Corporate Governance in Denmark

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1 Introduction

During the last three or four years, corporate governance has become one of the most popular topics in the Danish business sector. The “Recommendations for good corporate governance in Denmark – Corporate Governance in Denmark” issued by the *Nørby committee* in December 2001 have had an extraordinarily positive impact on the debate of corporate governance in Denmark.

The Danish debate is young. In terms of company law, one of the first contributions to the debate was the seminar on “Corporate Governance – New Challenges to Danish Ownership and Management Structures?” organised by Dansk Forening for Selskabsret (Danish Company Law Association) in September 1994.

The corporate governance debate is multi-faceted and it has no authoritative delimitation. Generally, the debate concerns all *matters affecting the way in which enterprises (companies) are managed*, and its *goal is to further economically effective management*. Both economics and legal scholars participate in the debate. The economics scholars include experts in financial theory, organisational theory and scholars with an empirical/statistic approach. The legal scholars are mainly experts in company law, securities law and capital market conditions.

The membership of the relatively young association “Danish Corporate Governance Association” reflects the varied and broad scope of the debate.

2 The Main Topics of the Debate

Economics scholars are interested in analysing how enterprises should be organised in to perform optimally. How should a company be organised in terms of *ownership*, *management* and the *provision of capital* in order to perform optimally? Does it affect the creation of value whether *ownership is diversified* *or concentrated*? Whether the company has *one or several governing bodies*? Whether the company is funded by *loan capital* or through the *capital market*?

Law is an integral part of the debate because enterprises are organised as corporations and therefore subject to company law regulation. One relevant question is *whether the legal framework hinders or furthers company performance*? The legal scholars analyse and adapt the legal rules so that the economic goals are reached.

Economics scholars have made a number of theoretical contributions that are today generally (internationally) accepted as the basis of the development of company law and securities law.[1] It is beyond doubt that economic reasoning play a decisive role in framing modern company law and securities law.

The best-known economic model for explaining why persons chose to organise their economic activities in a corporate form is *Ronald Coase's Theory of the Firm* from 1937. Briefly, the model sees the corporation as an alternative to market transactions, i.e. individual contracts of sale, construction etc. By replacing contracts with an enterprise (company) and its employees, production becomes more effective as long as the costs of managing the company are lower than the costs of making individual contracts.

When companies grow, problems invariably follow. As early as in the 1930s *Berle & Means* called attention to the problems arising from the separation of owners and management in large listed companies. This lead to the development of what is referred to as the *principal/agent theory*, which focuses on the economic efficiency of a company's organisation. One of the main topics in the corporate governance debate concerns the interaction between owners and management, in particular the question how owners may effectively control the management. The bottom line of the principal/agent theory is that shareholders need to spend time and resources to exercise control of the management, called *agency costs*. The company law rules should be framed so that it *becomes possible* for shareholders to control management and so that this can be done at the *lowest possible cost*. The separation of owners and management leads to *asymmetric information*. The principals (shareholders) do not possess the same information about the company as the agents (management). Economics scholars have pointed out that large companies run the risk that corporate management acts *opportunistically*, i.e. try to protect their own interests at the expense of the interests of the company (the shareholders).

In terms of corporate governance the prevalent opinion today is that the best performance will not be achieved if the shareholders are deprived of influence. One argument is that the shareholders and not the management bear the risk; another is that shareholders must be able to put pressure on the management both directly through voting and indirectly through acquisition and disposal of the company's shares. The present international trend (again) gives priority to shareholders. The perception that the (common) shareholder has insufficient

1 Some of the most influential contributions by economics scholars are collected in the four-volume publication *Corporate Governance*, edited by Kevin Kersey et al. 2000. The publication is reviewed by Paul Krüger Andersen in NTS (Nordic Journal of Company Law) 1999:3, at 35 et seq. A survey of the international development in law is found in Hopt, Kanda, Roe, Wymeerch, Drigge (eds.) *Comparative Corporate Governance*, 1998.

knowledge of the company's business matters, which makes management the centre of the company, has been abandoned. *If* the rules of company law give the shareholders actual influence, and *if* the shareholders have the possibility of "voting with their feet", they may contribute actively to the development of the company.

