The work of the Swedish Securities Council in 2023

2023 was an intense year for the Securities Council. The Council issued 62 rulings. An unusually large number of cases were of a more complex nature and were dealt with by the Council in a collegial composition. As usual, cases concerning public takeover bids predominated.

At the end of the year, the Chairman of the Council, former Supreme Court President Marianne Lundius, was succeeded, after seven years as Chairman, by former Supreme Court Justice Sten Andersson.

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 rules. The Council also interprets the Takeover Rules and hears petitions regarding exemptions from these.

The Council is run by a non-profit association, the Association for Generally Accepted Principles in the Securities Market. The Association is a representative body made up of nine members: The Swedish Association of Listed Companies; The Institute for the Accountancy Profession in Sweden (FAR); The Association of Mutual Funds; The Institutional Owners Association for Regulatory Issues in the Stock Market; Nasdaq Stockholm AB; The Swedish Insurance Federation; The Swedish Bankers' Association; The Swedish Securities Markets 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 must be in compliance 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 Nasdaq First North Growth Market, Nordic SME and Spotlight Stock Market trading platforms.

The Council can issue rulings on its own initiative or after receiving a petition. The Council itself determines 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. It is exceedingly rare that a submission is rejected without a hearing.

The Council consists of a Chair, a Vice Chair and around 30 other members who represent 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 the term can be extended.

At the end of the year, the Chair of the Council, former Supreme Court President Marianne Lundius, ended her long-standing chairmanship of the Council. Since 1 January 2024, the Chair of the Council is former Supreme Court Justice Sten Andersson. The Vice Chair is Supreme Court Justice Johan Danelius.

When a petition is heard, no fewer than four and no more than eight members of the Council are to participate. Some petitions may be heard by a wider group of no fewer than nine and no more than twelve members or in a plenary session with no fewer than half of the Council members. The members selected to hear each petition are determined according to principles set out in the Council’s Statutes and Rules of Procedure. In accordance with established routines, potential conflicts of interest are also evaluated before each hearing.

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 minor significance.

The Council has a secretariat, led by the Director General, (the undersigned), and a rapporteur, Erik Lidman, who is employed part-time. The secretariat also retains Council member Erik Sjöman as a 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 applicable, 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.

A significant proportion of the Council's work concerns takeover bids. The Council applies the provisions of the Swedish Takeovers Act and the Takeover Rules.

The Council's international contacts, etc.

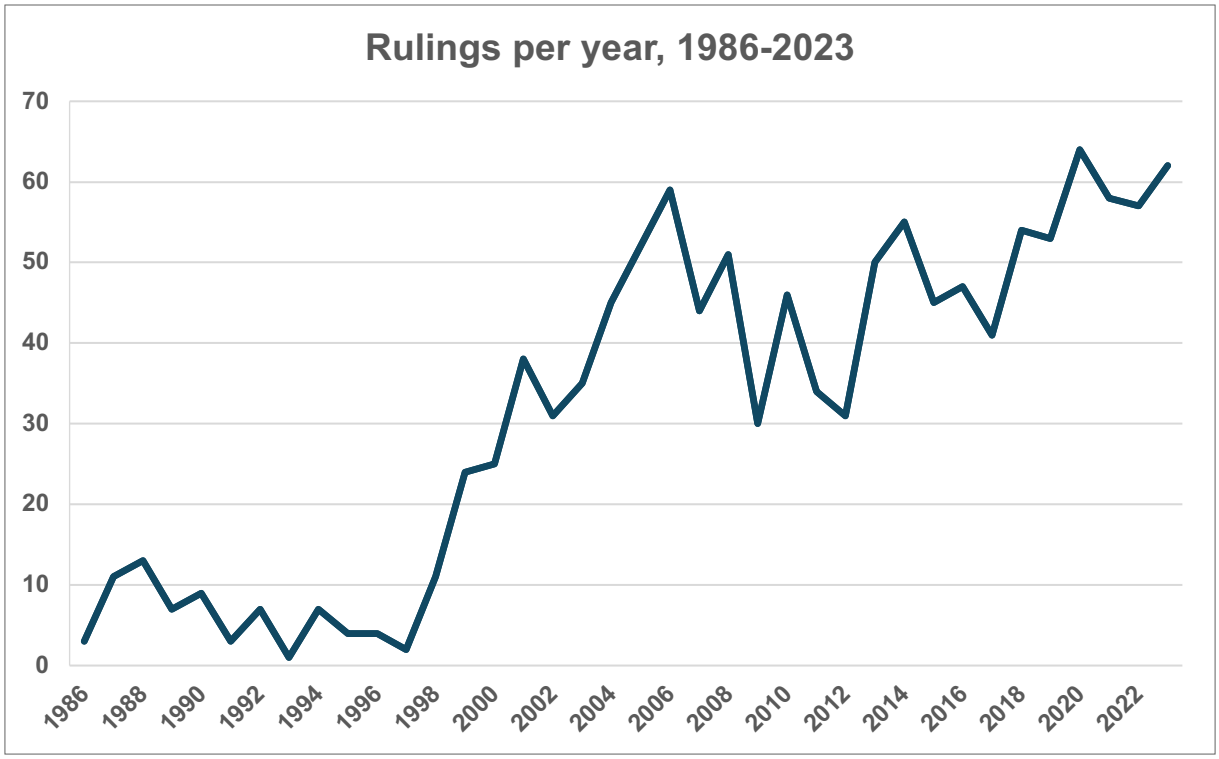
The Council's work involving public takeover bids is modelled to a large extent on that of the UK Takeover Panel. The Council's secretariat maintains continuous contact with the UK Panel and with equivalent bodies in other countries.

