Chapter 9
The importance of worker representatives on company boards and their right to consult with their trade union organisation and its management

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1. Introduction

This chapter addresses the need to respect the rights of worker representatives in company law and the law on the dealing in securities and under corporate governance regulations both at national and European level. The conflict between worker rights defined under labour and company law on the one hand and securities law on the other can be especially problematic in the case of worker representatives on company boards. These representatives are, as a rule, affected by both labour law and company law. Although such worker representatives frequently need to consult with other worker representatives who are not members of the board, such needs can collide with the recent tendency in securities law to place more and more restrictions on disclosure beyond the company board of important information which might affect the share price or involve trade secrets. This conflict is exemplified in a case referred to the European Court of Justice (ECJ) in 2004, which will be discussed below.

The main conclusion in this chapter is that European legislation in the area of company and securities law and corporate governance principles need to respect these national and European rights and the legitimate needs of worker representatives to fulfil their functions. Rather than granting supremacy to shareholder interests, EU law should recognise the principle that companies are a community of interests in which workers are a key stakeholder. Worker participation constitutes a fundamental right in the EU. Thus, existing national systems of worker participation need not only to be protected but also upgraded by way of EU legislation. The current discussion on European company law and corporate governance provides a context for airing these demands.

2. A legal challenge to a worker representative's right to consult

In 2004, the Swedish Government intervened in a case before the ECJ (Case C-384/02 *Criminal proceedings against Grøngaard and Bang* [2005] ECR I 9939) in which a Danish court referred the following very basic question (among others) for a preliminary ruling: 'Does Article 3(a) of Directive 89/592 preclude a person from disclosing inside information in the case where that person received the inside information in his capacity as an employee elected member of the Board of the undertaking to which the inside information relates and that information is disclosed to the General Secretary of the trade union which organises the employees who elected the person concerned as a board member?'

Directive 89/592[1] (Insider Directive) was introduced into Danish law in the Law on dealings in transferable securities. Section 35(1) of that law states: 'The purchase or sale, or incitement to the purchase or sale, of transferable securities may not be effected by anyone with inside information which may have a bearing on the transaction.' Section 36(1) of the same law provides:

> Any person in possession of inside information may not disclose such information to any person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties.[2]

Knud Grøngaard was the workers' representative on the company board at a financial institution (RealDanmark) that was about to merge with a bank (Danske bank). He was also the chairperson of the department within Finansforbundet (Danish Financial Sector Union) that organised over 90 percent of the employees at RealDanmark. Allan Bang was the General Secretary of Finansforbundet. Grøngaard consulted with Bang and gave him information about both the date and proposed rate of exchange between the shares in the two companies. Bang, in turn, passed on the information to two close colleagues on the staff of the Finansforbundet office. One of these colleagues used the information and

1. Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334, 18.11.1989, p. 30.
2. The directive was transposed into Swedish law in a similar way in section 7 of the Act on penalties due to market manipulations when trading in financial securities (2005:377).

bought shares, and was eventually sentenced for breaking the insider dealing rules. Prosecutions were also brought against Grøngaard and Allan. The main issue in the case was whether a worker representative on a company board was prohibited by the legislation in question (law on the dealing in securities) from consulting with the president of his trade union federation on the issue of a planned merger that could lead to the redundancy of thousands of employees (members), and whether the president of the federation in turn could share the information with his closest advisors. Should the consultation and sharing of information by the trade union official be seen as having been made in the normal course of the exercise of his employment, profession or duties as a worker representative within the exception stated above or did the main rule apply?

Along with others, TCO (Swedish Confederation of Professional Employees)[3] drew the Swedish Government's attention to the case before the ECJ and its significance for the Swedish rules on worker representatives on company boards. These rules are similar to the Danish rules but are not identical. At the hearing before the ECJ, the Swedish Government expressed the important view that, as far as possible, it should be for national courts to rule on the extent to which worker representatives on company boards may share insider information with other worker representatives. It emphasised that the extent of and systems for worker participation differed considerably between Member States, and that EU legislation on worker representation did not establish any minimum rules concerning board-level worker representation (Ahlberg 2004). These were arguments that also made a distinct mark in the ruling (paragraphs 39-40 of the judgment).