Since the 1960s economic-financial theory has developed a number of models with a view to planning an *optimal capital structure* in the individual company. To a wide extent the company may chose whether it is to be self-financed or leveraged. The contribution of the corporate governance debate is to point out that the issue is not limited to decisions as to which form of funding is the least costly, the risk of bankruptcy in case of substantial debt financing etc. The fact that the capital structure constitutes *a tool for controlling management* should also be taken into consideration. The shareholders should be aware of the difference between share capital and loan capital and of the actual nature of the various forms of capital (class A and class B shares, preference shares, intermediate forms such as convertible debentures etc.). It is generally assumed that a high degree of self-financing (high liquidity) in companies with a diversified group of owners reduces the shareholders' control of the management, whereas a high degree of debt financing restricts the latitude of the management and may put increased pressure on the management to invest profitably. Theory holds that debt claims reduce agency costs between shareholders and management.

As already indicated, several factors affect the choice of capital structure, including the intention to increase shareholder value (which tends to increase the debt-equity ratio). Overall, companies now pursue very active and deliberate strategies concerning the planning of their capital structure. The company that makes a virtue of being financially sound and having considerable hidden reserves is a thing of the past. Today the financial statements must show the actual values of the company (see also below). If the management is unable to convince shareholders that the company can invest its capital so that it will earn a satisfactory return, the order of the day dictates that capital is returned to the shareholders by the buy-back of treasury shares/reduction of share capital or payment of dividends.

The market capitalisation of a company depends on how well it is managed. If its management is less efficient, the market capitalisation is assumed to be lower than that of comparable enterprises. The quoted share price of a publicly traded company is a clear indication of how well the company is run. The lower the quoted price compared with the price of the company with an efficient management, the larger the profit will be for anyone who acquires the company and replaces the inefficient management with a more efficient one. This is the fundamental reasoning underlying the economic theories on "A Market for Corporate Control". The potential of takeovers is one of the economic mechanisms that may help increase the efficiency of companies. Whether a market exists and on which terms a takeover can be effected depend on the rules of securities law and company law and the specific ownership structure.

3 Green Paper on Active Ownership of 1999

The first official Danish response to the international corporate governance debate was the inter-departmental report "Debatoplæg om aktivt ejerskab" (Green Paper on Active Ownership) from 1999. The introduction to the report describes its focus as "the rules of interaction between owners, other providers of capital, management and other corporate stakeholders". It defines its central issue as "the rules that optimise the operation/earnings of enterprises and thereby maximise the total generation of income in the economy".

As its title indicates, the report is a green paper. It is not a usual report that makes specific regulatory proposals on the basis of various considerations and/or analyses. The value of the report lies in the fact that it presents a review of and explains international theory – which is largely based on American considerations – *on the basis of Danish conditions*. In chapters 2-5 the report describes some of the principal characteristics of the structure of the Danish business sector, including the size, organisation, ownership and sources of funds of enterprises. Chs. 6-7 explain and discuss the Danish ownership structure in an international perspective. Chs. 8-12 describe the possibilities of Danish shareholders of exercising active ownership in the regulatory framework provided by the management rules, rules on general meetings and the possibilities of limiting the influence of shareholders through restrictions on voting rights, transferability of shares etc. contained in the Danish Public Limited Companies Act (aktieselskabsloven). A special chapter deals with problems of foundation ownership. Finally, chapters 13 and 14 discuss the theory of the market for corporate control in a Danish perspective (Ch. 13), and the importance of information about the position of enterprises (financial accounting regulation, Ch. 14).

Even though the report makes no specific proposals, it indicates a number of main objectives to be followed by future regulation. The most specific recommendations are those that recommend improved shareholder access to information about company matters, especially in connection with the holding of general meetings. These recommendations are now being implemented (see immediately below). However, the report makes no precise recommendation as to the restriction on voting rights (class A and class B shares) or restrictions owner's influence (shareholder pledge).

Any understanding of a corporate governance debate must commence by an analysis of the national business structure, and this is one of the most important features of the Green Paper on Active Ownership. Several recent analyses indicate *that* the structure of the Danish business sector is characterised by a concentrated ownership structure with a relatively large number of family-owned enterprises in contrast to countries with diversified ownership (USA, UK), ownership by banks (Germany), or public-sector ownership (France, Italy), *that* the management structure (the modified two-tier structure found in the Danish Public Limited Companies Act) is different, and *that* Danish companies are widely stakeholder-orientated.[2]

2 For a further discussion see the so-called Magtudredningspublikation *Ejerskab og indflydelse i dansk erhvervsliv (*report on *Ownership and influence in Danish Business)* by Steen

4 Revision of the Danish Financial Statements Act

Act no. 448 of 7 June 2001 implements a new Danish Financial Statements Act (årsregnskabsloven). This new Act is both systematically and substantially different from it predecessor. It is beyond the scope of this paper to give a detailed account of the provisions of the new Act,[3] but it is important to appreciate that the new Act (also) includes a substantial corporate governance element. The main points are:

