COVID-19 Corporate Q&A: Sweden

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Directors' duties and liabilities

What are my duties as a director and how should I comply with them in the current environment?

The main duties of a director are set out in the Swedish Companies Act (2005:551). In the context of the COVID-19 outbreak, the following four duties are key:

- **the duty to ensure the organisation of the company and management of the company's affairs** – the board of directors shall ensure that the company's organisation is structured in such a manner that the company's accounts, asset management, and finances in general are monitored in a satisfactory way;
- **the duty to regularly assess the company's financial position** – the board of directors shall regularly assess the company's financial position and, if the company is the parent of a group, the group's financial position. The board of directors is also responsible for paying the company's taxes and fees to the relevant authorities. A failure by the company to pay taxes may entail personal liability for the board of directors;

- **the duty to act in the event of capital deficiency or insolvency** – the board of directors shall immediately prepare and cause the company's auditor to examine a balance sheet for liquidation purposes (Sw: kontrollbalansräkning) where:
  - there is reason to assume that the company's equity (Sw. eget kapital), is less than half of its registered share capital; or
  - in conjunction with execution (Sw: utmätning) under Chapter 4 of the Enforcement of Judgments Code (1981:774) it has been found that the company lacks assets capable of being subject to a warrant of execution.

Where the balance sheet for liquidations purposes shows that the company's equity is less than half of its registered share capital, the board of directors shall, as soon as possible, undertake a number of actions including convening a shareholders' meeting which shall consider whether the company shall go into liquidation (initial meeting for liquidation purposes). The balance sheet for liquidation purposes and an auditor's report with respect thereto shall be presented at the shareholders' meeting; and

- **the duty to act in good faith to promote the success of the company for the benefit of its shareholders as a whole** – when discharging this duty directors must have regard to a number of factors including (amongst other things) the long term consequences of their decisions; the interests of the company's employees; the need to foster the company's business relationships with customers, suppliers and others; the impact of the company's operations on the community and the environment; and the desire to maintain a reputation for high standards of business conduct.

To assist directors in demonstrating compliance with their duties in the current environment, the following practical steps are recommended:

- **hold regular board meetings and ensure comprehensive minutes are produced** in a timely manner which carefully document in matters discussed and the reasoning behind the decisions made so there is a clear decision-making trail. Meetings should be conducted by telephone or other remote means since physical board meetings are not required by law in Sweden;
- **financial information** – ensure that up-to-date, robust financial information is regularly prepared so that directors can make informed decisions in real time, and consider availability of existing facilities (including monitoring compliance with financial covenants) and alternative means of support (such as government assistance);
- **seek professional advice** early and on a regular basis – eg on workforce issues, customer and supplier arrangements (including termination events), and directors duties, including those additional duties which apply when there are solvency concerns. Where appropriate, note the advice given in the relevant board minutes;
- **customers and suppliers – engage with trading partners** and keep lines of communication open. While all parties' interests may not be aligned, all share the common goal on maximising the chances of their business surviving; and
- **plan** – key creditors (eg banks, the Swedish Tax Agency and landlords) will be more willing to grant ''breathing space'' if directors can present a clear plan on how their business is well-placed to weather the COVID-19 storm.

How can board members be appropriately protected in the performance of their duties (e.g. health & wellness, indemnification & insurance)?

If the board members neglect any of their obligations, they are personally and jointly liable for the damages caused by the neglect. However, at the annual general meeting, the company has to resolve on whether the board members are discharged from liability regarding the past financial year, or not. The general meeting votes on discharge from liability for each board member separately. This means that some board members may be discharged from liability while some might not. If the general meeting decides to discharge board members from liability, the principal rule is that no claim for damage to the company may be brought against the board members in question.

The indemnification can potentially cover both the award of damages against a board member and the costs involved in defending a claim, but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings.

