

Navigating and applying the corporate governance toolbox

Some of Sweden's largest asset owners discuss corporate governance approaches and challenges, with some additional perspectives from the academic and litigation side.

By: **Niklas Tell** Photo: **Christer Salling**



MAYA SAXENA, DANIEL KRISTIANSSON, PETER LUNDKVIST

In order to set the scene for the discussion, which was held in Stockholm in February, the Swedish asset owners around the table started out by sharing how they view and define corporate governance and active ownership in their daily operations.

DANIEL KRISTIANSSON: "We call ourselves engaged owners and in practice that means voting at AGMs and having dialogues with the companies we own. If you take a wider view on corporate governance, I would say it's about ensuring a healthy governance structure that fosters a long-term perspective and transparency. What's interesting from a Swedish context is the Swedish code of corporate governance, which we try to enforce in the companies where we are owners."

MAYA SAXENA: "How would you describe this code of corporate governance?"

DANIEL KRISTIANSSON: "It's a code that regulates the roles of different participants in the market for listed companies. It lays out the tasks of shareholders, the board and the management of the company against the backdrop of the Swedish companies act. It simply outlines what is considered best practice from a corporate governance perspective. One important aspect here is the concept of shareholder-led nomination committees where we as shareholders get to appoint the board of directors, as opposed to being a committee within the board."

EMMA SJÖSTRÖM: "But a company doesn't have to have a nomination committee."

DANIEL KRISTIANSSON: "According to the code, you should as it's considered best practice, but there are companies with very dominant owners that don't."

PETER LUNDKVIST: "For us, active ownership is about steering companies towards sustainable value creation. We focus on companies where we have the greatest opportunity to have an impact. In companies where we have a majority stake, such as unlisted Swedish real estate and infrastructure companies, we influence via board representation. In Swedish listed companies, active engagement is carried out in-house via company dialogues, voting at AGMs and via representation on nomination committees. In foreign listed companies, we often work together with other asset owners, mainly through the AP Funds' Council on Ethics. Also, we participate in initiatives together with other institutional investors."

JOHANNES WINGBORG: "We're very similar to what's been said already. We also sit on a number of nomination committees and I personally sit in 15 nomination committees for listed real estate companies. We have over 2000 holdings all over the world but there are only some 20 to 25 companies where we have significant stakes. With regards to nomination committees, it's time consuming as it involves interviews with each board member and the CEO. Especially in cases of recruitment processes with candidate selection. From time to time, the nomination committee members come to different conclusions and it's a challenge to handle. A key success factor in nomination committee work is to know the company really well and I think it's important to get opinions from others than the company and my own organisation. Equity analysts from equity research firms who follow the company have often valuable input. Nomination committees is a service that the largest shareholders do on behalf of all shareholders. Even if no changes are proposed by the nomination committee, it's a quality check of the board work, the team and the individual board members."

NIKLAS TELL: YOU HAVE ALL TALKED ABOUT ENGAGEMENT AND BEING ACTIVE OWNERS. HOW MUCH OF THE ENGAGEMENT IS WITH THE TARGET COMPANY AND HOW MUCH OF THE ENGAGEMENT IS WITH OTHER LARGE INVESTORS?

PETER LUNDKVIST: "In the local market, there's a lot of collaboration because we're all fairly similar, even if we might be governed by different regulatory frameworks. We share information but at the end of the day, we must of course act in the way we think is best for an individual company and we might disagree with other investors. We of course also work and have dialogues with investors in other markets."

NIKLAS TELL: ARE THESE COLLABORATIONS STRUCTURED OR IS IT MORE OF A CASE OF WHERE YOU KNOW INDIVIDUALS AT DIFFERENT ASSET OWNER ORGANISATIONS?

PETER LUNDKVIST: "It's both. In Sweden, we have something called 'Institutionella Ägares Förening' (Swedish Institutional Investors Association), which gathers the 16 largest institutional asset owners where we meet and share information. Globally, at least for us, it's a more informal cooperation."