- the Act changes the basis from a transaction-based accounting principle, where the focus is on historical costs, to a *value-based accounting principle*, which measures assets and liabilities at fair value,
- *the addressees of the annual report* are defined; see section 12 of the Financial Statements Act. The annual report must be prepared so as to support users of financial statements in their financial decisions concerning the investment of the user's own resources, the management's administration of the funds of the enterprise, and the distribution of the funds of the enterprise, and
- *the regulatory approach* has changed so that the future development of specific accounting rules will increasingly be based on the development of the International Accounting Standards (IAS/IFRS) rather than financial reporting legislation; see sections 136 and 137 of the Financial Statements Act. These two sections provide the legal basis for – and an assumption to that effect – a "privatisation" of the preparation of special standards for financial reporting.

In conclusion, the new Financial Statements Act is more investor-orientated than its predecessor. The requirement of recognition of more assets and liabilities means that the annual report gives a more true and fair view of the current financial position of a company than under the previous Act. The new Act makes it easier to assess the performance of a company and – directly linked to this – to reduce the possibility of its management of eliminating profit or loss or of concealing the company's current financial position.

5 The Recommendations of the Nørby Committee

5.1 Introduction

In its *business strategy*, referred to as dk 21, the former Danish Government set out its visions for the venturesome Danish corporate sector. These visions also give consideration to the work of supervisory boards.

The Danish Commerce and Companies Agency, Erhvervs- og Selskabs-styrelsen, therefore set up a focus group in March 2000, whose members

Thomsen, Torben Pedersen and Jesper Strandskov, 2002.

3 See in particular Hasselager et al. *Årsrapporten*, 2001.

included businessmen, academics, stakeholder representatives etc. Its task was to analyse and evaluate Danish board culture and, preferably, to prepare a set of guidelines dealing with this issue. At the same time, a number of studies were initiated with a view to describing the circumstances in Denmark in a global perspective.

The first result of these studies was the report “Bestyrelseskultur i Danmark” (Board Culture in Denmark), prepared by the Danish Commerce and Companies Agency in cooperation with the Danish business magazine Mandag Morgen, Strategisk Forum and published in February 2001.

There was initially some uncertainty as to the goals of the work and as to the procedure to be followed. The Danish Minister for Business and Industry dispelled the uncertainty in the terms of reference of 2 March 2001 for the project “Board Culture in Denmark”. A *committee* was set up consisting of four prominent Danish businessmen: Lars Nørby Johansen, Waldemar Schmidt, Mads Øvlisen and Jørgen Lindegaard, with Mr. Lars Nørby Johansen as head of the committee.

The committee was mandated to assess the need for a Danish description of good ethics on supervisory boards and, if such a need was found to exist, to make a proposal for this description. The committee was also requested to establish whether there was a need for a method of evaluation of supervisory boards, and if so, to propose such a method, and finally to identify which incentives are most likely to ensure that the members of Danish supervisory boards will act according to best practice.

The terms of reference make it clear that the committee has the overall responsibility concerning the best practices of supervisory boards. The existing focus group was not dissolved but continued as a network for the committee. Consequently, the committee has the sole responsibility for the final report and its recommendations (see further Section 5.3 below).

The final report was published in December 2001[4] and is known as “The Nørby Committee’s Report on Corporate Governance in Denmark – recommendations for good corporate governance in Denmark”.

5.2 Corporate Governance – the Danish Way

As appears from its title, the report – and therefore also its recommendations – should be regarded as a Danish contribution to the international debate on corporate governance. The recommendations contain “the best elements from the international recommendations, however, adjusted to specific Danish circumstances and needs” (p. 12 of the report).

As part of the preparatory work, the Danish Commerce and Companies Agency collected and analysed a number of the best-known foreign corporate governance codes.

The report is generally critical of regulatory intervention by way of legal rules. The report clearly states: “The aim of our work has not been to develop a set of detailed ground rules of how Danish companies must be managed” (p. 13

4 The report can be downloaded from “www.corporategovernance.dk”.

of the report). According to the report, one of the *basic values* is "that to a large extent it is the corporate sector itself which ensures that the companies are run efficiently and competitively and that they observe their duty to act responsibly" (p. 13). The report recommends *self-regulation instead of regulation* (see Section 5.4 below).

