Aktiemarknadsnämnden

THE SECURITIES COUNCIL

The work of the Swedish Securities Council in 2018

15 March 2019

2018 was a very active year for the Swedish Securities Council. The Council issued an average of more than one ruling per week. The vast majority of these were on the subject of takeover bids, with an unusually large proportion of cases being heard by the Council in session rather than by the Chair. The Council also hosted an international conference on takeover regulation.

Rolf Skog
Director General

THE COUNCIL'S RESPONSIBILITIES, RULES OF PROCEDURE ETC.

The Swedish Securities Council has three main tasks. It promotes good practice in the Swedish stock market through rulings, advice and information. The Financial Supervisory Authority, *Finansinspektionen*, has delegated to the Council the authority to issue rulings on interpretation of and exemptions from legislation within the field of takeovers, including the mandatory bid rule. The Council also interprets the Takeover Rules issued by Nasdaq Stockholm, NGM and the Swedish Corporate Governance Board and hears petitions regarding exemptions from these.

The Council is run by a not-for-profit association, the Association for Generally Accepted Principles in the Securities Market. The Association is made up of nine members: the Swedish Association of Listed Companies; the Institute for the Accounting Profession in Sweden (FAR); the Association of Mutual Funds; the Institutional Owners' Association for Regulatory Issues in the Stock Market; Nasdaq Stockholm; the Swedish Insurance Federation; the Swedish Bankers' Association; the Swedish Securities Dealers' Association; and the Confederation of Swedish Enterprise.

Any action by a Swedish limited company that has issued shares admitted to trading on a regulated market in Sweden, (Nasdaq Stockholm or Nordic Growth Market NGM), or any action by a shareholder in such a company which concerns or may be of relevance to a share in such a company may be subject to assessment by the Swedish Securities Council. The same applies to foreign limited companies whose shares are admitted to trading on a regulated market in Sweden, to the extent that the action is to comply with Swedish regulations.

The Council also issues rulings with regard to good practice in the stock market applicable to companies whose shares are traded on the First North, Nordic MTF and Spotlight Stock Market trading platforms.

The Council can issue rulings on its own initiative or after receiving a petition. The Council determines itself whether a petition warrants that the issue be brought up for decision. In doing so, the Council takes into account whether the issue is a matter of principle or of practical importance for the petitioner or for the stock market in general. The Council also considers whether the issue has been or can be expected to be dealt with elsewhere, for example in a court of law.

The Council consists of a Chair, Vice Chair and no more than 32 other members, representing different sectors of the Swedish business community and society. The members are appointed by the Association for Generally Accepted

Principles in the Securities Market. The term of office is two years, but can be extended.

The Chair of the Council is former Supreme Court President Marianne Lundius. The Vice Chair is Supreme Court Justice Ann-Christine Lindeblad.

When a petition is heard, no fewer than four and no more than eight members of the Council are to participate. A petition may be heard by a wider group of no fewer than nine and no more than twelve members if there is a compelling reason to do so. The members appointed to hear each petition are determined according to principles set out in the Council's statutes and rules of procedure. As per established routines, potential conflicts of interest are also evaluated.

The Chair or the Director General may issue a ruling on the Council's behalf in cases where the matter is particularly urgent, where a corresponding matter has already been dealt with by the Council or where the matter is of less significance.

The Council has a secretariat, led by the Director General (the undersigned) and a rapporteur. Ragnar Boman, who had been the Council's rapporteur for twenty years, left the Council at the end of 2018 and was succeeded by Erik Lidman. The secretariat also retains Erik Sjöman as Special Adviser to the Council.

The proceedings of the Council are based on what is stated in the petition at hand. As such, it is the responsibility of the applicant and, where appropriate, the applicant's advisers to provide a true and fair description of all circumstances relevant to the Council's assessment. This also means that the Council's rulings apply only to the conditions cited in the petition.