The argument advanced by the Swedish Government concerns the effect, in this context, of an important aspect of the principle of subsidiarity. Namely, something that is a normal part of the task of worker representatives in Denmark or Sweden may seem alien to the task provided for in the legal system of other Member States.

In a relatively short ruling, the ECJ held that to share the information at issue conflicts prima facie with the main rule of the Directive. However,

3. The Swedish Confederation of Professional Employees (www.tco.se) has 1.2 million members, and covers both private and public sectors.

this does not apply if there is a close link between the sharing of information and the carrying out of the individual's function. The Court underlined that in the case of an exception it must be interpreted restrictively (paragraphs 27-33) and, in that connection, set out a number of broad guidelines for the national court to consider. It indicated that the sharing of information may be compatible with the directive if it is necessary to fulfil the individual's function (paragraph 34). In that connection, it should be considered whether the circle of people receiving the information is limited (paragraph 36) and also how sensitive the information is (paragraphs 37-38). A test of proportionality should be applied asking whether, having regard to the exact timings of the actions concerned, it was necessary to share all the information at issue in order for the individual to fulfil his duty. Finally, the ECJ reiterated that, in making the final assessment, consideration must be given to the individual nature of the national legal system at issue (paragraphs 39-40).

Both Grøngaard and Bang were found guilty of breaking the insider rules by the Danish first and second instance courts but were acquitted by the Danish Supreme Court (Højesteret).[4] The Supreme Court found that it accorded with the purpose of the exception and the preparatory materials to the law that a worker representative on a company board has the right to consult with the president of his trade union federation on issues concerning a merger which have considerable significance for the employees. The court found that this was also common practice. The court underlined that Grøngaard consulted with Bang, not only because he wanted to be prepared before the public announcement of the merger, but also to consult on his own position relative to the planned merger. The Supreme Court noted that the merger would include many members of the federation and would lead to major staff cuts. Against that background, it found that it was a normal step on the part of Grøngaard in the exercise of his task to share the information that the merger negotiations had started and at what date the merger would be made public. The reason for sharing the information concerning the rate of exchange between the shares in the two companies was to discuss whether there might be a higher bid from elsewhere involving fewer redundancies. Consequently, the Supreme Court found that the disclosure was made on objective grounds and was a normal step in the discharge of

4. Judgment of 14 May 2009 in case 219/2008 *Public prosecutor v Knud Grøngaard and Allan Bang*.

his duty. Both Grøngaard and Bang were cleared of all criminal charges. Why was it so important for Swedish trade union organisations and the Swedish Government to intervene in a case concerning worker representation in Denmark as a way, ultimately, to defend worker influence on Swedish company boards? The answer lies in the fact that, if the outcome had been different, the case could have had serious effects limiting workers' influence on Swedish company boards. However, the issue remains critical. As the Insider Directive is currently under review, it is important to ensure that any changes to the directive do not limit the legal scope for worker representatives on company boards to share information with and consult the leaders of their trade union organisations. This scope has been acknowledged by the ruling of the ECJ and confirmed at national level by the Danish Supreme Court. In these circumstances, it is appropriate to recall that Article 27 of the EU Charter of Fundamental Rights guarantees 'workers' right to information and consultation in the undertaking' and that a limitation of national practice in this area through an internal market directive would be controversial to say the least.

The preliminary position of the Swedish Government concerning the ongoing work of the EU Council on insider dealing states the following as regards the aim of enlarging the extent of insider crimes:

> The definitions concerning what is to be seen as criminal must be carefully considered, especially against the background that the proposed directive leads to demands for administrative sanctions. As the proposal concerns the spreading of information in media it is also important to consider that the provisions are not in conflict with the Swedish Freedom of Press Act and the Freedom of Speech law. It is furthermore important that the directive does not lead to the workers' representatives on company boards being prohibited from sharing information with other trade union representatives in accordance with the elaborations of the EU Court in the case Grøngaard and Bang (C 384-02). (Swedish Government 2011).