As already indicated, the report is based on the international debate on corporate governance. It notes that the principal objective of the first codes, including the *Cadbury Report* from 1992, was to prevent financial scandals such as the BCCI bank scandal, which received wide press coverage. The report also describes how the debate has recently adopted a broader perspective of corporate governance. This broad perspective is reflected in the definitions of corporate governance found in the international codes. The Cadbury Report focuses in particular on the control aspect, stating that "Corporate Governance is the system by which companies are directed and controlled". Later codes, such as the OECD Principles of Corporate Governance from 1999, have a broader perspective.[5] The Nørby Committee has adopted a definition prepared by Sir Adrian Cadbury in the World Bank's Corporate Governance Guidelines from 1999. The committee defines corporate governance as follows:

> The goals according to which a company is managed, and the major principles and frameworks that regulate the interaction between the company's managerial bodies, the owners as well as other parties who are directly influenced by the company's dispositions and business (in this context jointly referred to as the company's stakeholders). Stakeholders include employees, creditors, suppliers, customers and the local community.

This definition reflects the committee's view on the discussion concerning the objectives of the company. On p. 37, this discussion is briefly characterized as the choice between a *shareholder* and a *stakeholder theory*. The committee finds that it is "insufficient that the management focuses solely on the interests of the shareholders", "the interests of other stakeholders must be considered to the relevant extent".

Accordingly, the committee advocates a stakeholder theory insofar as stakeholders other than shareholders are explicitly covered by the objectives of the company. This undoubtedly complies with the opinion of most Danish businesses.[6] The opinion of the committee can best be described as a consensus theory, eliminating, in the long run, the inconsistency between the shareholders' requirement of shareholder value and a stakeholder orientation.

The goal of improving the work of the management of companies is in line with the general opinion of the committee. On p. 36, the (changed) role of the supervisory board is discussed under the heading "From Controller to Strategic Partner" (of the executive board). The committee wants to reduce the focus on the control aspect and increase the focus on dynamic managerial work. The aim is to further "awareness, and through that, resources that will make the

5 The OECD Principles are discussed by Rolf Skog in NTS (Nordic Journal of Company Law) 1999:3, at 23 et seq.

6 See also the Danish report *Ejerskab og indflydelse i dansk erhvervsliv* (Ownership and Influence in Danish Business) 2002, at 68 et seq.

companies able to act and anticipate the specific problems and challenges that arise all the time" (p. 14).

The objectives of the recommendations for good corporate governance listed on p. 13, may be summarised as follows:

– to improve *the access to capital* for Danish companies,

– to inspire Danish supervisory boards *to tackle the strategic challenges* resulting from globalisation, and

– to stimulate *the debate* on corporate governance.

5.3 The Principal Content of the Recommendations

The recommendations are divided into two parts: The first part introduces a general principle, and the second part describes more specific and operational guidelines. The general principles describe why, in the opinion of the committee, it is important to deal with each individual area. The considerations are discussed below.

The recommendations concern seven main areas:

I The Role of the Shareholders and their Interaction with the Management of the Company

The key words of this principle are "the stakeholders' and society's joint interest in the development of the company", "active ownership", "dialogue between the management and shareholders", "strengthening of the role of the annual general meeting", and "proportionality between capital investments and voting rights".

The operational guidelines concern:

1. The exercise of ownership and communication.
2. Restrictions on voting rights.
3. Preparation for the AGM, including notice of meeting and voting by proxy.
4. The duties of the supervisory board and the rights of the shareholders in the event of takeover bids.

II The Role of the Stakeholders and their Importance to the Company

According to this principle, it is decisive for a company that it has a good relationship with its stakeholders.

The operational guidelines concern:

1. The company's policies in relation to the stakeholders.
2. The role of the stakeholders and their interests.

III Openness and Transparency

Openness and transparency are essential conditions for shareholders and other stakeholders to evaluate and interact with the company.

The operational guidelines concern:

1 Information and disclosure.
2 Investor relations.
3 Annual reports.
4 Additional information.
5 Quarterly reports.

IV Tasks and Responsibilities of the Supervisory Board

The rationale behind this principle is that the supervisory board is responsible for safeguarding the interests of the shareholders with due regard to other stakeholders. The principle also includes the duty to supervise the work of the executive board and define appropriate strategies for the company.

The operational guidelines concern:

1 The overall tasks and responsibilities of the supervisory board.
2 The tasks of the chairman.
3 The rules of procedure.
4 Information from the executive board to the supervisory board.

V The Composition of the Supervisory Board

It is essential that the supervisory board is composed in such a manner that it is capable of performing its managerial tasks. The supervisory board must be able to act independently of special interests, and its composition and rules of procedure must reflect the challenges posed by the company’s current situation and circumstances.