Directors' and officers' (D&O) liability insurance is common in Sweden. It typically provides cover for individual board members against claims made against them in their capacity as board members, including defence costs. The insurance also provides a cover for those entitled to compensation, which often is the company itself. Policy exclusions typically include claims in respect of a board member's fraud, dishonesty, wilful default or criminal behaviour.

Board members in their capacity as employees are afforded the same protection as other employees and their health and wellbeing must be safeguarded. For more detail on the duty of care owed by employers to employees, see our publication 10 practical steps for global employers, right now.

Corporate actions

Does my company need to hold an annual general meeting and, if so, how can I manage the risks associated with a physical gathering (or can my company hold a virtual meeting instead)?

A Swedish company must hold an annual general meeting ("AGM") within six months of the end of its financial year. There is no legal possibility to postpone or cancel the AGM. Many companies with a large number of shareholders have taken measures to minimize the interest of participation in the AGM such as not offering any food, minimize participation from the company's management and board of directors and recommendations for participations through proxy.

The government has proposed temporary legislative changes in relation to the formal requirements in order to facilitate participation in the AGM without being physically present. These changes will allow the board of directors of the company to collect proxy forms and the shareholders to exercise their voting rights by post without having to fulfil the requirement that the company must have included these possibilities in its articles of association.

Further, it is allowed to hold the AGM by telephone, through a videoconference or similar provided that the AGM is managed from the location in which the company maintains its registered office and that the AGM accepts that some or all shareholders participate in such manner. However, an AGM held in such manner requires

identification of the participants and there are currently no satisfactory technical solutions for such identification. Therefore, this option cannot be used by companies with widespread ownership.

It is possible for a company to hold its AGM *per capsulum*. This means that decision at the AGM can be made by circulation of the written meeting minutes, which the shareholders approve by signing the minutes. In order for the Swedish Companies Registration Office to accept decisions made in such manner for registration, all shareholders which have been entitled to participate in the AGM have to approve and sign the minutes. This option can be used for certain decisions that can be made without any ambiguity and is therefore not suitable for companies with a large number of shareholders.

Does my company need to file annual/audited accounts or are there dispensations?

A company's annual report must be filed with the Swedish Companies Registration Office within seven months of the end of the financial year. Companies may still be liable to be fined for late filing of annual accounts. However, companies have a possibility to request a concession to the fine related to late filing. The Swedish Companies Registration Office has announced that a late filing due to COVID-19 may be considered valid grounds for obtaining a concession. A case-by-case assessment of whether there are grounds for a concession will be made by the Swedish Companies Registration Office in each individual case. There are no dispensations from the prescribed time frame to date in Sweden.

Are any legislative changes in relation to the striking off or dissolution of companies in place or proposed?

No legislative changes have been proposed or made to date in Sweden.

What impact has COVID-19 had on the operation of the local companies registry?

The Swedish Companies Registration Office has not announced any operational impact due to COVID-19 to date.

What should we be taking into account when considering how best to preserve cash in the context of: dividends and other corporate actions (e.g. share buy backs); and incentive payments for directors / employees

The board of directors should consider cash management measures as an important tool to support the ongoing operations of the business and maintenance of the company's solvency. If prudent cash management measures are not taken, the board of directors should be mindful of the reputational damage that could be caused, whether this would handicap them in future negotiations with funders and whether this is consistent with their duties and the company's corporate purpose.

The Swedish Financial Supervisory Authority has published a press release on 26 March 2020 stating that the Swedish financial supervisory authority expects banks and credit market companies to stop dividend payments. The authority urges the board of directors of the relevant companies to immediately modify their proposed dividends and the spring's annual general meetings to resolve not to pay any dividends.

We have also seen a number of companies defer or cancel dividends and suspend buy-back programmes in order to maximise the amount of cash available to support their core business. Any decision to change dividend

policy or buy-back programmes should be announced promptly and the board's reasoning explained clearly.

The board of directors should also consider what steps they can take now to manage immediate and future incentive plan costs, in particular whether such steps fall within the discretion of the board or remuneration committee under the terms of the relevant plans. Transparent communication with directors and employees is of paramount importance.

