The Swedish Securities Council
Annual Report
2013

The increase in stock market activity in 2013 was reflected in the Swedish Securities Council's operations. During the year the Council issued an average of one statement a week and responded to a relatively large number of consultations. As in previous years, the majority of the statements dealt with takeover bids, predominantly mandatory bids. Nearly half of the statements were matters dealt with by the Council as part of its statutory tasks delegated by the Swedish Financial Supervisory Authority.

The Council's main functions, rules of procedure, etc.

Through its statements, advice and information, the Swedish Securities Council promotes best practices in the Swedish stock market. The Council is managed by a non-profit association – the Association for Best Practices in the Securities Market – with nine members: the Swedish Association of Listed Companies, FAR (the professional institute for authorized public accountants, et.al.), the Swedish Association of Listed Companies, the Institutional Owners Association for Regulatory Issues in the Stock Market, NASDAQ OMX Stockholm AB, the Swedish Bankers' Association, the Swedish Association of Stockbrokers, the Confederation of Swedish Enterprise and Insurance Sweden.

The Council may examine any action by a Swedish limited company with shares admitted to trading on a regulated market (the main markets of NASDAQ OMX Stockholm or Nordic Growth Market NGM) or by a shareholder of such a company if the action relates to or may be of importance to a share in such a company. The Council may also examine such actions by foreign companies with shares admitted

to trading on any of the above-mentioned exchanges, insofar as such actions are governed by Swedish rules. Finally, the Council may try matters relating to companies listed on a multilateral trading facility (MTF) in Sweden.

The Council may make statements on its own initiative or at the instigation of third parties. The Council decides itself whether or not to try a matter brought before the Council. As part of that process, the Council takes into account whether the issue at hand is a matter of principle or is otherwise of practical importance to the market. The Council will also take into consideration whether the issue is, or is expected to be, examined elsewhere.

The Council is composed of a Chairman (Johan Munck), a Vice Chairman (Marianne Lundius) and around thirty other members representing various sectors of the Swedish business community. The members are appointed by the Association for Best Practices in the Securities Market. The term of office is two years, but can be extended.

At the end of 2013 the following members stepped down from the Council: Thomas Ehlin, Stefan Erneholm, Göran Nyström, Jan Persson and Jan Stenberg. Replacing them as new members as of 1 January 2014 are Ramsay Brufer, Carl-Olof By, Margit Knutsson, Robert Ohlsson, Eva Persson, Erik Sjöman and Karl-Henrik Sundström.

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

The Chairman or the Director General may give rulings 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 Director General (undersigned) and a part-time rapporteur (Ragnar Boman).

A significant share of the Council's work concerns takeover bids. In this area the Council principally applies the Swedish Takeovers Act 2006 ("the Takeovers Act") and other statutes but also rules established through self-regulation, primarily the Takeover Rules issued by NASDAQ OMX Stockholm's and NGM as well as corresponding Takeover Rules for companies with shares traded on certain multilateral trading facilities.

In its capacity as a supervisory authority and as set out in the Takeovers Act and the Financial Instruments Trading Act 2007, the Swedish Financial Supervisory Authority has delegated to the Council the authority to take certain decisions which, according to the Takeovers Act, rest with the supervisory authority. This applies, for example, to decisions on the interpretation of, and exemptions from, the rules on mandatory bids. Moreover, NASDAQ OMX Stockholm and NGM have delegated to the Council the authority to interpret and try applications for exemptions from their Takeover Rules.

The Council's international contacts, etc.

The Council's operations involving takeover bid are largely modeled on the UK Takeover Panel. The Council's secretariat maintains continuous contact with the Panel and similar organizations in other countries such as Germany, France and Luxembourg.

Together with the Financial Supervisory Authority, the secretariat participates in the Takeover Bid Network (TBN) within the European Securities and Markets Authority (ESMA).

During the year ESMA published a statement on activities which shareholders can cooperate on without being considered to act in concert as defined in the EU Takeovers Directive. This issue is of relevance for the purpose of determining if and when a mandatory bid must be made. The statement was prepared by a working group within the Takeover Bids Network, in which the undersigned participated.