The operational guidelines concern:

1 The recruitment and appointment of members.
2 The training and introduction of new members.
3 The number of members.
4 The independence of the supervisory board.
5 Frequency of meetings.
6 Time allocated to board work and the number of board positions.
7 Retirement age.
8 The term of members of the supervisory board.
9 The use of committees.
10 Self-assessment of supervisory board work.
11 Assessment of executive board work.
12 Assessment of the collaboration between the supervisory and the executive board.

VI Remuneration to the Members of the Supervisory Board and Executive Board

The principle is that the remuneration paid to the members of the supervisory board should be reasonable compared to the tasks and the responsibility involved. Performance-related pay is recommended, and there must be openness about all important issues regarding incentive schemes.

The operational guidelines concern:

1 The principles of establishing incentive schemes.
2 Openness and transparency regarding performance-related pay based on shares.
3 Premature retirement compensation schemes for members of the executive board.

VII Risk Management

Efficient risk management is a prerequisite for the supervisory board being able to perform the tasks for which it is responsible. It is important that the supervisory board ensures that there are appropriate systems for risk management

The operational guidelines specify purpose and procedures.[7]

5.4 Comparison with other Codes

The recommendations of the Nørby Committee were inspired by the large number of codes prepared by several countries, organisations and institutions in recent years.[8] The report contains a schematic outline of the codes that must be assumed to have been the primary sources of inspiration, the British Combined Code, the OECD Principles of Corporate Governance, and the codes from Canada, France, Germany, the Netherlands and the United States (p. 12 et seq.). This outline shows that the codes share some common elements.

In the areas of general agreement, the Danish recommendations are in line with the international trend. This is evident from, inter alia, the recommendations concerning a company’s communication with its shareholders, concerning

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7 The recommendation on risk management was inspired by, for example, Teddy Wivel, Jørgen Walther Hansen & Thomas Riise Johansen’s book *Corporate Governance – Et bud på danske bestyrelsers rolle* (Corporate Governance – A Proposal for the Role of Danish Supervisory Boards) 2000; see also Thomas Rise Johansen & Teddy Wivel in NTS (Nordic Journal of Company Law) 2001:2, at 173 et seq. on board roles, risk management and auditor’s role.

8 The scope is illustrated by, inter alia, the OECD Principles of Corporate Governance discussed by Rolf Skog in NTS (Nordic Journal of Company Law) 1999:3, p. 13 et seq., and the recommendations by the private Danish Shareholders’ Association discussed Klaus Melby in NTS (Nordic Journal of Company Law) 2001:2, p. 169 et seq. In his paper, Rolf Skog describes the 1990s as the “decade of corporate governance codes”.

the holding of annual general meetings, and finally from the description of the tasks, recruitment of members, independence and remuneration of the supervisory board. The principles underlying these examples are couched in general terms that are unlikely to meet with disapproval. Areas in which the Danish views are expressed in specific terms include the recommendation of a retirement age of 70 for members of the supervisory board and a numerical limit on the number of board positions that a member may hold (item V nos. 6 and 7 of the recommendations).

A number of differences between the Danish recommendations and the international codes are due to special Danish circumstances. The Danish code must obviously be based on the *Danish management model*, i.e. the functional division between the supervisory and the executive board provided in section 54 of the Danish Public Limited Companies Act. The Danish model shares features with both the German and the Anglo-Saxon models. It is basically a two-tier model like the German, but its description of the allocation of tasks and the personal composition is so flexible that, in practice, it can be arranged according to the best features of the Anglo-Saxon model. The Danish (and Nordic) management structure could – and perhaps should – find greater approval in Europe as it reflects a trend towards convergence between the one-tier and two-tier systems.

In some areas, the Danish recommendations address issues that are controversial in Denmark as well as in the rest of Europe. Item I no. 2 of the recommendations rejects the possibility that the articles of association of Danish companies contain provisions *restricting the voting rights* by way of a differentiation of voting rights (class A and class B shares), limitation on the number of votes a shareholder may cast, or on the number of shares a shareholder may own in the company. The recommendations thus favour a *principle of proportionality of share rights (one share one vote).*

However, the Danish Public Limited Companies Act is not based on such a principle. Section 67 of the Danish Public Limited Companies Act allows a differentiation of voting rights – and quite a large number of Danish companies have adopted such a differentiation.