As stated above, a significant proportion of the Council's work concerns takeover bids. The Council primarily applies the provisions of the Swedish Takeovers Act and other legislation, but it also takes into account rules that have been formulated through self-regulation. The latter includes the Takeover Rules issued by Nasdaq Stockholm and NGM, as well as the (identical) takeover rules issued by the Swedish Corporate Governance Board, which apply to offers for companies whose shares are issued on the First North, Nordic MTF and Spotlight Stock Market trading platforms.

THE COUNCIL'S INTERNATIONAL CONTACTS ETC.

The Council's work involving public takeover offers is modelled to a large extent on that of the British Takeover Panel. The Council's secretariat maintains continuous contact with the Panel and with equivalent bodies in other countries, such as Germany and France.

Together with the Financial Supervisory Authority, the secretariat participates in a continuous European exchange of knowledge on takeovers through the Takeover Bids Network, (TBN), within the European Securities and Markets Authority, (ESMA).

In a different capacity, the Director General is a member of the OECD's Corporate Governance Committee, where corporate governance issues, including takeover processes, are regularly discussed by a global membership.

In 2018, the Swedish Securities Council and the Swedish Corporate Governance Board co-hosted the International Takeover Regulators' Conference. This event, which is held every three or four years, brings together representatives of regulatory authorities, stock exchanges and self-regulatory bodies in the field of takeovers to exchange information and knowledge of current issues. The 2018 conference, which was the sixth of its kind, commemorated the 50th anniversary of the introduction of the first takeover regulations in the United States and the United Kingdom.

The conference attracted almost a hundred participants from around thirty countries. All major markets were represented, including Australia, the United States, Hong Kong, Japan, Canada, the United Kingdom and the majority of European countries. Representatives from Africa, Asia, Latin America and New Zealand also attended. The conference was opened by Erik Thedéen, Director General of the Swedish Financial Supervisory Authority, and Marianne Lundius, Chair of the Council. It was moderated by the Council's Director General and Council member Erik Sjöman.

COUNCIL RULINGS IN 2018

Since its formation in 1986, the Swedish Securities Council has issued over 900 rulings. In 2018, the Council issued no fewer than 54 rulings.

Two petitions were rejected unheard. The reason for this was that they to a large extent were matters of company law that could be the subject of court proceedings.

With few exceptions, the rulings dealt with takeover bids, which can be seen against the background of significant takeover activity in the stock market. In 2018, 23 companies in the aforementioned marketplaces were subject to takeover bids, in some cases from several competing bidders.

Almost half of the petitions, 26 out of 54, were heard in council, while the rest were heard by the Chair alone. On average, seven members participated in each council hearing. The unusually high number of petitions heard in council is a reflection of the complexity of many cases. One petition, AMN 2018:47, was heard in an expanded council of twelve members

Just under a quarter of the petitions heard during the year, 13 out of 54, were delegated wholly or in part by the Financial Supervisory Authority. The majority of these cases involved interpretations of or exemptions from the rules on mandatory bids.

One of the first petitions of 2018, AMN 2018:03, concerned a very unusual mandatory bid matter. A listed company wished to spin off a not insignificant part of its business through the distribution of the shares in a subsidiary to the shareholders. The subsidiary would be listed a few days after the spin-off, but in the meantime there would be a change in controlling ownership of the company. The Council found that it would be contrary to good practice in the stock market to complete the transaction and, consequently, implement the change of controlling ownership during the few days when the company was unlisted and the mandatory bid rule was thus not applicable. Good practice required that, if the company was listed as planned, the transaction was to be carried out no sooner than at a time when the company had been listed and it would be possible to fully apply the mandatory bid rule, including the requirement that the bid price must not be lower than the average price of the share during the previous twenty trading days.