At the request of the Danish Financial Supervisory Authority, Finanstilsynet, which is currently working on a revision of the Danish takeover rules, the secretariat visited the FSA during the year to discuss the Swedish rules and the Council's operations.

In a different capacity, the undersigned is also participating in the OECD's Corporate Governance Committee, where corporate governance issues, including takeover bids, are regularly discussed by a global membership. The Committee held two meetings during the year.

The Council's statements

Since it began operations in 1986, the Swedish Securities Council has issued nearly 700 statements. In 2013 it issued 50 statements, a significant increase from 2012, when it issued 31. This trend coincides with the increased activity in the stock market.

Similar to previous years, the majority of statements were issued after petitions from companies or owners, typically through a legal adviser. One statement was issued on the Council's own initiative (Council Statement 2013:18).

During the year the Council issued 19 statements in matters dealt with by the Council as part of its statutory tasks delegated by the Financial Supervisory Authority. Three fourths of them related to applications for exemptions from the mandatory bid rule.

Of the 50 cases during the year, 11 were considered by the Council as a whole. An average of 6 members attended the Council's meetings. The remaining cases were considered by the Chairman.

The vast majority, 43 of 50 statements, related to takeover bids (including mandatory bids). Of these, about three fourths pertained to target companies on a regulated market and the rest to companies on a multilateral trading facility.

A relatively large share of the petitions received by the Council during the year involved mandatory bid exemptions, and as in previous years most were granted. As stated in previous annual reports, this is mainly because the typical reasons that motivate an exemption, which are cited in the preparatory works of the mandatory bid rules and set out in the Council's statements, are well known in the market, especially among advisors. During initial contacts with advisors and others considering submitting an application for exemption, the secretariat often has the opportunity to inform them of the grounds for exemption that have become established and the conditions the Council usually sets out in such situations. In one case during the year, a formal application for exemption was denied (Council Statement 2013:04).

During the year the Council had reason to remind applicants that mandatory bid exemptions are granted under special circumstances in connection with a particular acquisition. A shareholder who has been exempted from a mandatory bid in a specific acquisition and has been permitted to obtain a holding representing, for example, 40 percent of the votes in a company cannot then divest and reacquire shares within the range of 30-40 percent without a mandatory bid (cf. Council Statement 2013:28).

In one of several interpretations during the year, the Council addressed the issue of whether a certain action should be considered a takeover bid according to chapter 1 § 2 of the Takeover Act. The Council stated that a key element in such a bid is that it entitles the offerees, through a procedure specified by the bidder, to individually transfer their shares to the bidder or to another buyer designated by the bidder. The Council considered that the requirements were met in this case and therefore came to the conclusion that the action taken by the shareholder did constitute a takeover bid under the Takeovers Act.

In another case, the Council addressed a planned arrangement where a bidder, during the offer period, wanted to acquire shares in a target company outside the takeover bid, but, to avoid violating competition rules, instead considered letting a bank execute the acquisitions on its own behalf at prices no higher than the corresponding price in the takeover bid. The bidder would issue a put option to the bank, enabling the bank, after the bidder received approval from competition

authorities and completed the bid, to sell the acquired shares to the bidder. The bank might also issue a call option to the bidder, giving it the right, after completion of the bid, to acquire the shares. In both cases, the bank's compensation for the shares would have corresponded to the sum of what the bank had paid for the shares plus a financing cost not exceeding the market rate of interest.

The Council stated that the bank's acquisition would infringe the principle of equal treatment as long as the terms were not more favorable those in the takeover bid. The arrangement did not contravene the rules on trades outside the takeover bid either. In the opinion of the Council, the fact that the bidder compensated the bank on market terms for the financial costs of the arrangement did not affect this assessment, provided that the arrangement contained a call option giving the bidder the right to acquire the shares in question from the bank at the bid price.

In 2012 the Council issued a statement on its own initiative, Council Statement 2012:05, addressing conflicts of interest in certain related party transactions. Since the statement was issued, the Council has, as noted in last year's annual report, received several queries on its details. This was also the case in 2013, when the Council issued another statement on the topic which has not yet been made public. In one statement during the year, the Council criticized a related party transaction that had been executed without respecting 2012:05 (Council Statement 2013:40). Requests have been received for more detailed guidelines on situations where transactions would be considered so insignificant that 2012:05 is not applicable. During the year the Council brought the issue up for discussion, but was not prepared to issue any general guidelines, instead stating that each case must be evaluated individually.