Counter to the new recommendations, the latest amendment of section 79(2) of the Danish Public Limited Companies Act (1992) *has made it easier* to restrict voting rights.[9] There are – and have been – many arguments for and against the restriction on voting rights. The new recommendations undoubtedly reflect the general view of *the market*. Today many investors in the Danish stock market are clearly against restrictions on voting rights. This is explicitly evident from the recommendations made by Danish institutional investors such as LD (Employees Capital Pension Fund) and ATP (Danish Labour Market Supplementary Pension Fund), with whom the Nørby Committee concurs. However, it is probably not possible to assess definitively whether restrictions on voting rights are advantageous or disadvantageous. Most recently, this can be seen from the opinion found in the Green Paper on Active Ownership published by the Danish Ministry of Trade and Industry et al. in 1999, which discusses

9 See Report No. 1229:1992 on the simplification and adjustment to future requirements of the Danish companies acts.

“restrictions on the influence of shareholders” (p. 231 et seq. of the Green Paper).

In the autumn of 2002, the EU Commission submitted a new proposal for a takeover directive replacing the proposal that failed to win approval by the European Parliament in July 2002. The new proposal contains a number of restrictions on the transferability of shares and on voting rights that apply in case of a takeover bid. This is actually a continuation of a more extensive “break-through” rule proposed in a report by the *Group of High-Level Company Law Experts*. However, several Member States – among them Denmark - objected strongly to this proposal and consequently it was not approved. In this light, it is debatable whether it is appropriate that the Danish recommendation brands companies whose articles of association contain restrictions on voting rights and any other rules on this issue (see Section 5.4 below).

As a result of the difference between the Danish recommendations and the international codes, the recommendations are primarily aimed at listed companies whose registered office is situated in Denmark, as indicated by the comment on the listing rules of the Copenhagen Stock Exchange (see Section 5.5 below). Foreign companies listed on the Copenhagen Stock Exchange may be governed by a different set of recommendations.[10]

The purpose of a code is of course to ensure compliance with the recommendations. The terms of reference of the Nørby Committee explicitly request the committee to assess which incentives are likely to provide the proper basis for the members of supervisory and executive boards to pursue the objectives of good corporate governance. The outline of international codes shows that several options are available. Some codes are not based on a legal framework but only serve as a reference point with the strength that derives from their contents or the authority of the authors. Other codes are, at least partially, based on a legal framework, for instance the British *Combined Code*, which – like the Belgian and Canadian codes – is influenced by the relevant listing rules. The Danish recommendations have adopted the latter option (see immediately below).

5.5 Recommendations as Soft Law

The report of the Nørby Committee is not the result of an ordinary, public fact-finding mission. In the introduction, the committee members emphasize that they alone are responsible for the report and the proposals for Danish recommendations regarding corporate governance. Some idea of the nature of the recommendations is given by the statement that “Hopefully, this atypical process of preparation is suited to the kind of self-management and non-legal regulation that we are considering”.

The report frequently emphasizes that the recommendations are “voluntary and non-binding”, that they are “based on accepted values combined with a

10 The recommendations do not apply to unlisted companies, cooperative societies, non-profitmaking units etc. This does not mean that such enterprises have no corporate governance problems that need to be resolved.

voluntary and flexible basis" (p. 17, and p. 45 et seq.), that "the committee finds that self-management is the best method of regulation" (p. 46), and that "the market is best suited to assess this", i.e. the compliance with the recommendations (p. 47).

These quotations may be cited in support of the argument that the recommendations are not part of any legal framework. It is also clear that the committee hopes that the recommendations are accepted above all by the corporate sector, that they are "backed by the right culture, ethics and professionalism", and that "the management is genuinely willing to work with these recommendations and take an active part in the process" (p. 14).

Despite these statements, the recommendations should (also) be considered from a legal perspective:

The recommendations are not merely based on the initiative and work of the committee; the report is the result of a Government initiative and is based on terms of reference issued by the Ministry of Trade and Industry. Furthermore, a public authority, the Danish Commerce and Companies Agency, acted as secretariat and also published the report.

The recommendations take the *form* of rules and their *contents* are closely associated with the provisions of the Danish Public Limited Companies Act. For instance, it is reasonable to compare the recommendations with the list of requirements concerning the rules of procedure in listed companies that is set out in section 56(5) of the Act. Several recommendations might just as well be regarded as extensions to or clarifications of the rules of procedure required of companies. The headline of item IV of the recommendations, "The tasks and responsibilities of the supervisory board", suggests a connection with the rules of company law.