DANIEL KRISTIANSSON: "We shouldn't only talk about nomination committees, but I think that's one great example where we as institutional owners can work together in a very formalised way and develop very deep relationships with each other."

NIKLAS TELL: AS YOU'RE TRYING TO GAIN ACCESS, HOLD DIALOGUES AND INFLUENCE COMPANIES, HOW IMPORTANT IS YOUR "BRAND" AND IS THAT SOMETHING THAT YOU ARE ACTIVELY WORKING ON?

PETER LUNDKVIST: "For us, the brand is everything. We have such small ownership stakes in global companies that they don't really need to listen to our opinions. But if you call from the Swedish AP Funds, companies will at least try to listen because they know that we have something to say. It's not because we're the best or the biggest but because we're Swedish investors with sensible views."

NIKLAS TELL: EMMA, YOU HAVE LOOKED AT THIS IN A REPORT A COUPLE OF YEARS AGO. WHAT WORKS AND WHAT DOESN'T WHEN IT COMES TO ACTIVE OWNERSHIP AND ENGAGEMENT?

EMMA SJÖSTRÖM: "I wrote this report called 'Active ownership - What works' where I looked at other people's research and the one thing that stood out was that you don't need to have a large stake in the company to

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be successful. Building your business case is the number one factor that comes through in many examples and of course general legitimacy, which is what you pointed to Peter. Also, being a big player in the market will help, even if you don't own a large stake in the individual company. Being well regarded will open the door and it also helps being a good speaking partner and if you can show that you understand the complexities of the company. I think for the AP funds, in Sweden you're helped by that institutional context you're in. That's also something to consider when you're creating coalitions – that you can compensate for what you don't have with somebody who has that local institutional context."

MAYA SAXENA: "I think that's also true when it comes to litigations in some sense, even if there are examples where you need to be a very large investor that has a large loss. But when it comes to corporate governance cases, it's very similar to what you're saying. One example is the Tesla compensation case where the first complaint was brought by an individual investor. What was said in the document was so meaningful it gained the support of the institutional community. So with respect to Delaware litigation, it's very content based and it doesn't always have to come from an institution."

NIKLAS TELL: WE'VE BEEN TALKING ABOUT NOMINATIONS COMMITTEES, DIALOGUES AND TRYING TO INFLUENCE COMPANIES AT AGMS. WHEN WOULD YOU SAY THAT IT'S TIME TO CONCLUDE THAT TALK IS NOT ENOUGH AND THAT INVESTORS NEED TO TAKE ANOTHER ROUTE?

MAYA SAXENA: "I think if you're talking about a toolbox, we would probably be the hammer in your toolbox. Also, I did read your report, Emma, and noticed that you mentioned that there wasn't a lot of data on the impact of litigation. I think that has changed considerably since the time you wrote the report. I would say for virtually every area of ESG, there's now a pretty strong amount of case law and precedent. Any type of situation where the board has breached their fiduciary duties, that's one component of the cases. Another example is where the board lack oversight, which is a little bit harder to prove but there are many examples of it. I think one of the biggest areas has been safety-related and not least the Boeing case that was brought by the New York Common Retirement System. Here, the board failed to exercise appropriate oversight over one of the most important components of their operations, which is safety. The result of that case was a separation of the CEO role with the chairman of the board role and also that three of the board members have to have expertise in aerospace engineering and safety compliance. Then there are other examples as well with more traditional corporate situations, such as the Wells Fargo cross selling scandal a few years. So there are a lot of measures that you can take to get involved. As investors, you need to decide if the issue is a priority and if your holding in the company is enough of a priority to get involved. Litigation can simply

be a valuable tool for affecting specific changes in the way a company is run."

NIKLAS TELL: ARE YOU ACTIVELY USING THE HAMMER IN THE TOOLBOX IN YOUR WORK?

PETER LUNDKVIST: "Yes, we are. We have collaborations with legal firms and we ensure that we get our share in class actions if there's a fraud. But we're not going to be the lead plaintiff. As an investor, you should like the company you're invested in and if we don't, we would rather sell the company and then it's hard to lead a process against it."

