

## **The Swedish Securities Council's operations 2009**

*In 2009, the Swedish Securities Council's operations were dominated by queries related to share issues. In many cases they involved exemptions from mandatory bid rules in connection with share subscriptions or issue guarantees. Two thirds of the cases were delegated by the Swedish Financial Supervisory Authority.*

### **The Council's responsibilities, rules of procedure, etc.**

Through its statements, advice and information, the Swedish Securities Council promotes good practices in the Swedish stock market. The Council is managed by a not-for-profit association – the Association for Good Practices in the Securities Market – with ten members: the Swedish Association of Listed Companies, FAR SRS (the institute for the accountancy profession in Sweden), the Swedish Association of Listed Companies, the Institutional Owners Association for Regulatory Issues in the Stock Market, NASDAQ OMX Stockholm Exchange AB, the Stockholm Chamber of Commerce, the Swedish Bankers' Association, the Swedish Association of Stockbrokers, the Confederation of Swedish Enterprise and the Swedish Insurance Federation.

Any action by a Swedish limited company which has issued shares that are quoted on a regulated market or by a shareholder of such a company may be subject to the Council's evaluation if the action relates to or may be of importance to a share in such a company. The same applies to foreign limited companies which have issued shares quoted on a regulated market in Sweden, to the extent such actions must comply with Swedish rules.

To the extent it deems appropriate, the Council can also release statements on issues concerning good practices in the stock market that affect companies whose shares are traded on a trading platform in Sweden.

The Council can comment on issues on its own initiative or after receiving a petition. The Council determines itself whether a petition warrants that the issue in question be brought up for evaluation. In doing so, the Council takes into account whether the issue is a matter of principle or of practical importance to the stock market. The Council also considers whether the issue is or can be expected to be treated in another rule. Most petitions are submitted by shareholders, companies or a marketplace.

The Council principally applies the Act on Public Takeover Offers on the Stock Market (2006:451) ("the Takeover Act") and other statutes, but also uses rules established through self-regulation, primarily the NASDAQ OMX Stockholm's and NGM's (identical) rules on public takeovers on the stock market. The Council also applies the Swedish Code of Corporate Governance to cases in the area. However, the Council may also comment on issues where there is no written rule to apply or self-regulations.

In its capacity as a regulatory agency and with the support of the Takeover Act and the Financial Instruments Trading Act (2007:375), the Financial Supervisory Authority has delegated to the Swedish Securities Council the authority to take certain decisions which, according to the Takeover Act, rest with the supervisory authority. This applies, for example, to decisions on the interpretation of, and exemption from, rules on mandatory bids. Moreover, NASDAQ OMX Stockholm and NGM have delegated to the Council the authority to interpret and evaluate questions regarding exemptions from their takeover rules.

The Council is composed of a Chairman (Bo Svensson), a Vice Chairman (Marianne Lundius) and around 20 other members representing various sectors of the Swedish business community. The members are appointed by the Association for Good Practices in the Securities Market.

At least four and not more than eight members must be present to evaluate a case. The composition is determined according to the principles in the Council's by-laws and rules of procedure. An especially important case can be considered by a plenary session at the initiative of the Chairman.

The Chairman or the Executive Director may decide on behalf of the Council in urgent cases, where similar issues have already been considered or in cases of lesser importance.

The Council has a secretariat led by the Executive Director.

The Council's operations involving public takeover offers are largely modeled after the British Takeover Panel. The Council's secretariat in fact maintains continuous contact with the Panel. Contacts are also maintained with similar bodies in other countries, such as Germany and France. The secretariat also participates, together with the Financial Supervisory Authority, in the Committee of European Securities Regulators (CESR), a consultative body that addresses public takeovers. The Executive Director participates in the OECD's corporate governance work, where issues regarding public takeovers are frequently discussed by a global membership.

### **The Council's statements**

The Swedish Securities Council's operations were affected in several ways in 2009 by the financial crisis. The clearest manifestation was a lower number of cases – and thus fewer statements from the Council – than in preceding years. The Council issued 30 statements during the year, most in response to petitions from shareholders or their advisers. Two statements were issued after a petition from NASDAQ OMX Stockholm (2009:12 and 13) and one statement after a petition from NGM (2009:11).

The Council issued 21 statements delegated by the Financial Supervisory Authority, or two thirds of all its statements during the year, twice as many as in 2008.

Of the 30 cases reviewed during the year, slightly over half, 17, were considered by committee, the same share as the previous year. The remaining cases were considered by the Chairman.