The fact that the committee clearly does not advocate legal regulation obviously reduces the legal "weight", but does not completely deprive the recommendations of a legal nature. This *is soft law regulation*, which is also (reluctantly?) admitted on page 45 of the report. The committee here expresses the wish that the recommendations "shall remain legally non-binding".

However, an important step towards making the recommendations legally binding is the fact that they are already based on the rules of securities law. Section 36 of the Copenhagen Stock Exchange listing rules provides:

"The Copenhagen Stock Exchange recommend that the companies in their annual reports make clear their position on the recommendations for good corporate governance that are part of the report prepared by the Nørby Committee of 6 December 2001 on Corporate Governance in Denmark".

This implementation of rules strongly encourages – but does not compel – listed companies to make clear their position on the recommendations. The individual company *may* derogate from the rules, but must state acceptable reasons for doing so; this is an example of *comply or explain* regulation inspired by the British Combined Code. The wording of section 36 suggests that the Copenhagen Stock Exchange will not strictly enforce the new obligations in the initial phase, but the Stock Exchange will probably become more strict in its enforcement over time, and the contents of the rules may be made more detailed or clear so that the possibility of derogation from (some of) the recommendations will be restricted. The establishment of a new committee, "The Copenhagen Stock Exchange Committee on Good Corporate Governance", whose task is to consider future changes and adjustments, may serve as an indication that a development (of rules) is envisaged.

The recommendations of the Nørby Committee constitute an interesting contribution to the development of company law and securities law in Denmark. The specifics are of course open to discussion, but on the whole the recommendations will undoubtedly contribute to a positive development. The recommendations have mainly met with approval from the corporate sector, which is ascribable to, inter alia, the explicit indication that the corporate sector, represented by the committee, laid down the rules itself.

For those who are occupied with the legal dimension of corporate development, the recommendations add many new aspects to the discussion on the future development. This applies to the choice of regulatory method as well as the contents of the regulation.

By advocating *self-regulation* over statutory regulation, the recommendations are in line with international trends. The Copenhagen Stock Exchange has made the recommendations part of its listing rules and this is a form of self-regulation as the Stock Exchange now has the status of a private corporation. On the other hand, the Copenhagen Stock Exchange is still a sort of regulatory authority because the Danish Securities Trading Act (værdipapirhandelsloven) provides that the Stock Exchange must monitor the capital market and allows the Stock Exchange to lay down special rules that must be followed by the actors in the capital market, including the listed companies. Many of the recommendations of the Nørby committee almost encroach on the company law regulatory regime, which has so far consisted of the Danish Public Limited Companies Act. The adoption of the recommendations in the listing rules of the Stock Exchange gives rise to some important issues of principle regarding the delimitation of the jurisdiction of the Stock Exchange compared to that of company law regulation. The principal task of the Stock Exchange is to monitor the capital market and contribute to its development by laying down rules. The regulation of companies has so far been effected by statutes. The Danish Commerce and Companies Agency has no general power to lay down rules that supplement or extend the various companies acts. The newly established committee on good corporate governance may address many different issues, but the relatively general delegation of regulatory powers granted to the Stock Exchange may not be used to displace the regulatory powers in the field of company law.

The Nørby committee is right in stating that recommendations are a more flexible and speedy way of regulation than traditional legislation. On the other hand, recommendations do not have the *legitimacy of legislation* (or delegated legislation). When is a problem or issue so important that it needs to be regulated by law? In Denmark this question has not been discussed so far, but it should be given careful consideration in the continuing process.

6 New Rules on Electronic General Meetings and Electronic Communication

The IT revolution impacts on several aspects of company law. One of the most important concerns the general meetings of shareholders.

The use of IT implies that the general meeting may regain its importance as a principal forum for decision-making. The use of IT reduces the problems arising from the fact that shareholders are widely dispersed geographically. The large number of foreign shareholders of Danish companies cannot be expected to be physically present at general meetings held in Denmark. *Cross-border voting* is one of the hottest topics of company law; it is high on the EU agenda and several Member States are implementing rules regulating this issue.

Danish company law scholars have disagreed widely about the possibilities of using IT in connection with general meetings under the previous rules contained in the Danish Public Limited Companies Act.

The Commerce and Companies Agency has for some time considered these problems. In December 2002, the Agency submitted a number of proposals for changes in the Public Limited Companies Act and the Private Limited Companies Act for comments by the public. On 29 January 2003 a considerably amended bill was introduced in the Danish parliament, *Folketinget*, and the bill was passed as Act no. 303 of 30 April 2003. It came into force on 1 October 2003.