Together with the Financial Supervisory Authority, the secretariat participates in a continuous European exchange of knowledge on takeovers through 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 discussed regularly by a global membership.

Council rulings in 2023

Since its formation in 1986, the Swedish Securities Council has issued approximately 1,200 rulings. In 2023, the Council issued 62 rulings.



Most rulings, 50 out of 62, related to public takeover bids including mandatory bids. In 2023, 20 takeover bids were made on the Swedish stock market. Several of these bids gave rise to one or more submissions to the Council, but the Council also dealt with several submissions concerning planned but not (yet) submitted bids.

Almost half of the total number of petitions during the year, 28 out of 62, were dealt with by the Council in collegial composition. This was an unusually high proportion. The remaining cases were handled by the Chair. On average, seven members participated in each Council hearing.

One fifth of the petitions, 13 out of 62, were handled wholly or partly by delegation from the Swedish Financial Supervisory Authority. These cases concerned the interpretation of or exemption from the legal rules on public takeover bids, particularly the rules on mandatory bids.

In its annual report for 2022, the Council mentioned a couple of cases during that year concerning exemptions from the mandatory bid rule in connection with a planned directed issue intended to rescue a company from financial difficulties. In this context, the Council noted that, in cases where such requests were rejected, the reason was often that the request did not make it sufficiently clear that the company was in such

financial difficulties that the Council considered it to justify a waiver of the mandatory bid requirement or that the planned issue was the only realistic possibility in practice to remedy the situation. A couple of such cases also occurred in 2023. In another case, the application was rejected because the directed issue was to be decided by the Board of Directors based on an authorization and there was thus no possibility for the Council to make an exemption conditional, in the usual way, on the resolution being passed or approved by the shareholders at a general meeting.

A recurring issue in cases concerning public takeover bids is the conditions under which one or more shareholders in an offeree company can act as joint bidders in an offer by "rolling over" their shares into an offeror company created for the purpose, while other shareholders are only offered a cash consideration. This may involve one or more shareholders making a joint offer to acquire the shares in the offeree company, but also, and in practice more often, one or more major shareholders together with, for example, a private equity firm making such an offer.

Whether this is compatible with the general principle of equal treatment in the Takeover Rules is determined on a case-by-case basis by an overall assessment of whether the parties to the offeror company are *de facto* bidders or merely offeree shareholders given a “special deal”. There are no fixed criteria for this assessment. The commentary on the rules mentions a number of circumstances that may be taken into account in this context, such as how many shareholders have been contacted regarding participation in the offeror company, the type of shareholder involved, on whose initiative and when the discussions on cooperation started, the way in which the shareholder in question has contributed to the financing of the offeror company, and the conditions that apply to participation in and exit from the offeror company. However, the list is not exhaustive, and the Council may, in individual cases, also consider other circumstances and attach different weight to the various circumstances. In some cases, the Council has found the circumstances to be such that the procedure was compatible with the regulations, but in other cases it has found that this was not the case.

In an unpublished ruling during the year with a PE firm as the main investor in the offeror company, the Council considered that the petition had not stated any reasons

why a certain shareholder (but not others) should be offered to join the bidding consortium together with the PE firm. According to the Council, this fact, together with other circumstances, meant that the shareholder in question, in an overall assessment, could not be regarded as a *de facto* bidder but should be considered an unlawfully favored shareholder.

It is not uncommon for the Council to consult the UK Takeover Panel in cases of this kind. In line with the practice of the Panel, the Council has recently placed greater emphasis on the overall assessment nature of these cases. Perhaps a trend towards a more restrictive approach can also be discerned. It cannot therefore be taken for granted that previous judgements regarding individual components of a consortium formation will still hold in new overall assessments. Each case must be assessed individually.

