
September 2015

More efficient protection of minority interests in the Swedish Companies Act

In recent years, criticism has been levelled against the rules protecting minority interests contained in the Swedish Companies Act (2005:551). Criticism has included; that the regulations allow improper use by majority owners as well as minority owners; and that the rules are ill-suited to small firms and private companies. Report Ds 2015:25, published on 18 May 2015 proposes amendments to the regulatory framework to make it more efficient. The proposed amendments mainly concern special examinations and the procedure for the compulsory buy-out of minority shares, both of which are outlined below.

1. Special examination etc.

Part of the minority protection scheme comprises the opportunity to conduct a special examination of the company in question by way of a special examiner. Upon a special examination the minority is provided with an opportunity to examine more closely whether there are any irregularities or grievances in the company. The minority is also offered an opportunity to propose that an auditor participates in the audit together with the ordinary auditors.

1.1 Clarifications and simplifications of the regulations

Under current provisions, any proposal to appoint a special examiner and a minority auditor must be dealt with at a shareholders' meeting and be supported by shareholders representing at least one-tenth of all shares in the company, before a request for appointing a special examiner or a minority auditor can be submitted to the Swedish Companies Registration Office.

The requirement that the proposal be submitted to a general meeting has, however, enabled the majority to delay the process of appointing a special examiner or a minority auditor, by repeatedly postponing the matter at the general meeting. For this reason a complement to the current rules has now been proposed to the effect that the minority will be able *directly* to address the Swedish Companies Registration Office with a request for an appointment of a special examiner or a minority auditor, on the prerequisite that one-tenth of the shares support the request.

The report also proposes that the special examiner is *independent* in relation to the shareholders and in general be suitable for the engagement. It is up to the Swedish Companies Registration Office to determine whether these prerequisites are fulfilled or not.

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Today, it is common that guidelines for the examination are broadly drafted and lack detail. The report therefore proposes stricter requirements as to the subject of the examination and the time period the examination is to cover, with a statutory deadline being imposed.

At present only the board of directors and the managing director are obliged to assist the special examiner by providing assistance and information as requested by the special examiner. The report suggests that the company itself, rather than individuals, should be obligated to assist and inform the special examiner. The person best suited to assist the examiner in any given case will instead be determined by the general principles on representation as well as the internal rules for delegation and division of responsibility that apply to the company in question. These changes are proposed to apply also in relation to the duty of disclosure towards the company's ordinary auditor and any general examiners (*Sw. lekmannarevisorer*).

Moreover, it is proposed that the right of examination is explicitly extended to include such companies within the group of companies, which, according to Chapter 1 Section 11 of the Swedish Companies Act, are defined as subsidiaries.

1.2 The minority's liability for compensation

In practice, the minority has also misused the special examination. The minority has in some instances requested a special examination which has benefitted neither the minority owners nor the company. Since it is the company which is liable for the costs of the special examination, these disloyal procedures on the part of the minority have resulted in high and, as it seems, quite unnecessary costs for the company.

To tackle this problem it is proposed that in some instances, the minority in certain cases will be liable to compensate the company. To ensure that the minority does not refrain from using the protection when it is actually justified, the liability to compensate the company can only come into question when the examination has been *clearly unnecessary* and the minority owners in question *realized or should have realized this*. The rule on liability for compensation is moreover restricted to apply exclusively to private companies.

2. Buy-out of minority shares

A shareholder holding more than nine-tenths of the shares in a limited company is entitled to buy-out the remaining shares. Accordingly, the other shareholders are entitled to have their shares bought-out by the majority shareholder. This buy-out right is related to the fact that a minority, which holds less than a one-tenth of the shares in the company, is not at liberty to exercise many of the minority rights laid down in the Swedish Companies Act.

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2.1 More flexibility in buy-out disputes and clarifications of the procedure rules

Occasionally disputes arise regarding the buy-out right/obligation and the purchase price. According to the present rules, such disputes are to be settled by three arbitrators in accordance with the provisions stipulated in Chapter 22 of the Swedish Companies Act as well as the Swedish Arbitration Act (1999:116). It is now proposed to incorporate an opportunity to decide in the Articles of Association that a dispute regarding buy-out of minority shares will be resolved in a *general court* instead of by an arbitral procedure. It is also opened up for an opportunity to agree on fewer or more arbitrators and also to appoint them in an order different to the present rules. The rules are intended to cover public as well as private limited companies.

The present procedural rules for arbitral procedures (with the amendments proposed in the report and which are outlined below) are to apply, notwithstanding the fact that the dispute is pending in a general court. It has previously been somewhat unclear as to the extent the Swedish Arbitration Act should be applicable in buy-out disputes. Therefore, a clarification is now proposed to the effect that all provisions in the Swedish Arbitration Act will be secondarily applicable unless otherwise stipulated by special provisions in Chapter 22 of the Swedish Companies Act or if the provision in question does not allow application with regard to the special preconditions for the buy-out procedure. It is, however, left to law enforcement agencies to determine what rules of the Swedish Arbitration Act are to apply in each specific case and on what conditions.

As regards questions related to compensation in buy-out disputes, the majority owner's liability for compensation to a trustee appointed to cover absent minority owners' right is proposed to be extended to cover the case where the trustee has challenged an arbitral award or appeals against a judgment on redemption. The majority owner's compensation liability for the trustee's costs has previously been limited to cases where the majority owner challenged the arbitral award but not the other way round, *i.e.* in the event that the trustee challenged the arbitral award.

2.2 The amount of the purchase price

One of the most disputed areas in connection with buy-out procedures are the rules on determination of the purchase price, in the event the parties cannot agree on a price. The main rule is that the amount shall correspond to the price of the share which might be expected upon a sale under normal circumstances. With respect to a share which is traded on a Swedish or foreign stock exchange, an authorized marketplace or any other regulated market, the purchase price is to correspond to the market value, unless special grounds otherwise dictate. Through the so called *special provision* (*Sw. särregeln*) the purchase price must however correspond to the consideration offered in a public offer from the majority owner, where such offer has been accepted by holders of more than nine-tenths of the shares to which the offer relates, unless special grounds otherwise dictate. Application of the special provision requires, however, that the public offer addresses *all shares* not held by the majority shareholder itself.

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It is now proposed that the requirement for a public offer to include all shares not already held by the majority shareholder be removed. The special provision is instead proposed to be applicable at buy-out which has been preceded by a public offer provided that the offer has addressed a *wide circle* and has been adopted by owners of nine-tenths or more of the shares to which the offer relates, unless special grounds otherwise dictate. The purpose of the new regulation (which is in conformity with the former wording that was in effect prior to the Swedish Companies Act of 2005 entered into force) is mainly to enable application of the special provision although certain jurisdictions have been excluded in a public offer in order to prevent the legal framework for securities markets of other countries from being applicable. The special provision has been justified by reference to the fact that if an overwhelming majority of the shareholders, which have received the offer, have considered the consideration offered to be fair, it would under normal circumstances be reasonable to consider this compensation to represent the real value of the shares. These reasons are maintained even though the offer is not addressed to all minority shareholders, as long as the circle addressed by the offer is sufficiently wide to ensure that its assessment of the value can be considered as representative.

3. Summary

In conclusion, the proposed changes imply in several respects a more flexible protection of minority interests by the introduction of alternative procedures. At the same time, the demands on the minority shareholders increase when the minority wishes to make use of the protective rules. So does the minority owners' liability for the procedures they invoke. The purpose and expectation of the review is that these measures will result in more efficient minority protection, which will not enable misuse to the same extent as previously. The amendments are proposed to enter into effect on 1 January 2017.



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