Also worth mentioning is a statement, issued during the year but not yet made public, on the applicability of the so-called Leo rules in Chapter 16 of the Companies Act with regard to associated companies which are not subsidiaries of the listed companies. The provisions are not applicable to "Leo transactions" in associated companies, but in line with its established practices the Council noted in last year's statement that the ownership structure of an associated company may be such that it is nevertheless necessary from the standpoint of best practices to apply the Leo rules

in such situations. Consistent with Council Statement 2012:05, however, the Council also considered in these cases that the requirement should be limited to issues that are not insignificant to the “group” and its shareholders.

A recurring problem brought before the Council relates to amendments of terms of outstanding convertibles. In several statements, the Council has noted that there are many reasons from the standpoint of best practices in the stock market to be restrictive with regard to such changes and that they may be acceptable only in special circumstances. Accordingly, the Council noted during the year in an unpublished statement that a potential revision of the conversion price because the company's share price had traded in a way that a conversion was unlikely, and the company’s financial situation did not allow for cash repayment of the convertible loan, would deviate from the generally accepted practice in the securities market that trading must take place on predictable terms. Therefore, such a revision would be inconsistent with best practices in the stock market.

In an unpublished statement in 2012, the Council considered a crossborder merger where a foreign company was being absorbed by a listed Swedish company. Reiterating what it had stated a few years earlier, the Council stated it could not place any demands on such a decision beyond what is stipulated in applicable laws in the target company’s domicile. A similar issue was dealt with in 2013. The case involved a planned amalgamation between two foreign companies, where the shares in the target company were traded only on a regulated market in Sweden. The Council did not feel in this case either that it could make any demands on such a decision beyond what is stipulated by law in the target company’s domicile (Council Statement 2013:35). The Council’s position in these and earlier cases involving company law decisions in foreign companies should be seen in the light of, among other things, the Council’s by-laws, which permit the Council to give rulings with regard to actions by foreign companies whose shares are traded on a regulated market in Sweden “insofar as such actions are governed by Swedish rules”. A company law decision on a merger, for example, is not such a measure.

At the end of the year NASDAQ OMX Stockholm announced it will take measures to ensure that clearer information is provided on listed companies which are governed

by foreign company law. In addition, NASDAQ OMX Stockholm has initiated a process with a view to supplement the Takeover Rules with certain rules on mergers and amalgamations and in that context consider whether these rules should apply in certain cases to foreign companies as well. The Council welcomes these initiatives and the undersigned will participate in the work.

Of the 50 statements issued in 2013, 39 have been made public to date. The statements that have not been made public usually concern planned transactions which have not yet been announced. In certain cases, it is obvious that the transaction will not be completed as planned, since the Council ruled against the applicant in some critical respect. However, the Council continues to seek permission after time has passed to make these statements public as well, if nothing else in anonymous form.

In total, 85 percent of the statements issued in the last ten years have made public.

The Council's aim is to maintain fast response times. In cases handled by the Chairman, the Council generally gives its ruling the day after the final petition is submitted. Even in cases examined by the Council as a whole, response times are usually short. During the year response times varied in these cases from two days to two weeks.

The Council's decision in matters dealt with by the Council as part of its statutory tasks delegated by the Financial Supervisory Authority can be appealed to the FSA. None of the Council's rulings in 2013 were appealed.

Consultations with the Swedish Securities Council

The Council's operations also include responding to consultations where companies, shareholders, advisors and marketplaces contact the secretariat by telephone or e-mail. The number of consultations was about the same as the previous year.

Some of the consultations concerned issues that were later covered in formal statements by the Council, although many consultations never led to such a ruling. The decisions made by the secretariat in consultations are not binding for the Council. If the party that consulted the Council proceeds with a request to have its issue formally examined, the case will be evaluated without regard to the previous consultation. Therefore, details of consultations are not made public by the Council, and its responses cannot be publicly cited with reference to the Council.

Rolf Skog
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