The Takeover Rules state that it is not compatible with the rules to allow a certain shareholder in the offeree company to participate in a bidding consortium as offeror but to retain parts of its shareholding and thus to some extent also be an offeree, selling shares for cash consideration. In an as yet unpublished ruling during the year, the Council again noted that this also applies to sales of shares (in that case, to the lead investor in the offeror company) in order to obtain funds to pay the tax that would arise as a result of the bid-related transactions (see also the annual report of the Council for 2018). According to the Council, however, it would be acceptable for the parties in question to borrow from the lead investor, on market terms, an amount corresponding to the tax payable.

In another unpublished ruling during the year, the Council addressed the question of whether an investment fund, which did not own any shares in the target company, could participate in a bidding consortium while certain other related investment funds, which were shareholders in the target company, would not participate in the consortium despite the fact that all the investment funds had a common fund manager. According to the Council, this was acceptable. The Council noted that it was not a matter of one and the same owner, or several owners in the same group, dividing their holdings, but of different legal entities (funds) acting in different ways based on separate statutes.

The fact that the investment funds were managed by the same manager did not, in the circumstances stated in the petition, give reason to view the matter differently.

In another case, a potential bidder intended, in a planned bid for a company with ordinary and preference shares, to offer consideration in the form of a certain number of ordinary shares in the bidder for ordinary shares in the target company and a certain number of preference shares in the bidder for preference shares in the target company. The Council was asked to rule on whether the arrangement would be compatible with the Takeover Rules' requirement that the difference in value between the consideration for each class of shares must not be unreasonable. In its ruling, the Council noted that the reasonableness requirement means *that* the difference in consideration must be objectively justified in the sense that it may only reflect actual differences in the conditions for the different classes of shares, *that* it is up to the offeror to determine the offered consideration in the individual case so that it is compatible with the rules, and *that* in circumstances such as those of the transaction in question (share exchange offer), the offeror should be required to use relevant external expertise in determining the consideration.

The vast majority of cases concerning takeover bids were, as usual, initiated by potential bidders, but one case was initiated by a potential target company and concerned so-called defense measures (frustrating action). According to the Swedish Takeovers Act, if the board of directors or the CEO of a listed company has justified reasons to assume that a takeover bid for the company's shares is imminent, the company may only take measures that are likely to impair the conditions for the submission or implementation of the offer after approval by the general meeting. In this case, a listed company was in advanced, confidential negotiations for the acquisition of a particular business when it was approached by a potential bidder which was unaware of the negotiations in question. The Council was asked whether the planned acquisition could be considered a defense measure and thus the negotiations on the acquisition could not be completed without the approval of the general meeting. In its ruling, the Council recalled a previous, similar case (AMN 2018:28) where the Council stated that a first circumstance to consider in this context is whether the acquisition can be considered to fall within the ordinary course of the target company's business. For this reason alone, an acquisition that is completely unrelated to the ordinary

business may be considered to constitute a defense measure. It may also be relevant whether the acquisition relates to something that would result in the offeror being required to obtain regulatory authorization or similar in order to carry out the planned offer. Another factor to consider is the size of the acquisition. An acquisition outside the ordinary course of business but of limited size does not necessarily constitute a defense measure. Similarly, a large acquisition may constitute a defense measure if it falls within the ordinary course of the target company's business.

In the case in question, the planned acquisition was fully in line with the company's acquisition strategy and the value of the acquisition corresponded to approximately one twentieth of the company's market capitalisation. According to the Council, in light of this and what was otherwise stated in the petition, the acquisition could not, due to its nature or size, be considered to be likely to impair the conditions for the submission or implementation of the offer. The company could therefore continue the negotiations without obtaining the approval of the general meeting. On this matter, too, the Council consulted the UK Takeover Panel.

The acquisition of a listed company can take place not only through a public takeover bid but also, for example, through a statutory merger in which the company in question is, in the terminology of the Companies Act, absorbed by another company. Unlike in the case of a takeover bid, where each shareholder may individually consider the offer to transfer their shares to the bidder, the decision to merge is taken by the general meeting of the target company, i.e., the company to be absorbed.

Under the Companies Act, a merger decision is valid if it has been supported by shareholders representing at least two-thirds of both the votes cast and the shares represented at the meeting. However, if the transferring company is a public limited liability company whose shares are admitted to trading on a regulated market and the merger consideration is to consist of shares not admitted to trading on such a market, a significantly higher majority requirement applies. The decision is then valid only if it is supported by all shareholders present at the general meeting and representing at least nine-tenths of all shares in the company. This provision is based on the idea that shareholders of the transferring company should not have to accept merger

consideration that is not traded on the same or an equivalent market as the shares of the transferring company.