The vast majority of cases relating to exemption from the mandatory bid rule are relatively straightforward in the sense that preparatory legislative texts and the large number of previous rulings by the Council normally support the granting of

dispensations, on certain standard conditions stipulated by the Council, in certain typical, common cases. In a case in 2018, a company wished to deal with an internal financial crisis by carrying out a rights issue in which the principal owner intended to subscribe not only to its pro rata share, but also to shares that were not subscribed to by other shareholders. In accordance with established practice, the Council approved unconditionally the part of the request for dispensation from the mandatory bid rule that related to the pro rata subscription. In the case of subscription of shares without preferential rights, the Council typically also grants exemption from the mandatory bid rule, but, virtually without exception, this is on condition that the shareholder resolution regarding the rights issue is passed in a certain way. In this particular case, the rights issue resolution was urgent and would therefore be passed by the board of directors on the basis of a previously granted authorisation. There was therefore no room for the Council to require a shareholders' vote on the rights issue. The Council did not consider that the circumstances of the case justified such a departure from accepted practice and therefore rejected that part of the petition. This ruling has not yet been published.

In another dispensation case later during the year, the issue resolution would also be passed by the board of directors rather than the shareholders' meeting, but in that case the shareholders' meeting had not yet granted authorisation to the board. Given the circumstances in this particular case, the Council could accept that the board make the decision regarding the issue, but only on condition that the shareholders' meeting's authorisation was given with due observance of the terms that the Council otherwise usually sets for shareholders' meetings' decisions to issue (AMN 2018:35).

In an unpublished ruling issued in 2018, the Council was asked whether it would be compatible with the Takeover Rules and good practice in the stock market that a bidder in an ongoing takeover bid make an increase in the proposed consideration conditional on the board of the offeree company recommending the offer. In the opinion of the Council, there was no reason to view a conditional increase differently from a conditional offer. In both cases, the assumption is that it cannot be considered to be of significant importance for the acquisition of the offeree company that the board recommend the bid. The Council did not see that there was any reason to make exceptions to that point in this particular case. Such a conditional increase in the consideration would therefore have been in violation of the Takeover Rules.

In another unpublished ruling, the Council again returned to the question of whether the principle of equal treatment is respected when a shareholder in the offeree company participates in a takeover bid as a shareholder in the offeror company. The notes on Rule II.10 of the Takeover Rules state that the question

of whether this is compatible with the principle of equal treatment should be decided on a case-by-case basis by means of an overall assessment, where the main question is whether the parties in the offeror company are de facto bidders or shareholders in the offeree company receiving preferential treatment. It cannot be regarded as compliant with the regulations that a shareholder acts as a bidder by participating in the offeror company while retaining a full or part shareholding in the offeree company and is thus also a recipient of the offer.

In this case, shareholders in a listed company intended to submit a bid for the shares in the listed company together with a private equity firm. The shareholders in question intended to "roll over" the majority of their shares in the offeror company, but sell some of the shares for cash. The proceeds would then be used to settle loans for which shares in the offeree company were collateral, to issue loans to the bidder, to create a liquidity buffer and to pay any tax that would be incurred as a result of the sale of the shares. In the view of the Council, the reasons stated were not such that they justified regarding the members of the consortium as de facto bidders

An issue that has attracted increased interest in recent times, not least with regard to takeover bids, is to what extent different actors in a takeover process are bound by statements that they make in connection with the bid. On several occasions, the Council has stated that a general stock market principle is that parties must not without good reason deviate from a declaration of intent which has been announced to the stock market, (see, for example, AMN 2014:38 and 2013:11). Partly as a consequence of this, the Takeover Rules, (Rule II.2), also stipulate that bidders who announce that they will or will not act in a certain way with respect to their offer are bound by this statement if it is intended to create legitimate market confidence.