In sharp contrast to the trend in recent years, the Council had only a few cases in 2009 concerning voluntary public takeover offers, clearly reflecting the low level of takeover activity in the stock market. Instead, questions concerning new issues – in particular, exemptions from mandatory bids in new issues – dominated during the year.

One of the cases involving securities issues unrelated to mandatory bids concerned the applicability of a specific condition (2009:13). The majority of the cases related to exemptions from mandatory bids, however. In many cases, they dealt with exemptions in order to subscribe for shares with preferential rights, but in several cases also with exemptions in order to guarantee the issue.

With regard to the ability to subscribe for shares with preferential rights, the Council stated in case 2009:05 that every shareholder normally must be able to subscribe for new shares with preferential rights without risking a mandatory bid if the mandatory bid limit is exceeded because other shareholders have not exercised their preferential rights. The Council did not specify any special conditions.

The Council has issued considerably stricter requirements to grant exemptions to a shareholder that guarantees a preferential issue and risks exceeding the mandatory bid limit by fulfilling the guarantee. In case 2009:26, the Council stressed that it took into consideration that such a guarantee commitment on one owner's part was designed in such a way that the guarantor, with its support, could only subscribe for shares that are left over after all shareholders, including the guarantor, have had the opportunity to

subscribe for shares with primary or subsidiary preferential rights and after all shareholders, excluding the guarantor, and the public have had the opportunity to subscribe for the remaining shares without preferential rights. Moreover, the Council reaffirmed the established condition that shareholders should be informed prior to the general meeting of the maximum capital and votes that the guarantor could obtain by subscribing for shares with preferential rights and fulfilling the guarantee commitment, and whether the issue decision is supported by shareholders representing at least two thirds of both the votes cast and the shares represented at the meeting. When tallying the votes, the shares held and represented at the meeting by the guarantor shall be ignored.

In an unreleased statement, the Council treated a case concerning an issue for non-cash consideration and an exemption from a mandatory bid. In this instance, the Council also cited as a prerequisite for an exemption the condition that the issue decision is supported by shareholders representing at least two thirds of both the votes cast and the shares represented at the meeting. In this case, shares held and represented at the meeting by those who subscribe for shares in the issue shall be ignored.

Of the 30 statements issued in 2009, 22 have been made public to date. As noted in previous annual reports, confidential statements usually concern deals that have been planned but not yet implemented. In certain cases, it is obvious that the takeover will not be completed as planned, since the Council ruled against the questioner in some critical respect.

The Council continued in 2009 to maintain short response times. In practically every case handled by the Chairman, the Council announced its decision within two days after a final petition was submitted, and in several cases as early as the same day. Even for cases evaluated by the Council, the response times were short and only in a few cases exceeded one week. Cases requiring longer consideration generally involved another party that was offered an opportunity to respond.

The Council's decision in cases delegated by the Financial Supervisory Authority can be appealed to the latter authority. This occurred in one case in 2009 and related to a decision on an exemption from a mandatory bid (2009:08). Before the appeal could be treated by the Financial Supervisory Authority, however, a mandatory bid was issued, thus making the appeal moot.

### **Consultations with the Swedish Securities Council**

The Swedish Securities Council's operations also consist of consultations where companies, shareholders' advisors and marketplaces contact the secretariat by telephone or e-mail. The number of consultations declined as well compared with preceding years. An increase was noted during the fall, however. Some of the consultations concerned issues that were later covered in formal statements by the Council, although many never led to a ruling by the Council. The rulings made by the secretariat in consultation are not binding for the Council. If the party that consulted the Council proceeds with a request to have its issue evaluated, each case is evaluated without preconditions. Therefore, details of consultations are not made public by the Council, and its decisions may not be publicly cited with reference to the Council or in other contexts.

### **The new year**

The Swedish Securities Council is slightly changing its composition in 2010. Some of the Council's members are stepping down at year-end, while new members are taking their place. This is a natural part of a continuous effort to ensure that the Council meets the requirements it faces in term of representativeness, expertise, etc. With its new composition, the Council is well-prepared for what should be an exciting year ahead.

The economic recovery we are now seeing, not least in the financial markets, is likely to mean more cases for the Council in 2010 and that it will again receive more questions related to public takeovers. It is also worth mentioning that the Industry and Stock Exchange Committee has issued rules on public takeover offers by companies whose shares are listed on one of the trading platforms First North, Nordic MTF and Aktietorget. These rules, which in material respects correspond to what applies to companies on regulated markets (NASDAQ OMX and NGM), entered into force on 1 January 2010. For the Swedish Securities Council, this means greater responsibility, since it will be up to the Council to interpret and evaluate issues regarding exemptions from the Industry and Stock Exchange Committee's rules as well.

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