

## RECOMMENDATIONS ON GOOD GOVERNANCE OF FOUNDATIONS

### Introduction

On 22 December 2014, the Committee for Good Governance of Foundations (the "Committee") issued 16 recommendations on good governance of foundations (the "Recommendations"). It is the first time for such recommendations for foundations to be published.

All commercial foundations have to deal with the Recommendations through the "comply or explain" principle, as it is known from the Recommendations on Corporate Governance. A foundation's board of directors may choose not to follow one or more of the Recommendations, but the reason therefore and the manner in which the foundation has decided to organize itself must be specified.

The first time that the board of directors must address the Recommendations is in connection with the 2015 annual report.

The Recommendations include topics within the following areas:

- openness and communication;
- the board of directors' duties and responsibilities;
- the board of directors' composition and organization;
- the board of directors' independence;
- appointment period for board members;
- evaluation of the management's work; and
- remuneration of the management.

The Recommendations and their implications are reviewed briefly below.

### Openness and Communication

In order to ensure transparency and openness and to give reliable and accurate information in relation to the foundation's stakeholders, it is recommended that the board of directors adopts guidelines for external communications. In this context the Recommendations suggest that the foundation establish who may publicly speak on behalf of the foundation.

It may be appropriate to include a general description of these guidelines in the board of directors'

rules of procedure.

## **The Board of Directors' Duties and Responsibilities**

It is recommended that the board of directors decides on the foundation's overall strategy and share-out policy based on the regulations at least once a year.

In the case of board meetings, it is recommended that they are organized, convened and chaired by the chairman of the board. The commentary to the Recommendations suggests that it may be expedient to introduce a meeting schedule for the year, including the agenda for each meeting, into the board of directors' rules of procedure.

If the chairman exceptionally performs specific operational tasks, it is recommended that this should be an extension of a board resolution that ensures that the board retains the independent overall management and control function.

## **The Board of Directors' Composition and Organization**

If the foundation's regulations do not provide requirements to the composition of the board of directors', the board must define which competences the foundation needs. It is therefore recommended that the board regularly evaluates and determines which skills the board must hold to best perform the duties of the board.

In order to obtain appropriate and optimal appointment of board members, it is recommended that the board must ensure a structured, thorough and transparent process for selection and nomination of candidates for the board. The Recommendations recognize, however, that there may be provisions in the regulations on the appointing right, and the Recommendations clearly state that such right must (continuously) be respected.

According to the commentary to the Recommendations, it may be expedient for the board of directors to establish a nomination committee whose task is to come up with proposals for candidates.

It is recommended that the board members are appointed based on their personal characteristics and skills, taking into account the board's joint competences as well as the need for renewal and continuity of the board.

In this connection, it is recommended that the annual management report sets out the board's composition and diversity and provides some information about each member, such as name, occupation, age, gender, election period, special skills, other directorships, appointment, and independence. If the foundation has a website, it is recommended that this information is also made available there.

It is also recommended that individuals who are members of the board of directors or the management of one of the foundation's subsidiaries only represent a minority of the foundation's board of directors.

This does not apply if there is a wholly owned holding company, and this is based on the fact that such company typically has no independent operation.

## **The Board of Directors' Independence**

It is recommended that an appropriate share of the board members is independent. What is meant by "appropriate share" will depend on the size of the board of directors:

- If the board of directors consists of up to four members, no less than one member must be independent.
- If the board of directors consists of five to eight members, no less than two members must be independent.
- If the board of directors consists of nine to eleven members, no less than three members must be independent.

It is the board of directors' responsibility to individually evaluate the members' actual independence.

When determining whether the individual board member is independent, emphasis should be on "the member's ability and willingness to neutrally and impartially protect the object of the foundation."

The Recommendations contain a non-exhaustive list of factors that lead to a member of the board not being considered independent. It is also worth mentioning that any membership of the board which lasts for more than 12 years inherently implies that the member of the board cannot be considered independent.

## **Appointment Period for Board Members**

It is recommended that the board members are appointed for a period of two to four years. Re-election may take place. This period has been established to ensure a balance between in part the consideration of dynamics and innovation and in part of the consideration for the members having the necessary time to understand the foundation's conditions. This is compliant with the Recommendations' other terms concerning the relationship between continuity and renewal.

In addition, it is recommended that the board members set an age limit, from which members of the founding family may, however, be exempt.

Any member of the board of directors may resign from the board at any time. It is solely the commercial foundations supervisory authority that can dismiss a board member during a term of appointment.

## **Evaluation of the Management's Work**

To support the board of directors' compliance with the Recommendations, it is recommended that the board annually evaluates i) the board members' contributions and achievements as well as ii) any

management's and/or administrator's work and achievements.

It is recommended that the board of directors establish a procedure for the annual evaluation which may be included profitably in the board of directors' rules of procedure.

## **Remuneration of the Management**

Because commercial foundations do not have owners and thus not hold general meetings, it is important that the remuneration of a foundation's management is transparent and open.

In order to support an appropriate long-term development of the foundation, it is recommended that the management receives a fixed remuneration and that the possibility of bonus is not dependent on financial results.

It is not contrary to the Recommendations that the board of directors' remuneration is paid in the form of shares in any listed subsidiaries.

The board of directors has the possibility to enter into pension agreements with the foundation's management, if there is a management, but it is not possible to allocate pension to the board members seeing as the relationship between the board members and the foundation is not an employment relationship.

The Recommendations state that the foundation shall incorporate the foundation's remuneration information in the annual results so that the annual results provide information on i) the management's total remuneration and ii) each member of the management's fees from the foundation and from other group companies.

## **Sanction**

The commercial foundations supervisory authority may order the board of directors to explain how the board approaches the Recommendations if the foundation:

- does not respond to one or more of the Recommendations;
- does not explain and motivate any deviation from the Recommendations; or
- does not motivate any deviation from the Recommendations which appears unfounded or meaningless.

## **Our Opinion**

With the Recommendations the foundations boards have been given an important tool for their work and the groundwork has been created for strengthening communication with the stakeholders of the foundations.

It is important to emphasize that when a foundation fails to follow one or more of the Recommendations, this is not a reflection of non-compliance with rules in this area as long as the derogation is appropriately justified. The free choice between pursuing a given recommendation or to explain a deviation is thus an integrated part of the Recommendations. It is expected, however, that time eventually will form a 'best practice' for which Recommendations should be enforced consistently as well as for how derogations should be justified.

In any case, the foundations' boards of directors have significant work ahead of them.

If you have any questions or would like additional information regarding the above, please contact partner Dan Moalem (dmo@mwblaw.dk), senior associate Henning Hedegaard Thomsen (hht@mwblaw.dk) or junior associate Rasmus Albrechtsen (ral@mwblaw.dk).

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