

Justitiedepartementet
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Yttrande över Europakommissionens grönbok om bolagsstyrning i EU (dnr Ju2011/2880/L1)

NASDAQ OMX har beretts tillfälle att avge synpunkter på Europakommissionens grönbok om bolagsstyrning i EU ("grönboken"), att utgöra underlag för Justitiedepartementets arbete med att utarbeta sitt remissvar över grönboken.

Synpunkterna som lämnas är preliminära och kortfattade. Detta eftersom remisstiden har varit kort. Förslagen i grönboken kommer att påverka samtliga NASDAQ OMX marknadsplatser. NASDAQ OMX eget remissvar på grönboken är alltså under utarbetande och analyser av implikationerna pågår. NASDAQ OMX kommer att informera Justitiedepartementet om slutliga synpunkter när ett slutligt remissvar på grönboken är klart.

NASDAQ OMX Group

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NASDAQ OMX preliminary comments on the European Commission's Green Paper on The EU corporate governance framework

This paper does not prejudice NASDAQ OMX' final reply to the consultation, which closes on 22 July 2011.

Summary:

- The policy discussions regarding financial companies from the financial crisis should not spill-over on the broad non-financial community of companies across Europe.
- Corporate governance frameworks must be crafted to ensure the continued flexibility, innovation power and growth of Europe's companies, not least the small and medium-sized enterprises.
- Many of the proposals in the Green Paper risk deteriorating the well functioning Nordic model of principle based corporate governance codes, a model that for instance supports strong and active shareholders.
- Listed markets must not be disadvantaged compared to other types of shareholder models.
- The Green Paper lacks sufficient analysis of the effects of many of the proposals.

The Nordic Corporate Governance model

In the European jurisdictions where NASDAQ OMX operates, the Scandinavian/Nordic corporate governance model is the rule. Owing to company legislation, corporate governance traditions and some specific preconditions regarding the ownership structure on the stock market, Nordic corporate governance differs in some respects from the Anglo-Saxon and European Continental models.

The Nordic model builds on corporate governance codes and the principle of comply or explain. These codes include principles, which can be applied according to the size and other characteristics of each company. Furthermore, the framework of course includes company law and for listed companies also NASDAQ OMX' listing rules.

The Nordic codes display similarities, but there are still differences and a common Nordic Code has not been developed. This shows that even in very integrated markets showing many similarities, there still needs to be room for adaptation. There does not seem to be room for full harmonization. Hence, principle based corporate governance codes seem the most appropriate.

Furthermore, we believe the Nordic model supports strong and active shareholders. This positive feature should be recognized and maintained. Many of the Commission's proposals instead risk destroying the Nordic model and deteriorating the well developed shareholder activity. In our view, this may hamper the creativity, power of initiative, entrepreneurship that is a precondition for growth, not least growth in the small and medium sized businesses in Europe, and for job creation.

World Economic Forum has concluded Sweden is the country with the best corporate governance in the world. Such a winning concept must not be destroyed, rather defended.

Financial vs. non-financial companies

NADAQ OMX is struck by the conclusion that deficiencies in the corporate governance and risk management in financial institutions displayed during the financial crisis, automatically motivates measures also for non-financial companies. We do not share this view. Measures for non-financial companies should not be taken until there is clear evidence of the need for such measures. Such evidence has not been demonstrated.

Negative effects on companies and competitiveness

Many of the Commission's proposals are unnecessary. If implemented, they may add unnecessary burden to companies and also risk having a negative effect on the flexibility, innovation power and competitiveness of European businesses.

For listed companies, the demands on transparency are already high. These public listed markets performed well during the crisis. There was continuous liquidity, thus providing access to capital markets for the issuers. Further rules should not be implemented unless a thorough analysis has demonstrated a demand, especially from investors, for further transparency. In case further transparency requirements are added for the listed companies, there is a risk that more companies opt for being outside the listed markets. In other words, this would function as a disincentive for listing on the public transparent markets. Alternative ownership models, such as private equity and government ownership would be favored by such additional rules especially for listed companies.. This would risk having the consequence of overall reduced transparency.