Disclosure

What are our disclosure obligations in the context of the rapidly evolving situation around Covid-19 and its uncertain impact on our business?

The European Securities and Markets Authority ("ESMA") has issued a public statement on 27 March 2020 to promote coordinated action by national competent authorities regarding issuers' obligations to publish periodic information for reporting periods ending on 31 December 2019 or after in the context of the COVID-19 outbreak. ESMA expects national competent authorities during this specific period not to prioritise supervisory actions against issuers who, due to COVID-19 outbreak, are unable to publish the financial reports within the statutory time frames provided that the financial reports are published within a period specified in ESMA's public statement. A case-by-case assessment will be made by the relevant national competent authority (in Sweden, the Swedish Financial Supervisory Authority) in each individual case.

Furthermore, the public statement states that issuers, who reasonably anticipate that publication of their financial reports will be delayed beyond the statutory time frames, are expected to inform their national competent authorities of this and inform the market of the delay, the reasons for such delay and to the extent possible the estimated publication date. However, the issuers continue to be subject to the disclosure obligations laid down in Article 17 of the Market Abuse Regulation. In particular, issuers must continue to inform the market as soon as possible for any inside information that directly concerns them. The Swedish Financial Supervisory Authority supports ESMA's public statement. Please see ESMA's public statement here https://www.esma.europa.eu/sites/default/files/library/esma31-67-742_public_statement_on_publication_deadlines_under_the_td.pdf.

In addition to the above, ESMA has published recommendations to financial markets participants in which it is stated that issuers should provide transparency on the actual and potential impacts of COVID-19, to the extent possible based on both a qualitative and quantitative assessment on their business activities, financial situation and economic performance in their 2019 year-end financial reports (if these have not yet been finalised) or otherwise in their interim financial reporting disclosures. Please see our publication (in Swedish) for further details https://sweden.dlapiper.com/sv/nyhet/noterade-bolags-informationsgivning-i-kolvattnet-av-covid-19.

The above-mentioned means that listed companies must continue to discharge their ongoing obligation to disclose inside information relating to the company under the Market Abuse Regulation and ensure that regulatory announcements regarding the impact of COVID-19 are made in a timely manner. Given the situation is changing rapidly, assessing whether inside information has arisen is particularly challenging. The directors must keep this under regular review and ensure that the company is in a position to make disclosures to the market promptly as required (for example, that it is able to convene and hold board or committee meetings to

consider regulatory disclosures and that its systems and controls for identifying inside information remain robust).

Moreover, directors also need to consider their responsibilities to disclose information in the annual report regarding the principal risks associated with, and the impact of, COVID-19. Directors should endeavour to identify and articulate the precise risks that their company is facing and ensure risk reporting is not generic.

Transactions

When undertaking M&A, what issues should we be considering given current levels of uncertainty?

Please see our alert Managing coronavirus COVID-19 risks in corporate deals.

For companies that want to access the capital markets, what options are available (and what particular issues will arise) given current levels of uncertainty/volatility (e.g. rescue rights issues, underwriting arrangement, disclosure)?

Equity markets can pose fundraising opportunities for distressed companies in need of bolstering their balance sheets given the current tightening of debt markets and cash-flow pressures on their business through, for example, discounted rights issues and emergency fundraising. However, the current market volatility due to COVID-19 creates execution risks that should be taken into consideration as fundraisings may be pulled or delayed, perhaps at a late stage.

A substantial equity fundraising would typically be expected to trigger the requirement for a prospectus prepared in accordance with the EU Prospectus Regulation and national laws implementing the directive. A prospectus must contain all information relevant to an investment decision and the information must be accurate in all material respects. The issuer and its board of directors are responsible and bear the risk of the prospectus and that the information contained in the prospectus corresponds to the facts. Particular attention should be given to risk factors, which must be tailored to the issuer's business and cannot be generic. In conjunction with the issuer's financial advisers it is important therefore to thoroughly diligence the issuer's COVID-19 response and the specific impacts the pandemic has had and is likely to continue to have on its business. Here, the response regarding the disclosure obligations under MAR and the recent recommendations regarding the publication deadlines of the issuer's financial reporting under the Transparency Directive can be particularly noted (see above section "Disclosure").