To put this position in context, it is helpful to examine the background to and the purpose and content of the Swedish rules on worker representation on company boards.

3. The Swedish Board Representation (Private sector employees) Act

3.1 Background and purpose

The issue of employee representation on company boards began being discussed more seriously in Sweden during the latter half of the 1960s. The executive of TCO appointed a committee, known as SAMKO, in September 1969 to look into the issues of cooperation between management and employees at the workplace. Among the measures that the committee suggested was representation for the workers on company boards. Together with the Swedish Trade Union Confederation (LO), TCO tried to regulate these issues through collective agreements, but the employers' organisations refused as they did not consider that they had the mandate to regulate issues that were normally reserved for the company annual general meeting. TCO and LO then asked the government to introduce legislation giving workers the right to representation on company boards.

The first legislation on board-level worker representation came into force in 1973-74 through two different acts, one relating to limited liability companies and cooperative associations (LSA) and one for bank institutes and insurance companies (LSABF). After a successful trial period, the legislation was made permanent, with some changes introduced a few years later. The present legislation on the right to board-level representation for workers came into force on 1 January 1988 and on all substantial issues has remained unchanged since then.

The legislation on worker representation on company boards that was introduced mainly during the 1970s must be seen as one part of a reform process in Sweden which seeks to make working life more democratic. Subsequently, the Act on Co-determination (MBL) (1976:580) came into force with rules on information and consultation and, as a result, laid the foundation for increased employee influence at the workplace. Thereafter, legislation was increasingly supplemented, or even replaced, through collective agreements. Seen from this perspective, the right to worker representation on company boards is a complement to the regulatory regime that provides for employee participation in Sweden. At the same time, it is clear that the rules on board-level worker representation also include elements associated with company law (Companies Act (2005/06:26)). For example, this legislation contains rules on how

company boards should be constituted, how they should work, and what obligations and responsibilities individual board members have.

The legislation that came into force during the 1970s concerning the right to board representation was, however, not without reservations on the part of trade unions. They were initially hesitant in relation to forms of participation that involved taking part in managerial functions within companies. Participation in the decision making process was viewed as raising possible conflicts of interest as the worker representatives would simultaneously have to be loyal both to the company and to the employees. It was feared that worker representatives would find themselves becoming pawns in difficult company situations in which any criticism of board decisions was directed towards worker representatives instead of, more accurately, being directed towards company management itself. The initial view of trade unions changed as demands for working life to become more democratic strengthened towards the end of the 1960s. Important decisions at both TCO and LO congresses at the beginning of the 1970s laid down broad outlines for an enlarged democracy in the workplace and emphasised, in addition, the right to worker representation on company boards as an important step towards increasing influence in companies.

The legislation (on worker representation on company boards) first met opposition from the employers' side who were of the view that cooperation between a company and its employees should take place on a voluntary basis and not be mandated by legislation. After the successful trial period at the beginning of the 1970s, the employers changed their view, noting that the legislation had had positive effects, and recommended its continuation.[5] This positive view was confirmed in the preparatory work for the 1987 legislation[6] and also in academic research (Levinson 2001) at a later date.

Despite this common view shared by the Swedish social partners regarding the importance of worker representation, this right is not unthreatened, particularly when one takes account of the actions of other players at the supranational (European) level. This is evident from the different proposals that come up from time to time at both European and national

5. Government bill 1975/76:166, p. 96.
6. Government bill 1987/88:10, p. 44.

level concerning new European legal forms (for example, the European private company (SPE)) and in relation to corporate governance (Swedish Government 2004) where mostly it is the economic independence of companies and the protection for shareholders that are stressed. This may be due to the fact that a majority of the owners of global companies with support from the European Commission and, in particular, its Internal Market and Services Directorate do not share the same attitude to cooperation that is held by most representatives of the social partners in Sweden (Lundberg and Bruun 2005). This is a policy that, to my mind, conflicts with the fundamental rights recognised within the EU and contradicts a strengthened EU social dimension desired by the citizens. It also obstructs an effective fight against economic and financial crises as worker representatives on a company board have an interest in long-term perspectives, which is beneficial to the work of the board. The fact that a company board which includes worker representatives can reach unanimous decisions concerning important issues attests to stability and a long-term perspective. A worker representative often has unique insight into the company workings which is a great asset to the board. These are insights that should be of utmost importance to companies owned by foreign interests which ought to embrace the employee influence that prevails in the country of operation.

