the members of the NC. This will support continuity and facilitate the invitation of a smaller private shareholder:
— in listed companies with more than 100,000 shareholders, so-called “household stocks” and in smaller companies lacking institutional investor, the NC shall always invite a representative from smaller shareholders.

The SARF’s championing of the Swedish external NC, and the adjoining introduction of a Cadbury-inspired code of best practice with comply and explain, should be understood in the context of the Swedish consensus and collaborative structure. Though the SARF in the early 1990s received support for the formation of a code, the institutional investor community, the incumbent owners, were in general reluctant to adopt a British style-governance code. It was not until 2005 that a Corporate Governance Code, with an external NC, became adopted in Sweden, after pressure from both the Government and Commission.

That Sweden settled for an external shareholder-appointed NC (rather than a board committee) can further be explained by the Swedish popular movement tradition, with civil society democratically structured to include non-profit organisations and co-operatives in all parts of life (föreningstradition). In this democratic structure, with each member assigned one vote, standard procedure is to carry out director nominations and elections through the help of external NCs made up of members nominated by different groups at the AGM.47

The Code offers two different models of appointing NC members: either directly by the shareholders at the AGM, which resembles the SARF’s original idea that shareholders join together to ensure the NC’s accountability to all shareholders. The shareholders can also decide on a procedure for the later appointment of some or all the members. About four of five listed companies apply the latter, less transparent, approach.48 Most companies enrol the NC at the time of the third quarter, usually six months before the AGM, i.e. the Q3-model.

In order to avoid the NC becoming dominated by a controlling shareholder, the Code states that at least one member must be independent of the largest shareholder. A typical NC will be made up of one or two representatives of the controlling shareholder, the chair (which is often associated with the controlling shareholder) and two or three (other) institutional investors. These institutions are likely to be Swedish. Foreign institutional investors usually abstain from participating. The

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47 For research related to the Swedish popular movement, see Filip Wijkström, Stockholm Centre on Civil Society Studies at SSE Institute of Research (SIR).
general reason given is that they don’t understand the NC model, there is a language barrier and there are problems related to the allocation of time.49

A number of studies show that the Swedish external NC has had a positive effect on shareholders’ engagement in the nomination process of directors. It has increased confidence in the board function,50 reduced both the free-rider and collective action problems,51 and broken down the old boys’ network.52

However, the Swedish external NC has limits. Studies highlight the concentration of power in the hands of the NC. When the NC only represents perhaps 10–15% of the total shareholdings, it lacks true legitimacy in the eyes of minority shareholders.53 The external NC also faces difficulty when dealing with controlling shareholders that do not wish to collaborate with minority shareholders (who could include institutional investors).54 Discussing the activities taken by the hedge fund activist Cevian in the book Corporate Governance in Modern Financial Capitalism, Kallifatides, Nachemson-Ekwall and Sjöstrand show how the external appointed NC may handle risks of short-termism or stakeholder-interest only to the extent a shareholder responds to social control, i.e. legitimacy.55 In addition, the book highlights the tendency for institutional investors to appoint “their” representatives on the NC, whereas the purpose is to represent all shareholders in line with the ideas from the Swedish popular movement tradition.56

Consequently, the SARF argues that, to enhance the legitimacy of the external NC, its members must be appointed at the AGM. This is, as previously stated, in line with the purpose of the NC to work in the best interest of the company. Such a procedure would also facilitate the invitation of a representative from the smaller shareholders.

Highlight 5: time to end general mandates for the board to decide on a capital increase without first offering all current owners a right to participate

Ownership Policy (Ch.9.4, pp.100–102):

- the SARF takes a clear stand against general mandates for the board to decide on directed cash issues without first offering incumbent shareholders.
shareholders a right to participate, without first calling a shareholders’
general meeting for a decision;
• the main rule should be that decisions concerning directed cash issues
must be taken at the general meeting by a qualified majority vote
(two-thirds) of both present votes and capital (Abl. Ch.13 s.2). The
Companies Act should make clear what can be considered an
acceptable departure from the rule:
— the company is facing a financial crisis;
— it should never be considered an acceptable departure from
the main rule if an incumbent investor or group of investors
participate in a consortium eligible for the directed cash
issue;
— In the situation where there is limited liquidity in the stock,
an acceptable departure from the main rule could be that
incumbent investors and new investors take half each of a
cash offer and rights issue; and
• it must be clearly stated in the Abl. that multiple voting stocks might
not be offered in a directed cash issue.