In the past year, the Council dealt with a case in which the shares of the acquiring company were not listed on the stock market and the shares of the transferring company were not admitted to trading on a regulated market but on an MTF trading platform. Thus, the merger was not subject to the particularly stringent majority requirement of the Act. The Council, which had to assess the situation from the point of view of good practice on the stock market, noted that the purpose of the particularly stringent majority requirement in the Act also applies in the event that the acquiring company's shares are listed on a trading platform and that the corresponding majority requirement should therefore also be applied in such a case. The Council further noted that a merger where the shareholders of a listed transferor company receive unlisted shares as merger consideration in practice entails a delisting. The Council has long set correspondingly strict majority requirements for delistings.

Yet another way to carry out an acquisition is to acquire the business of a company, often referred to as an asset deal. In 2022, the Council dealt with a couple of cases concerning asset deals. These cases were mentioned in the annual report for that year. In the two rulings, the Council also noted that there was reason to consider whether the Takeover Rules should be supplemented with rules on asset deals. The matter was considered in the review of the Takeover Rules conducted in the autumn of 2023, but no amendments were made. It is thus still incumbent on the Council to decide what constitutes good practice with regard to planned or completed asset deals. In autumn 2023, the Council received such a question, regarding so-called exclusivity agreements.

In the case of public takeover bids, the Takeover Rules contain a provision on offer-related arrangements prohibiting an offeree company from entering, among other things, into an exclusivity agreement with a bidder, i.e., an agreement that prohibits the offeree company from engaging in discussions with other potential bidders (Rule II.17a). In the present case, however, the question was whether a listed company could enter into an exclusivity agreement not with a bidder but with a potential buyer of the company's assets, and thereby commit not to discuss a sale of the assets with anyone

else or, in a more far-reaching alternative, not to discuss a sale of the assets *or* a public takeover bid with anyone else.

With regard to the less far-reaching alternative, i.e. an exclusivity agreement aimed exclusively at preventing discussions with a competing buyer of the assets, the Council noted that the company's board of directors is to act in the interest of all shareholders and must therefore carefully consider whether entering an arrangement that grants exclusivity to a certain potential asset purchaser, and thus risks reducing the likelihood of a competing buyer emerging, is in the interest of the shareholders.

As regards the more far-reaching alternative, i.e., an exclusivity agreement aimed at preventing discussions with not only a competing asset purchaser but also potential bidders in a public takeover bid, the Council considered - with reference to the purpose of Rule II.17a of the Takeover Rules - that a listed company is prevented from entering into such agreements.

It seems likely that the Council may receive further questions in the future regarding asset deals.

One of the frequently recurring topics in the Council's cases that do not involve takeover bids is private placements of shares (directed share issues). The basic provisions on share issues are contained in the Swedish Companies Act. To supplement the provisions of the Act, the Swedish Corporate Governance Board issued a recommendation in 2014 concerning what is good practice on the stock market in connection with private placements. The recommendation was replaced on 1 September 2023 by the Swedish Securities Market Self-Regulation Committee's Rules on directed cash issues. The new rules incorporate the Swedish Securities Council's practice in matters concerning directed cash issues and expand the requirements for issuers' disclosures in connection with such issues.

As a starting point, the Council's rulings must be made public. Around 80 per cent of all rulings and around 85 per cent of the rulings issued over the past ten years are currently published. The rulings that have not been published are generally related to planned but not realized transactions. In some cases, it is obvious that the transaction

will not be realized as planned either, as the Council's ruling has gone against the petitioner in some crucial respect. However, the Council works continuously to obtain, after some time, permission to publish such rulings as well, if only in anonymized form. Of the 62 rulings issued by the Council in 2023, 42 are currently published.

The ambition of the Council is to be highly available and provide short processing times. This means that the Secretariat is available every day of the week for consultations as well as formal cases. In cases dealt with by the Chair, the Council generally announces its decision no later than the day after the final petition is submitted. As a rule, processing times are also short for cases handled by a collegiate Council. During the year, processing times in these cases varied from one day to a couple of weeks in cases where the parties were allowed to comment on each other's submissions. Experience shows that the processing time is often shorter if a petition has been preceded by prior contact with the secretariat.

Council rulings on matters delegated by the Swedish Financial Supervisory Authority can be appealed to the Authority. None of the Council´s decisions in 2023 were appealed.

Consultations with the secretariat of the Council

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, it 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 may not be publicly cited with reference to the Council.

Rolf Skog
Director General