3.2 The main content of the Swedish legislation

In private companies in Sweden that have at least twenty five employees (regardless of the form of employment or working time), the employees are entitled to appoint two representatives to the company board and one deputy for each representative. This is the rule applying to companies up to an average of 999 employees per financial year. In companies that conduct business in different sectors and in the most recent financial year have employed an average of at least 1,000 employees in Sweden, the employees are entitled to three representatives on the company board and three deputies. However, the number of employee representatives may not exceed the number of other company board members.[7] This legislation applies to those businesses that are limited liability companies, cooperative associations, banks and insurance companies. It does not apply to trading partnerships, limited partnership companies

7. When the number of votes are equal, the chairperson has a casting vote.

or foundations. Exemptions from the rules may in some cases be given by the Tribunal for Employee Representation on Boards of Directors.

The representatives are appointed by the workers' organisation that has a *collective agreement* with the employer.[8] It should be noted that a worker representative on a company board does not only represent their own trade union organisation and its members. The worker representative represents all employees at the company, also non-organised employees as well as those that are members of other trade union organisations (Lavén 1988). In principle, worker representatives should be appointed by the employees in the company, but this may not always be the case.[9] According to the preparatory works on the legislation, the legislature presumes that trade union organisations will take equality between women and men into consideration when they appoint representatives to company boards. This concern for equality arises as a result of the major imbalance between men and women in the boardroom both in the public sector and private industry.[10] In May 2011, TCO stated in response to an ETUC draft reaction to the European Commission Green Paper on Corporate Governance Framework that the EU should push for equal representation between men and women on company boards using an acceptable approach, as it is an urgent issue and basically concerns equal treatment and democracy.

The purpose of having worker representatives on company boards and social dialogue in the workplace is to achieve industrial democracy. Employees should gain insight into and knowledge of the basis for the company's actions on different issues and an understanding as to why the company takes certain decisions. Company management should gain from the perspectives employees bring to the activities of the board. As mentioned above, worker representatives often have an interest in the long-term effects of decisions and this, in itself, has a positive effect on the activities of the board. All members of a company board have the same rights, obligations and responsibilities. This principle of equality ensures that both the members appointed by the annual general meeting and the worker representatives have a duty to look after the interests of the company.

8. When the number of votes are equal, the chairperson has a casting vote.
9. Government bill 1987/88:10, p. 57.
10. Ibid., p. 58.

The Board Representation (Private sector employees) Act sets out certain detailed rules on the form and content of the activities of the board. This complements the Companies Act, which regulates the duties of the board in general terms. Under these provisions, worker representatives are to receive the available board documents in reasonable time and in an appropriate manner before the board takes its decision. The deputy of a worker representative also has the right to attend the board meeting even when the ordinary representative attends. One of the worker representatives also has the right to attend and participate in the deliberations of a working committee consisting of board members and officials of the company if the matter under discussion is to be decided later by the board. However, worker representatives have no right to attend and participate in decisions that concern collective agreements related to industrial action. That exclusion does not, however, prevent a worker representative from taking part in other board decisions that are, or may become, subject to negotiations on cooperation between the trade union and the company.

The Board Representation (Private sector employees) Act contains no specific rules of confidentiality in relation to worker representatives. Likewise, the Companies Act does not make any specific provision in that regard. In practice, confidentiality must be maintained by worker representatives to the same extent as other board members in relation to any facts whose disclosure could harm the company.[11]

The Board Representation Act requires employees and their trade union organisations to be made aware of the activities of the company, i.e. it presupposes a fairly open flow of information. The fact that a worker representative is also a trade union representative who is appointed by the trade union with an ultimate responsibility to the employees in the company gives the board function a distinctive feature. This is something that has been recognised by the legislature.[12] Worker representation on company boards will therefore lead to a shifting of the traditional boundaries concerning the scope of confidentiality. As far as it is necessary to fulfil the function of an employee board-level representative, confidentiality has to be limited. There are no explicit legislative rules