Small and unlisted companies

(1) Should EU corporate governance measures take into account the size of listed companies? How? Should a differentiated and proportionate regime for small and medium-sized listed companies be established? If so, are there any appropriate definitions or thresholds? If so, please suggest ways of adapting them for SMEs where appropriate when answering the questions below.

(2) Should any corporate governance measures be taken at EU level for unlisted companies? Should the EU focus on promoting development and application of voluntary codes for non-listed companies?

No. There should be no specific measure to take into account the size of a company or the fact that it is non-listed. Instead, the codes should be principles based and build on the comply or explain approach, thus enabling any company to adapt the application of the code according to its size and other characteristics.

Small companies are very different in size, stage of growth, type of business and other characteristics. They are normally more rooted in the local business environment than larger companies that may have a more international business. They are also normally more dependent on

local investors. For these reasons, there are no benefits in developing an EU-wide rules for smaller companies, as their growth would be better supported if they could adapt their application of corporate governance principles to their characteristics and the local environment.

Furthermore, introducing special rules for small and medium sized enterprises (SMEs) that are listed, would create an additional regulatory layer, an ‘SME layer’, which we do not support. An SME layer would risk deteriorating the integrity and competitiveness of the listed market. If such a layer was to be developed, we strongly believe the definition of an SME must be the same across Europe, it must be based on the same threshold. It has been proposed to introduce a definition that is based on the size of the national market. We strongly oppose this, as it would result in companies of different sizes being captured by different rules, depending on where the company is located. This does not support a level playing field, for instance as regards the various types of ownership, and it does not provide small companies across Europe with equal opportunities for growth.

The Swedish Corporate Governance Board considered the question of whether special corporate governance rules should be developed for smaller companies, in relation to the review of the Swedish Code in 2008. The conclusion was no. Instead, smaller companies may adapt the application of the code, and then explain this.

What could be considered is a development of harmonized principles as a benchmark, either by the industry alone or by the Commission in close cooperation with the industry. As part of companies’ natural growth process, the interaction with international investors may increase. At this stage, companies may benefit from benchmarking against international principles. Such principles should however, as already stated, not be binding but should be developed either fully by industry or by the Commission in close cooperation with the industry.

Board

(3) Should the EU seek to ensure that the functions and duties of the chairperson of the board of directors and the chief executive officer are clearly divided?

This already seems to be ensured in the company legislation of at least the Nordic countries. In the Anglo-Saxon model, such a rule could possibly be useful while in the German model it would appear to have no effect. Instead, this is an example of an area where a principle-based regime seems most appropriate.

Board composition

(4) Should recruitment policies be more specific about the profile of directors, including the chairman, to ensure that they have the right skills and that the board is suitably diverse? If so, how could that be best achieved and at what level of governance, i.e. at national, EU or international level?

(5) Should listed companies be required to disclose whether they have a diversity policy and, if so, describe its objectives and main content and regularly report on progress?

(6) Should listed companies be required to ensure a better gender balance on boards? If so, how?

NASDAQ OMX believes in board diversity, including that the board should be composed of representatives with the right skills. We also believe the composition of the board should be the responsibility of the owners, not legislation. Rules on the composition of the board are best placed in the corporate governance codes based on sound principles.

Depending on the size, type of business, stage of growth, etc., the best board composition for each company may be very different, also over time. A company needs to be able to compose a board that has the skills and experiences that are the most appropriate over time. Restrictions in this regards would be a limitation to the free entrepreneurship that is fundamental in a market economy and even a limitation to the basic principle of protection of property. It would risk hampering the sound development of successful enterprises. Furthermore, company law already includes rules on the appointment of board members. A rule on board composition would go against already established company law principles that place the board composition decision power on the shareholders.

In case the Commission believes that in some countries there are deficiencies in shareholders' rights, activities or responsibilities regarding board composition issues, then such deficiencies should be addressed in the context of shareholder activity rather than by detailed rules on board composition.

Availability and time commitment

(7) Do you believe there should be a measure at EU level limiting the number of mandates a non-executive director may hold? If so, how should it be formulated?

There is no need for rules on limiting the number of commitments allowed for a board member. Nor is it possible to create an appropriate such rule. Also, see the comments to Q 6 above.