MAYA SAXENA: "There are some differences between different cases in terms of whether or not you need to own the company stock. The corporate governance cases that I've talked about are called shareholder derivative cases and in those, you do have to own the stock in order to have a legal standing. You have to have purchased the stock and held it during a relevant period, which is the time when the wrongdoing occurred. However, for that second bucket of cases that you're talking about, which has the monetary component, you could sell that stock anytime."

EMMA SJÖSTRÖM: "I assume it's also a question of resources."

PETER LUNDKVIST: "Yes. The fund has around 70 employees, a handful of whom work in legal matters. They're busy managing our investments and if we were to be involved in legal proceedings, we would likely have to seek external help. Even with external help, participation in this type of processes would be very time-consuming."

MAYA SAXENA: "That has changed a lot though, especially after Covid when we've shifted to a remote model. It has become a lot less labour intensive than it was 10 or 15 years ago. I also think the case law has evolved in a way that really takes the emphasis away from the investor that's involved as a lead plaintiff."

PETER LUNDKVIST: "Also, a good thing is that at least the firms we collaborate with are compensated on a success fee, so it costs us nothing to participate in the processes."

MAYA SAXENA: "Yes, that's the way it always works. Our recovery comes out of the settlement and the size of that is decided by the judge."

DANIEL KRISTIANSSON: "I'm not involved personally in these cases but we see it as our fiduciary duty not to leave money on the table so we have participated in some litigations. We're actually leading the class action against First Republic Bank in order to recover as much of the capital as possible."

MAYA SAXENA: "We see that when an institution such as yourselves is involved, the recoveries are significantly higher. The way I phrase it to my clients is that you absolutely don't



EMMA SJÖSTRÖM, JOHANNES WINGBORG

have to get involved in every case. What you have to do is look at each situation and determine whether your involvement in that particular case can enhance the recovery for yourself and for the class members."

NIKLAS TELL: AS INVESTORS, DO YOU EVER HESITATE? CAN THERE BE A HEADLINE RISK TO BE INVOLVED IN LEGAL ACTIONS?

PETER LUNDKVIST: "The AP Funds are government agencies, so there could of course be problematic with headlines in the international press that Sweden is suing a foreign company. Representatives from the government and parliament may call and ask what we're doing, so it could be a reputational risk. However, I think people in general understand that this is part of the business. We don't have this type of lawsuits in Sweden but if we had, I think it would be very difficult for us to sue a Swedish company."

DANIEL KRISTIANSSON: "I think that's a very interesting question. The question is what's best for the company and what's in the best interest of our beneficiaries."

JOHANNES WINGBORG: "We want to create value for our unit holders and that's the goal of all of our actions – from these types of processes or whether it's voting at the AGM, sitting on the nomination committee or having a dialogue with companies."

MAYA SAXENA: "It's an interesting question because when I first started in the business, there was a stigma on getting involved in these types of cases. You did have public pension funds in the US getting involved, but you still didn't have private institutions and you didn't have a lot of foreign investors. That has definitely changed over the years and now you have large pension funds getting involved in strong cases. I think investors now understand that their

primary duty is not to the company, but it's to their plan participants or their shareholders. If they truly lost a lot of money during the specified time period, I think they feel a duty to try and get back as much as possible of that."

NIKLAS TELL: IF SOME INVESTORS ARE STILL A BIT HESITANT TO TAKE LEGAL ACTION SUCH AS THESE, ARE THERE ANY OTHER TOOLS IN THE LEGAL TOOLBOX?

MAYA SAXENA: "Yes, there are a lot of other tools we can use short of filing a public complaint. One of the most valuable tools – and perhaps most underutilised – is that what we call a 2/20. If you own the company's stock, you have the right in Delaware to demand an inspection of the books and records if you have a strong suspicion of certain wrongdoings or violations, for example of ESG principles. Then you send a demand letter to the board of directors and request documents for this period of time. We then review the documents and we try to ascertain whether there has been any wrongdoing. In many situations, we've resolved the shareholders concerns just through this process, so it hasn't even gone to litigation. This is a process that I don't think a lot of people know about but it's a very useful tool in trying to affect corporate change without being all over the news."