11. See the report by the Committee on Civil Law on the government bill concerning the Act on protection of company secrets; LU 1988/89:30, p. 30.
12. Government bill 1987/88:10, p. 66.

which establish that worker representatives have the right to share information with, for example, the local trade union committee. However, normally there should not be any obstacle to such a confidential flow of information. In this connection, it is important to observe that the information and consultation rules in the Act on Co-determination (MBL) give trade union organisations far-reaching opportunities to scrutinise companies and that this right to information also applies to items of information that may be regarded as confidential. Individuals who have received some confidential information in their capacity as an employee representative may also share this information with another committee member in that organisation without breaching any confidences. In turn, the principle of confidentiality also applies to the other committee member. In this context, to treat a worker representative on the board of a company differently from a trade union representative in a consultation for the purposes of the MBL does not seem very practical and, as a rule, ought not to be legally permitted.

There are good reasons why worker representatives on company boards should be able to discuss issues that are dealt with on the board with other trade union representatives – especially within the local trade union committee but also, as in the Danish case, with the leadership at federation level and, if necessary, to get support and help from this level on difficult legal and economic issues. It is not reasonable that, as regards the opportunity to discuss a matter with those giving the mandate and to obtain support and help from experts, there should be restrictions on board members appointed by trade unions different to those which apply to other board members appointed by or representing the company's owners. Specifically and more candidly, the question is whether the developments in EU law have led, or will lead in the future, to a shift of that kind.[13]

13. Following agreement on the Treaty of Lisbon, the EU Charter of Fundamental Rights has become legally binding, which includes the right to information and consultation, and the EU has adopted secondary legislation on board-level worker participation in the European company (SE). The EU will become a party to the European Convention on Human Rights and Fundamental Freedoms (ECHR). The protection for freedom of speech established in Article 10 ECHR has been strengthened by new rulings of the European Court of Human Rights (case no 39293/98 *Fuentes Bobo v Spain*, 29 February 2000; case no 14277/04 *Guja v Moldavia*, 12 February 2008; and case no 28274/08 *Heinisch v Germany*, 21 July 2011).

A prosecution in Sweden similar to the one that took place in Denmark in *Grøngaard and Bang* would naturally have to be assessed in light of Sweden's distinctive national legal character including the common practice that exists in this area. The Swedish Government has expressed concern that a new or revised insider directive would reduce the scope of national law in that regard. Consequently, it is seeking to prevent any wording that would prohibit worker representatives on company boards from sharing information with other trade union representatives as permitted by the ECJ in *Grøngaard and Bang*.

4. Conclusions

In Sweden, a worker representative on a company board normally has the right to consult with other trade union representatives in his own trade union committee (local union or department) or corresponding centrally-placed trade union representatives prior to decisions being taken at the board meeting. The fact that this right normally exists points in favour of an interpretation of legislation and/or national practice which allows for the continued exercise of such right. Further support for that view can be found in the ECJ judgment in *Grøngaard and Bang* and the final ruling of the Danish Supreme Court neither of which reduces the scope of that right. It is important for employees, companies and society as a whole that this scope is not limited by a revised future directive.

Following the ECJ ruling in *Grøngaard and Bang* and the subsequent decision of the Danish Supreme Court it is now clear that, notwithstanding the main rule of the Insider Directive, it is not incompatible with the current directive for a worker representative on a company board in accordance with national practice, as is the case in Denmark, to seek advice from his trade union leadership and/or with the group that has appointed him and, as a consequence, to share sensitive information with them. The same conclusion could be drawn for Sweden.

It is fundamental that in the area of worker participation future EU proposals on corporate governance and securities law do not allow national rules and practices concerning company board representation (or other aspects of labour law) that are more far-reaching than the EU standards to be neglected. At the same time, good cross-border rules on worker participation are needed. Following that, as a first step, there needs to be a general right to basic board representation for all employees in Europe,