The abovementioned will also be required in order to access underwriting commitments and, from the issuer's perspective, close attention should be given to the conditions and termination events in underwriting agreements that may include force majeure clauses that might provide that grounds for exemption exist, provided that the COVID-19 outbreak also actually prevents the contracting party from performing its obligations.

Price discovery is particularly challenging in volatile markets. Hence, it will be important to conduct a thorough market sounding exercise (in compliance with regulatory requirements) in advance of any fundraising in order to maximise its chances of success.

Contracts

To what extent can a MAC/MAE provisions be relied on as a result of issues flowing from Covid-19?

In an M&A context, much will depend on the exact terms of the MAC negotiated by the parties. In Sweden, MAC clauses are not specifically regulated by law and the construction of the optimal MAC clause varies, depending on the specific conditions for the agreement. However, generally a MAC clause shall be construed narrowly, clear, specific and objectively measurable, for it to get the desired effect and avoid litigation.

In the challenging environment brought about by the COVID-19 outbreak, it is in the interests of all parties to ensure that any MAC conditions or termination rights are clear and tightly drafted. In circumstances where a buyer terminates in reliance on a broad or generic MAC, litigation is likely. A MAC clause is more likely to be successfully obtained (and conceded) if it relates to specific COVID-19 risks identified during due diligence and sets out the means by which such risks can be objectively measured and quantified. Alternatively, if the parties agree that there should be commitment to consummate the transaction notwithstanding COVID-19 risks, then the MAC (if any) should be drafted to expressly exclude such risks.

In light of movement restrictions, can we sign contracts electronically and if so how?

Contracts governed by Swedish law can be validly signed electronically provided that they fulfil the requirements of general contract law (primarily the Contracts Act (1915:218) (Sw. avtalslagen)).

However, not all electronic signature methods have the same evidential weight, or are sufficiently secure, reliable or resistant to fraud. E-signature platforms may provide more security and better evidence than a person typing his/her name or pasting his/her signature into an electronic version of a contract (as this can easily be forged). When considering the use of e-signature platforms, parties should consider cost (eg licence fees) and timing implications; ensure that the parties know in advance who the signatories (and their witnesses) will be (as typically each signatory and witness will need to be pre-registered with the e-signature platform provider); address potential confidentiality concerns (eg where a witness is attesting the contract using a separate device); and ensure the parties' IT security requirements are satisfied.

In general, most transactions can be concluded through electronic signature. However, a few specific types of contract have statutory requirements and must be in a certain format. For example, contracts for the purchase of real estate must be in a physical written format, as they must be signed by hand. Further, there may be difficulties where the contract needs to be filed with an authority or registry (eg the Swedish mapping, cadastral and land registration authority) which will not currently accept electronic signatures, if it needs to be notarised, legalised or apostilled; if the signing party is using its common seal or if there are constitutional restrictions on its corporate capacity or authority to use electronic signatures.

Another example is that some documents filed with the Swedish Companies Registration Office need to be signed in original. Examples of such documents are registration forms, certificates and the adoption certificate (Sw. fastställelseintyg) in the annual report. However, minutes from board meetings and general meetings, as well as the annual report may be electronically signed. It must be noted that the electronic signature in these cases have to meet the legal formal requirements regarding advanced electronic signatures, according to the eIDAS-regulation. If the signing party has identified itself through Swedish BankID, or another form of e-

identification, the legal formal requirements regarding advanced electronic signatures is automatically considered met. Having a Swedish BankID means that the signatory must have a Swedish identity number. If the authentication is done by only the use of code, via text message or e-mail, the electronic signature is generally not considered an advanced electronic signature.