NIKLAS TELL: YOU MENTIONED ESG HERE, WHICH I GUESS ARE THREE PROBLEMATIC LETTERS IN THE US RIGHT NOW. HOW HAS THAT IMPACTED WHAT YOU DO?

MAYA SAXENA: "You're absolutely correct that you can't use those three letters anymore. It's just very contentious and divisive in the US right now and is very politically driven. Even before the Trump presidency a few years back, we had this issue around Blackrock. We represent clients on both sides of the political spectrum and one day we saw a letter written by 17 attorneys generals from the Republican states

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– Peter Lundkvist, AP3

basically saying they’re going to divest in all funds that have anything to do with ESG. The next day you had the letter from the Democratic attorney general saying the opposite. So you can’t really cast litigation as ESG-based anymore and you have to look for a creative way to bring this case. For example, if a company is talking about sustainability and its green practises and if that’s a material reason why investors invest in the stock and they’ve lied about it, then your case is they lied about these specific statements. Not that this is an ESG case. It’s tricky these days and it’s still something we’re trying to navigate through, but I do feel the judiciary is one of our few remaining branches of sanity.”

NIKLAS TELL: BEING ACTIVE OWNERS AND ENGAGING IN DIALOGUES WITH COMPANIES, WOULD YOU SAY THAT THE MAJORITY OF CASES FOCUS ON RISK MITIGATION OR IS THE FOCUS MORE ON PERFORMANCE ENHANCING MEASURES?

PETER LUNDKVIST: “I think it’s both. A couple of years ago, it was more about monitoring risks but today I think it’s equally about enhancing returns in the short, medium and long term.”

DANIEL KRISTIANSSON: “I mean, sustainability is essential to long-term value creation and I don’t think it really matters what we call it. It’s still important for our investments that we have sustainable value chains and that we’re not so dependent on coal for example.”

PETER LUNDKVIST: “I think it’s easier to initiate a discussion if you say that you would like to talk about long-term sustainable returns rather than that you want to talk specifically about ESG.”

NIKLAS TELL: EMMA, I GUESS THAT’S WHAT YOU MENTIONED EARLIER THAT IT HELPS IF YOU AS AN INVESTOR SHOW THAT YOU RECOGNISE THE COMPLEXITY OF THESE ISSUES RATHER THAN PAINTING THINGS IN BLACK AND WHITE?

EMMA SJÖSTRÖM: “Yes, I think so. I actually wanted to ask the investors here if there’s always a convergence between long-term returns and doing the right thing. Because now that we can’t use ESG as a catch-all label, I guess you need to further explain the business value and benefits to long-term returns. Could it be that when you call it ESG, you have more room to do ‘the right thing’ without having to specify the business case for it? Because in the short term, you can make money for not doing the right thing.”

PETER LUNDKVIST: “You can always make money in the short term by cheating – but that will catch up with you longer term. The AP Funds operate under something called generational neutrality. This means that the management of pension funds must not benefit one generation at the expense of another – all generations must be treated equally. That can be a challenge because when we talk about sustainability, there are often big up-front costs and long-term benefits.”

MAYA SAXENA: “I see that with clients in the US as well. We have clients in some of the more liberal states that are trying to achieve that balance between investments in the fossil industry and at the same time investing in companies that have more long-term benefits for society. They’re actually being challenged in court now for failing to do what this current administration believe, which is to get the immediate returns for the plan participants. Many of them are actually litigated against right now for remaining in ESG-based funds.”

JOHANNES WINGBORG: “I would like to come back to AGMs because I think that’s a good forum to highlight questions that are important to you as an investor. Rather than having discussions in closed rooms, you ask the question openly at the AGM. 2023 was a really bad year with a lot of deaths in the construction industry. As an investor in many listed real estate companies, I wanted to ensure that they are on top of it because it’s a large risk that we see in general in real estate companies, especially the ones with a large portfolio of building rights.”

NIKLAS TELL: HOW DO YOU BALANCE BEING VOCAL AT AN AGM VERSUS HAVING CLOSED ROOM DISCUSSIONS?