The Swedish Companies Act states that a shareholders’ general meeting may not adopt any resolution which is likely to provide an undue advantage to a shareholder or another person to the disadvantage of the company or another shareholder. This finds support in the general clause.\(^{57}\) To assure fair treatment of all shareholders at the time of a directed cash issues, the Companies Act requires a two-thirds majority vote of the capital and votes present at the general meeting.\(^{58}\) Some decisions require 90% support.

However, smaller shareholders run a particular risk of being disadvantaged in the case of directed cash issues. Directed cash issues were given a great deal of attention in the wake of the financial crisis when it was difficult and time-consuming for many SMEs and start-ups to raise cash. Inspired by the US capital market, where directed cash issues are standard procedure and small shareholders are used to being diluted, the Swedish Ministry of Justice commissioned a memorandum concerning directed cash issues and a review of the companies act.\(^{59}\) However, instead of proposing changes in the Abl., the Ministry handed the issue over to the Corporate Governance Board, which 2014 issued a statement, compiled by the Securities Association.\(^{60}\) The recommendation describes how directed cash issues can be made with departure from shareholders’ preferential rights, without the

\(^{57}\) The general clause states that a board or AGM decision may not be made in favour of a particular shareholder or someone else, to the detriment of the company or any other shareholder (Aktiebolaglagen Ch.7 s.47 and Ch.8 s.41).

\(^{58}\) Discussed in Department of Justice Memorandum 1993/94:196, p.114.

\(^{59}\) The department of justice memorandum concerning directed share issues and a review of the Companies Act (DS 2011:21) available at: http://www.regeringen.se/49b5d/contentassets/1a4641d577ad46949ed5f95d37d8959/vissa-lagandringar-i-fraga-om-riktade-emissioner-av-aktier-ds-201121 [Accessed 3 November 2017]. Directed cash issues were also addressed in the government Bill Förenklingar av aktiebolagslagen (Simplifications of the Companies Act) 2013/14:86.

prior approval of a resolution at the general meeting and yet be considered consistent with best practice, something that the SARF at the time also accepted.

However, the recommendation from the Governance Board has proved to be a disappointment from the perspective of small private shareholders. The recommendation is formulated too generally, leaving room for circumventions. Transparency is lacking. In a governance system where large shareholders can control the general meeting and board elections, this is open to misuse. Problems emerge in companies that lack institutional investors as owners, and where the smaller shareholders usually lack financial resources and competence to protect their interests. The SARF’s representatives cannot attend all shareholder meetings. In these cases, a structure with a Securities Council that both abstains from taking its own initiative and does not support the smaller shareholders with simplified advice limits public trust in the efficacy of self-regulation.

The SARF argues that the difficulty of raising capital has been widely exaggerated. It is unusual for it to be in the interests of shareholders to deviate from preferential rights. Instead, dilution of the share capital and voting rights in the company can lead to damage to shareholders. There can be directed cash issues to owners without good transparency. There may be a significant wealth and power shift. It is difficult to determine a market price as liquidity in the stock can be low. Giving a discount is extremely controversial and, in companies with occasional trading, small issues give the feeling that the board is involved in price manipulation.

Consequently, the SARF wishes to see a strengthening of the pre-emptive rights in the companies act on directed cash issues. The main rule must always be that decisions on targeted issues be taken at the shareholders meeting by a qualified majority. It is also necessary that the Companies Act makes clear what may be acceptable departure.

There are also particularities related to directed rights issues in Swedish listed companies that need to be addressed. There must be an explicit ban on the issue voting A-shares for targeted issues. Moreover, there must be an end to the growing and common use of financial guarantees, where a large shareholder guarantees a general rights issue. Many banks demand it. But the guarantees are often unnecessarily expensive and they are overused. The shareholders’ ability to claim that the guarantees be honoured in the case that a rights issue is not being fully booked is unclear. Consequently, this overexploitation of guarantees must terminate.