In connection with an offer made in 2015, the Council heard two cases, in 2017 and 2018 respectively, on the issue of whether an offeror was bound by a statement to the effect that “[the offeror] will neither raise the Consideration nor buy any [offeree company] shares at a price that exceeds the Consideration after the Offer.” In its 2017 ruling, (AMN 2017:38), the Council found that the offeror must still be considered bound by the statement, while in its 2018 ruling, (AMN 2018:36), the Council found that, three and a half years after completion of the bid, the offeror could no longer be considered bound by the statement. However, the Council stated that the length of time that must elapse in order for an announcement of this nature no longer to be considered binding must be decided on a case-by-case basis. The Council’s position in this specific case should therefore not be perceived as a general statement about the length of time that an announcement is regarded as binding. In several offers submitted later, offerors seem to have wanted to limit the scope of their announcements to refer

only to the bidder's actions during the bid period but not thereafter by formulating their announcements in a different way. It is of course important that such press releases are formulated clearly, so that they do not give rise to uncertainty about the bidder's intentions.

In another ruling issued in 2018, the Council found that an announcement by a major shareholder not to accept a submitted offer is a statement of the kind that may be covered by the general principle that parties may not without due cause deviate from a statement of intent that has been announced to the stock market if the announcement was made in such a context and in such a way that it was designed to create legitimate market confidence, (AMN 2018:33).

In an unpublished ruling, the Council considered the application of ruling AMN 2012:05 regarding related party transactions to the issue of loans to a listed company from one of the company's owners. In line with previous Council statements and taking into account the expected introduction into the Swedish Companies Act of rules on related party transactions which may lead to a review of the Council’s rules, (Prop. 2018/19:56), the view of the Council was that the loan in question could be raised without applying a procedure corresponding to that which is a consequence of ruling AMN 2012:05.

In its final hearing of 2018, the Council returned to the question of under what conditions it is compatible with good practice in the stock market to apply for delisting of a company's shares from a marketplace even though the listing requirements are fulfilled. The circumstances of this case were unique in several ways, which is why general conclusions should not be drawn from the Council’s decision. However, this does not extend to the Council's criticism of the company for its announcement of its plans to delist in a press release to the stock market without waiting for the Council’s ruling on a petition that the company itself had submitted.

The Council would also like to emphasise the importance of companies and other actors in the market who issue press releases or other documents that refer to rulings by the Council presenting the rulings in a fair and balanced manner, preferably by reproducing what the Council has stated in sufficient detail. For example, it is not regarded as good practice to state that the Council has approved a certain procedure if the conditions set by the Council regarding the matter are not reported. Here it is important that advisers provide their clients with guidance on what is applicable, as in many cases the advisers should have more knowledge of stock market law than the actors in the market.

As a general rule, the Council’s rulings are to be made public. To date, around 80 per cent of all Council rulings and approximately 85 per cent of rulings issued in

the past ten years have been published. Normally, rulings which have not been made public pertain to processes that are planned but have not yet been completed or that have been cancelled. In some cases it is clear that the transaction will not be completed as planned, since the Council's ruled against the petitioner in some crucial respect. Nevertheless, the Council also tries to obtain permission to publish such rulings after some time has passed, even if this is done without naming the parties involved. Of the 54 rulings issued in 2018, 80 per cent are currently publicly available.

The aim of the Council is to be highly accessible and to have short processing times. This means that the secretariat can be reached seven days a week for consultations and formal matters. For petitions ruled on by the Chair, the Council normally announces its decision no later than the day after the final version of the petition was submitted. For cases heard collectively by the Council, response times are usually also short. During 2018, the processing period of such cases ranged from one day to, in cases where the parties were given time to respond to each other's submissions, a couple of weeks.

Council rulings on cases delegated by the Financial Supervisory Authority can be appealed to the Authority. None of the Council's rulings in 2018 were appealed.

CONSULTATIONS

The Swedish Securities Council also provides a consultation service, whereby companies, shareholders, advisers and marketplaces can consult the secretariat by telephone or email.

Some of these consultations concern issues that are later covered in formal rulings by the Council, but many do not lead to a formal petition. The responses given by the secretariat in consultations are not binding for the Council. If the party that consulted the Council proceeds with a formal request to have its petition heard, the case will be heard without preconditions or reference to consultations with the Council secretariat. Details of consultations are therefore not made public by the Council, and consultation responses cannot be publicly cited with reference to the Council.