According to the general comments in the explanatory memorandum, the proposals were based on “the Government’s intention to strengthen shareholder participation (“active ownership”). The *statutory amendments* are therefore the first that are based on the Green Paper on Active Ownership.

The most important innovation is the new provision in section 65A of the Public Limited Companies Act. The section explicitly provides that shareholders with the same majority as is required for amendments to the articles of association are entitled to decide to use electronic media in connection with the holding of a general meeting (electronic general meeting) provided, however, that a minority of 25% do not vote against this option. The provision leaves it entirely up to the shareholders to decide the extent and the manner in which electronic media will be used. Consequently, it is possible to hold either entirely virtual general meetings, or general meetings where IT merely supports a general meeting with shareholders physically present.

Large companies are obviously the most likely enterprises that want to use IT. The wording of the provision makes it likely that the Copenhagen Stock Exchange committee on good corporate governance will recommend that listed companies should exercise the right to make decisions under section 65A.

According to a new provision in section 65B of the Act, similar numbers and percentages are necessary if the general meeting intends to use *electronic communication* between the company and its shareholders.

The previous section 66 of the Danish Public Limited Companies Act provided that the shareholders may *be represented by proxy*. The section laid down no requirements as to the contents of a proxy form except that it had to be in writing and the authority limited to twelve months. It has been argued that the collection of proxy forms may be used to strengthen the powers of the management at the expense of the shareholders. The bill that was submitted for consultation remedied this problem by introducing a new rule providing that a proxy to the company's management must include the shareholder's position on all items on the agenda of the general meeting and the complete proposals. Accordingly, the provision did not allow the grant of unlimited proxy power to the management. However, the provision in the new Act has been diluted as a result of criticism from the Danish business sector, so that the management can only be granted proxy for a specific general meeting whose agenda has been announced. It is therefore not necessary for a shareholder to express an opinion on each individual item on the agenda. The new diluted provision makes it easier for shareholders to decide whether or not to grant proxy power to the management, but still allows the grant of unlimited proxy power to the management.

The last few years have seen a debate on increased *access to information about shareholder matters*. Compared to Norway and Sweden, the Danish position has been very restricted. According to the existing rules, a company's shareholders have no access to its register of members even if a shareholder may have a considerable interest in knowing the other shareholders. Legislators have complied with the request of increased openness by introducing a new rule in section 26(3) of the Danish Public Limited Companies Act which provides that the articles of association may grant shareholders access to the register of members, for instance through an electronic medium. This is a very narrow opening, which may not, in effect, change the position under existing law. It is important, however, that the *travaux preparatoires* are sympathetic to a development towards greater openness. This is also an area in which the Copenhagen Stock Exchange committee on good corporate governance may make a recommendation.

7 Concluding Remarks

The corporate governance debate is one of the most significant features of modern company law and securities law. It signals a move away from the traditional view of company law as a system of protection and anti-abuse rules. Now the rules are generally regarded as part of society's efforts to achieve economic growth and welfare. This is a change to a *new company law paradigm* that must generally be welcomed. Recent scandals such as the *Enron affair* should not cause the pendulum to swing back.

On 21 May 2003 the EU Commission published an action plan on Modernising Company Law Enhancing Corporate Governance in the European Union (COM/2003/0284 final), which announces a number of new measures on EU level.

The above account shows that Denmark follows the international trends in the corporate governance field. The Danish position is already in line with many of the general recommendations in the Commission's action plan. We have started addressing significant problems, in particular the use of IT, but much still needs to be done. Several rules other than those mentioned above can be assessed in a corporate governance perspective, for instance the rules on *discharge of the corporate board members*. In terms of corporate governance it seems strange that one of the first things the management does at a general meeting is to ensure the discharge of liability for its work. Another issue that warrants consideration is whether the list in the Danish Public Limited Companies Act specifying the decisions that require the approval of the general meeting is in keeping with the times. In the field of securities law the issue of delisting companies warrants consideration; and in the field of company law the issue of establishment of groups.

Some of the issues that need to be given thorough and coherent consideration concern the choice of regulatory method. As indicated above, there is a clear move away from statutory regulation – at least in the form of specific rules – and towards the use of codes and other forms of self-regulation. At the same time, many experts believe that the market is largely self-regulating. The Green Paper on Active Ownership contains no general considerations on regulatory methods, which is probably due to the fact that it contains no specific proposals for regulation. More general assessments in connection with the introduction of bills, such as those on IT discussed above, are not likely either. The best solutions to these issues are most likely to be found in the legal literature.