**Highlight 6: clearer alignment between takeover rules in Sweden and the rest of Europe**

Ownership Policy (Ch.10, pp.106–114):

- Swedish listed companies should not be easier to buy than listed companies in other countries. We need a level playing-field—reciprocity—where the offeror and the target company obey the same takeover rules and regulations. In the situation where an offeror is domiciled outside EU, a takeover should be cleared by a special authority; and
• mandatory bids, today set at 30% control of stocks or votes, must more strictly prevent circumventions of the intentions behind the rule. Currently, the Securities Council grants exemptions to such a great extent that it is very difficult for investors to foresee those cases that will not be exempted.

Swedish takeover regulation rests on the EU Takeover Directive of 2006,\footnote{Directive 2004/25 on takeover bids [2004] OJ L142/12.} implemented by the Act on Takeovers on the Stock Market 2006, i.e. the Takeover Rules.\footnote{Lag 2006:451 om offentliga uppköpserbjudanden på aktiemarknaden, LUA, svensk författningssamling 2006:451; EU Takeover Directive 2004/25; Takeover-regler för Nasdaq Stockholm och Nordic Growth Market NGM, issued by the Corporate Governance Board 1 February 2015.} The responsibility of the Takeover Rules is shared between the stock exchanges (Nasdaq Stockholm), which has delegated the administration of the takeover rules to the Corporate Governance Board, and SFSA, which supervises mandatory bids, flagging requirements and the prospectus. Also, both authorities have delegated the Securities Council to issue statements related to specific matters.\footnote{Nasdaq Stockholm can issue fines. Cases delegated to the Securities Council by the SFSA, such as the mandatory bid, can be appealed in court. Such cases have been very rare.} Additional rules are found in Abl., OECD recommendations, the Shareholder’s Rights Directive and MAR 2014. That all these rules are harmonised is of special importance in the case of cross-border deals. Establishing a level playing-field among constituencies has been the guiding principle for the work of the Commission.\footnote{The playing-field approach is described in Winter Group, Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids (Brussels, January 2002). See also Action plan from the European Commission (2002), J. Winter (chair), Winter Report (Brussels, 4 February 2002), IP/02/1600.}

The SARF has a long history of providing guiding recommendations to smaller shareholders in relation to takeover offers. The SARF explains the conditions of a bid, collects proxies and plays an active part in compulsory redemption.\footnote{High-profile cases championed by the SARF involve the Volvo-Norway deal (1978); Zeneca’s bid on Astra (1998); and Old Mutual’s takeover of Skandia (2005).} However, the Ownership Policy lists a number of circumstances where regulations need development: i.e. it is of importance that arbitrage or “statute shopping” between national frameworks is kept to a minimum. This is especially true in the situation where a bidder is perceived as hostile. Consequently, the SARF demands that SFSA and the self-regulatory bodies commission an investigation into how well the Takeover Rules work. It cannot be accepted that it is easier to buy a Swedish company than in other countries; there must be reciprocity.

Other issues relate to the directive’s board neutrality rule. Swedish takeover regulation applies a stricter view of board neutrality than in most other European countries.\footnote{The board neutrality rule (art.9 of the EU Takeover Directive). An account of the Swedish perspective is offered in R. Skog, “The European Union’s proposed takeover directive, the ‘breakthrough’ rule and the Swedish system of dual class common stock” (2004) 45 Scandinavian Studies in Law 173; see also R. Skog, “Harmoniserings av bolagsrätten inom EU — fortfarande vind i seglen?” (2007) 1 Nordisk tidsskrift for Selskabsret 66.} Abl., with its general clause, is clear on board loyalty to the company but the interpretation of the company’s interest is left to the shareholders as group—as expressed by the shareholders at the general meeting (e.g. through shareholder directors’ nomination)—board neutrality during a bid offer and the right to sell shares into a bid. Swedish board neutrality, in line with shareholder supremacy, implies that when a dominant shareholder is lacking, it is generally easy for a single investor or offeror to put a company into “play”. Also, the opposite
holds true: where there is a dominant shareholder it is easy for an offeror to get hold of a large stake.67 This has contributed to making Sweden the most active takeover market in Europe after the UK.68

Further, the mandatory bid rule (MBR), which demands that any investor that surpasses 29.9% of shares or votes presents a bid to all shareholders, is often circumvented in Sweden. A review of the Takeover Directive shows that Sweden and the Securities Association stand out compared with other jurisdictions in the number of exemptions from mandatory bids that are granted.69 Sweden lacks additional levels for mandatory bids once a controlling owner has surpassed 30% ownership of votes and capital. There are creeping takeovers, where a bidder that has surpassed 30% of votes or capital but has not received support for a takeover continues buying shares. Most jurisdictions have additional mandatory bid thresholds at 40 or 50% ownership. The UK demands a mandatory bid following every 2% increase.