JOHANNES WINGBORG: “I think it depends on the situation and the company. If we are in the nomination committee, we have the opportunity to ask individual board members if the subject has been on the agenda in the board room and if there is enough experience and competence in the board in this area. The AGM is a formal and open forum where we sometimes ask questions but if you want results rather than attention, it’s sometimes better to discuss it in closed rooms. Also, if shareholders use the AGM as the only forum to ask questions, it will be a very long AGM.”

EMMA SJÖSTRÖM: “I remember a case some 20 years ago where the Amnesty business group had been working towards companies and bought one share in each company on the Stockholm Stock Exchange that didn’t have a human rights policy. Then they went to the AGMs and asked a question about that. However, they had prepared the companies beforehand so they could make a statement. The point was not to catch them off guard but rather to move the issue forward.”

PETER LUNDKVIST: “I would like to highlight that you will probably never see AP3 in the media talking about a specific company. We talk with companies and not about them and that’s very important. However, when we talk with companies, we will tell them that we have an escalation process if things are not developing in the direction that we see is beneficial.”

NIKLAS TELL: WHAT DOES THE ESCALATION PROCESS LOOK LIKE?

PETER LUNDKVIST: “It starts with a dialogue with the company and if nothing happens, we will talk with other investors to bring more capital behind our demands. The next step is that we will try to change things, for example by changing the composition of the board of directors. The last and final step is to divest the company.”

DANIEL KRISTIANSSON: “I just would like to point out that there’s also a lot of dialogue in advance of the AGMs and that’s something that takes up a lot of my time. We do receive proposals that we’re expected to comment on. It could be an updated remuneration policy and then we want to ensure that it’s clear and transparent enough. One recent example was a company asking for an authorisation to do a capital increase. We thought that was unclearly written and then the company came back with clarifications also to the broader investor base. I think these kinds of dialogues is an indication of a well-functioning market and it’s absolutely easier to get more information ahead of the AGM in Sweden compared to some other markets.”

“It seems to me that Swedish companies are more open to engagement than American companies”

– Maya Saxena, Saxena White

MAYA SAXENA: “From what you are all saying, it seems to me that Swedish companies are more open to engagement than American companies. That’s why litigation is often utilised in the US because we don’t really see this kind of engagement, particularly if you’re not one of the top five shareholders.”

PETER LUNDKVIST: “I personally have contact information to most CEOs and board members at Swedish companies and I do have opportunities for direct contact with them. That’s simply not possible in most foreign companies where the legal department act as gatekeepers and try to protect the board of directors.”

MAYA SAXENA: “It’s ironic because if they were open to that level of engagement, we would probably have less litigation.”

NIKLAS TELL: HOW CAN YOU ACT AS AN ACTIVE OWNER IF YOU HAVE BOTH INTERNALLY AND EXTERNALLY MANAGED ASSETS?

PETER LUNDKVIST: “It can be a problem if external managers are acting in a different way to what you think is right. We can of course try to influence them and if that’s not possible, we always have the opportunity to end the contract. However, we currently only have a small portion of our capital under external management, so for us it is not a major problem.”

NIKLAS TELL: WOULD YOU SAY THAT THIS HAS BEEN AN IMPORTANT REASON FOR THE INSOURCING TREND THAT WE’VE BEEN SEEING OVER THE YEARS?

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PETER LUNDKVIST: “It’s one of the reasons. However, I would say that the main reason is that we think we’re doing a better job managing the money in-house and it’s also more cost-effective, at least if you have an actively-managed portfolio.”

NIKLAS TELL: JOHANNES, YOU MENTIONED A CHALLENGE RELATED TO EXTERNAL MANAGERS OVER LUNCH.

JOHANNES WINGBORG: “Before we brought all our assets under internal management, we had an example where two different funds had investments in the same company. That company came to me to get my input on their dividend policy and I reached out to our two external managers. One said that they shouldn’t give any dividend at all but rather re-invest the money. The other manager wanted the dividend to increase. Things like these are easier to coordinate when you have everything in-house.”