Board evaluation

(8) Should listed companies be encouraged to conduct an external evaluation regularly (e.g. every three years)? If so, how could this be done?

We do not see the need for further development of the already existing recommendation on this issue in the European Commission's Recommendation. It has been implemented as part of the Swedish Corporate Governance Code. Evaluations should be made but they should not be made public, as they may contain information that is sensitive confidential for personal or business reasons.

Directors remuneration

(9) Should disclosure of remuneration policy, the annual remuneration report (a report on how the remuneration policy was implemented in the past year) and individual remuneration of executive and non-executive directors be mandatory?

(10) Should it be mandatory to put the remuneration policy and the remuneration report to a vote by shareholders?

Disclosure of remuneration is already the practice in the Nordics. Rules must be compliant with company law principles on division of tasks and responsibilities among the various company bodies. Further legislation is not needed.

Risk management

(11) Do you agree that the board should approve and take responsibility for the company's 'risk appetite' and report it meaningfully to shareholders? Should these disclosure arrangements also include relevant key societal risks?

(12) Do you agree that the board should ensure that the company's risk management arrangements are effective and commensurate with the company's risk profile?

Fundamental company law principles already place a responsibility on the board to ensure that the company is managed in the best interest of the shareholders. This includes a responsibility for the risk profile of the company. We do not see a need for further regulation in this regard, as they would even result in watering down the already fundamental principles. The proposals in this part seem to spill-over from the policy thinking regarding financial institutions that are in a specific risk-taking business, and are not well-placed in a debate regarding corporate governance for the broad community of companies.

SHAREHOLDERS

Under this section, we only provide comments to Q 21-23 at this stage.

Minority shareholder protection

(21) Do you think that minority shareholders need additional rights to represent their interests effectively in companies with controlling or dominant shareholders?

(22) Do you think that minority shareholders need more protection against related party transactions? If so, what measures could be taken?

There are already rules on minority protection in the Nordic company law. Furthermore, the Nordic Corporate Governance Codes includes rules on independent board members – independence in relation to larger owners, the management and the company itself. Further rules are not needed.

Employee share ownership

(23) Are there measures to be taken, and if so, which ones, to promote at EU level employee share ownership?

The ownership structure of companies should not be regulated. It is an issue for the company to be decided in relation to for instance financing. For listed companies there are already, by nature, requirements on share distribution and number of shareholders. Further rules are not needed.

THE 'COMPLY OR EXPLAIN' FRAMEWORK – MONITORING AND IMPLEMENTING CORPORATE GOVERNANCE CODES

(24) Do you agree that companies departing from the recommendations of corporate governance codes should be required to provide detailed explanations for such departures and describe the alternative solutions adopted?

(25) Do you agree that monitoring bodies should be authorised to check the informative quality of the explanations in the corporate governance statements and require companies to complete the explanations where necessary? If yes, what exactly should be their role?

It is a central feature of the principle based Nordic model that companies are required to explain deviations. In Sweden, the Corporate Governance Board conducts a yearly assessment of the corporate governance reports of the listed companies and publishes the result in its yearly report. Furthermore, NASDAQ OMX as part of its surveillance function monitors the listed companies and according the listing rules an issuer that does not comply with good practice may be brought to the disciplinary committee.

This system works well. In addition to what we have already explained above in this paper, we note the Commission's observations that the 'comply or explain' approach is widely supported, that a gradual improvement of the quality of explanations can be seen and especially we note that the Swedish code provides a good example. Against this background, it would be inappropriate to embark on the route to further regulation, including empowering competent authorities to monitor 'explanations'. It would risk destroying the 'comply or explain' approach that is widely accepted and also is proven to function well in our Nordic markets.

Specifically, we wish to, again, underline that a more detailed framework for listed companies risks having a detrimental effect on the transparent markets. The listed markets need to be defended as a well functioning way to access capital for enterprises.

As regards the conclusions of the Commission's study on Monitoring and Enforcement Practices in Corporate Governance in the Member States, we are convinced that signs of weak implementation of codes cannot be remedied by even more rules. On the contrary. Focus should be on improving implementation. If the Swedish code could be useful as an example, as the Commission notes, we are available to provide any assistance in this regard.