Also, a blockholder in control of 29.9% of the votes or often less can, in accordance with Abl., enjoy a majority of the votes at the meeting, which in fact gives it control over the board without having made a mandatory bid. The SARF’s Ownership Policy brings to our attention that advisers during bids, such as lawyers and investment banks, are continuously developing ways to circumvent soft and hard rules. One of the latest examples involves using the minority protection rights that allow a shareholder in control of 10% of the votes or shares to call for general meeting. This rule, intended to protect minority shareholders, has been used by hedge funds and hostile offerors to instruct the board to take certain actions or enrol a minority auditor to hinder the activities of the main owner. However, this deliberate sabotage is not aimed at protecting incumbent minority shareholders as a group but to entice the new owner to buy the activists’ shares at a premium.

European academics show that the takeover rules in Europe focus more on delivering regulation that facilitates shareholders right to sell, i.e. trading and liquidity, rather than on how to enhance the individual company’s value-creating ability.70 This becomes especially clear at times of cross-border hostile bids. The takeover targets of hostile bids appear not to be those companies that are poorly managed, whose management ought to be challenged, but those companies that are susceptible to takeovers, as such reducing the efficacy of a market for corporate control in Europe. This development is neither in accordance with the SARF’s long-term investment policy, nor a reflection of a responsible approach to the engagement of owners.

It is argued in the Ownership Policy that boards of directors need to take a broader perspective on their role during a takeover than is currently stated in the Takeover Rules. The Swedish Takeover Rules still limit the boards’

recommendation to the price offered.\textsuperscript{71} For inspiration, the UK Takeover Code has been revised to ensure that directors, when evaluating a bid, do not limit their recommendation only to the price offered but also include a broader stakeholder interest as well as societal and sustainability concerns.\textsuperscript{72}

\textbf{Concluding remarks}

The revised Ownership Policy (2017) from the Swedish Shareholders Association covers more than 200 suggested policy changes to strengthen the voice of small shareholders. This article has focused on six areas that are of particular importance from a Swedish corporate governance perspective, such as how to ensure that trust is maintained between the majority blockholder and minority shareholders. But there are many more areas of importance. One such area relates to the recent legislative change requiring the appointment of non-executive independent directors to the audit committee. Since the EU rules do not consider the situation where a dominant Swedish shareholder is able to appoint all directors on the audit committee, there is a possibility that a dominating blockholder will appoint all directors on the audit committee. Previously, the Code stated that at least one director on the audit committee must be independent of a large owner and the company. Another issue relates to the option of broadcasting the general meeting over the internet and distance-voting through secure IT devices. Another area relates to executive pay, where the SARF wishes to see a binding vote on bonuses amounting to a level higher than the annual salary. In addition, governance in SMEs listed on various trading platforms needs to be enhanced.

The work with the Ownership Policy has involved 50 representatives of the stock market. Now it will be read, and it will have an influence and be refined. The world develops all the time. The Swedish Shareholders’ Association has been, is and wishes to remain an important voice for private and smaller share ownership.

\textbf{Facts box}

The revised and extended Ownership Policy from the SARF is 120 pages long and includes two parts. Part one describes the views on corporate governance in general, the international trends, including all the new EU directives. Part two includes a guide to shareholders, companies and other constituents that act on the stock market on a daily basis. Seen as a whole, the ownership policy highlights the importance of considering the national governance framework when developing protective measures from the perspective of the individual shareholders, who often act as small investors on a domestic market. From a theoretical perspective, this adds to the corporate governance discussion of institutional complementarities. Aoki (2001, p.31) writes that “institutions in the past and in the future, are mutually interlinked
in a complex manner”. Institutions generated endogenously at one point of time may at a later period interact with agents in a different way from what was the original intention of the policy-makers. Pointing to this problem, Fligstein and Choo (2005, p.80) write:

“The importation of another country’s corporate governance institutions is not likely to work unless the entire system is borrowed or the borrowed system fits with what already exists in a given society.”

If anything, this shows the necessity of including the smaller shareholders’ perspective when developing new legislation on the stock markets across Europe.