MAYA SAXENA: “We can see this in litigation cases



sometimes where most of our public fund clients have externally-managed assets. In the Tesla compensation case, investors could find out that their manager actually voted in favour of the deal that they are now litigating.”

NIKLAS TELL: DANIEL, HAVE YOU BEEN INVOLVED IN LITIGATION-TYPE ACTIONS OUTSIDE THE US?

DANIEL KRISTIANSSON: “Not me personally, and before my time, Alecta has had very few cases over the last 10 years. It’s certainly more common in the US.”

NIKLAS TELL: IF WE LOOK AHEAD TO THE AGM SEASON, WHAT DO YOU SEE AS SOME OF THE KEY THEMES FROM A GOVERNANCE POINT OF VIEW?

JOHANNES WINGBORG: “Incentive programmes are always top of mind and here we would like to see some form of ESG component. If a company doesn’t have that, we would like to see argumentation for why that’s the case. Another topic that I think is important is the fact that many AGMs are scheduled for the same day and sometimes even at the same time that day. That makes it difficult for institutional investors. Not to exercise our right to vote because we can send a postal vote before the AGM or we can send someone else to the AGMs. But I think it’s important for key people from the institutional investor side to be present as it’s a good place as a shareholder to ask questions, give feedback to management and listen to what other shareholders think and what questions they ask.”

DANIEL KRISTIANSSON: “I think Johannes summarised this very well. A trend that we’ve seen over the last couple of years is the growth of international asset managers on the Swedish exchange with varying degrees of active and passive approaches. Our Swedish governance model is very much based on engaged and active owners, so I think we have an important task of explaining how the Swedish model works.”

PETER LUNDKVIST: “I very much agree with what’s been said already. I could just add that we’re coming from a very good 2024, so it’s going to be good year for dividends from Swedish companies. At the same time, we have companies, for instance in real estate and construction, that are not as well-capitalised. Another concern would be the development that we see in the US where the current administration is clearly not interested at all in anything

related to sustainability and this is of course going to be a problem.”

PETER LUNDKVIST: “We need to see companies putting up a fight on these issues and as investors, we need to hold management and the board of directors accountable for decisions they make. Also, it’s very important to keep an eye on Swedish companies to ensure that they continue to work with sustainability. We’ve already seen large US asset managers leaving the Net Zero Alliance and the same with US investment banks. Hopefully, this is just a temporary setback.”

NIKLAS TELL: WHAT TRENDS ARE YOU SEEING MAYA?

MAYA SAXENA: “When I saw your question about trends in corporate governance, I called a colleague of mine who focus on these issues and while he’s a bit dramatic, he said that what we’re currently seeing is a battle for the soul of America. One big concern that we have relates to Delaware and what we call ‘controlled companies’. Companies in Delaware were traditionally blue-chip companies that had a very diverse ownership structure and not these very strong colourful tech companies with private equity and venture capital backing that you see now. Historically, the Delaware courts have always tried to balance the interests of founders and controllers of companies with the rights of minority shareholders. What we’ve seen recently is that when companies like Meta, Dropbox and Tesla are saying that they’re leaving Delaware, the Governor of Delaware has come out and said ‘please don’t leave – we’ll take care of you’. We’re seeing the erosion of minority shareholder rights and that’s troubling.”

NIKLAS TELL: EMMA, IT HAS BEEN 10 YEARS SINCE YOU PUBLISHED YOUR REPORT ON ACTIVE OWNERSHIP. IF YOU WERE TO DO AN UPDATED VERSION, WHAT WOULD BE SOME OF THE KEY THINGS YOU WOULD BE LOOKING AT?

EMMA SJÖSTRÖM: “I think I would tie it closer to corporate governance. In the report that I wrote, I explicitly did not look at governance but focused on the ‘E’ and the ‘S’ as if you could do that without looking at the ‘G’. Today, I think it’s more of an overall corporate governance discussion. I have also recently applied for research funds to look into female board chairs because we currently only have some 9 per cent female chairs at the company boards – both in Sweden and if you look at companies in the MSCI ACWI.” ●