The Swedish Securities Council

2022

The work of the Swedish Securities Council in 2022

2022 was another very active year for the Swedish Securities Council. The Council issued 57 rulings during the year, which is an average of more than one per week. Almost all the Council's rulings concerned takeover bids in a broad sense. A couple of these involved acquisitions of assets and liabilities and highlighted the need for the rule issuer to consider whether these should in future be assessed in part or entirely within the framework of the Takeover Rules.

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 issued within the framework of the stock market's self-regulation procedures 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

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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, two Vice Chairs 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.

The Chair of the Council is former Supreme Court President Marianne Lundius. The Vice Chairs are Supreme Court Justice Sten Andersson and 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 primarily applies the provisions of the Swedish Takeovers Act, as well as the Takeover Rules that have been formulated through self-regulation.

The Council's international contacts etc.

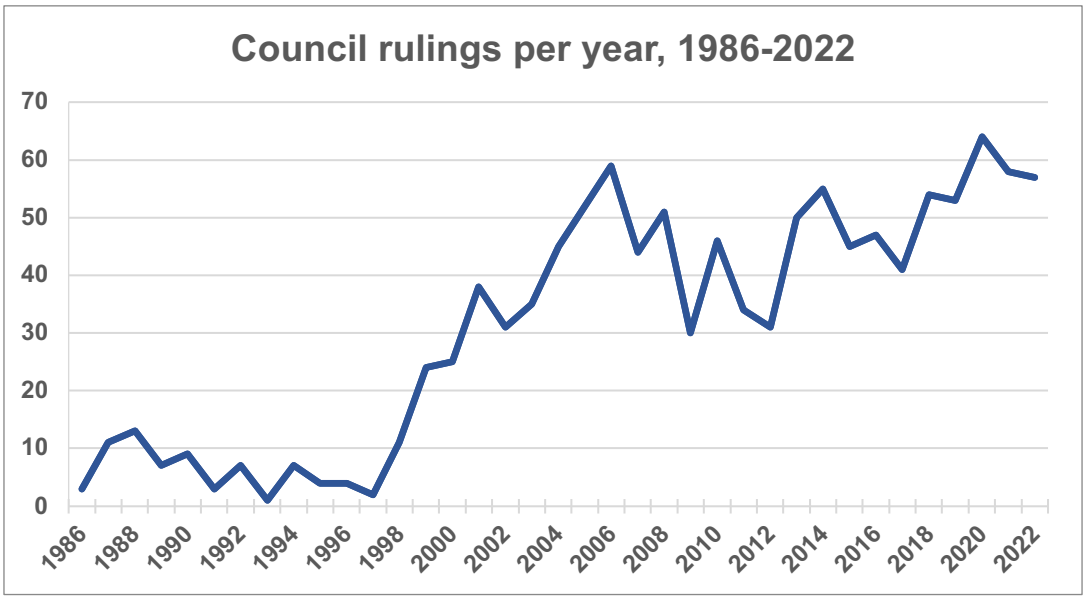
The Council's work involving public takeover bids is modelled to a large extent on that of the British Takeover Panel. The Council's secretariat maintains continuous contact with the Panel and with equivalent bodies in other countries.

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 discussed regularly by a global membership.

Council rulings in 2022

Since its formation in 1986, the Swedish Securities Council has issued over 1100 rulings. In 2022, the Council issued 57 rulings.



The vast majority of the rulings in 2022, 53 out of the 57, concerned takeover bids, including mandatory bids. This can be seen against the background of continued significant takeover activity in the stock market. In 2022, 26 companies were subject to takeover bids, and several of these transactions gave rise to one or more petitions to the Council.

More than a fifth of the petitions, 12 out of the 57, were heard in Council, while the rest were heard by the Chair alone. On average, seven members participated in each Council hearing.

Twelve of the petitions heard during the year were delegated wholly or in part by the Financial Supervisory Authority. These cases involved interpretations of or exemptions from the rules on mandatory bids.

At the beginning of the year, the Council heard two thematically related cases in what

could perhaps be called the borderlands of the takeover regulations, namely acquisitions of assets and liabilities. Both matters were considered important matters of principle and were heard by a wider group of Council members.

In the first case, AMN 2022:04, a company was intending to acquire what was in practice all the assets of a listed company for a consideration which would consist wholly or predominantly of shares in the purchasing company. In the petition to the Council, the purchasing company requested a decision on whether such a transaction would be compatible with generally accepted principles in the stock market.

The Council found that there are significant similarities between a pure acquisition of assets and liabilities and a merger, especially if the consideration received for the acquisition consists entirely or predominantly of shares that are passed on to the offeree company's shareholders in one way or another, but that there are no express provisions on acquisitions of assets and liabilities in the Takeover Rules. The Council concluded that there is cause for the rule issuers to consider whether such rules should be introduced. Pending such considerations, the Council ruled that good practice requires that the shareholders in the offeree company be given the opportunity to discuss the proposed acquisition of assets and liabilities at a shareholders' meeting, in the same way as in the case of a merger and with the corresponding decision rules; that the shareholders receive documentation prior to the shareholders' meeting that is, in relevant respects, equivalent to that which would be required in the event of a merger; and that the shareholders are informed of the board's plans regarding the company after the transfer of the assets and liabilities and its plans regarding the consideration received.

In the second case, AMN 2022:06, the circumstances were different in a number of respects. In this case, the starting point was an ongoing takeover bid where the offeree company's board had stated that it considered the value of the consideration offered to be too low and therefore recommended the shareholders not to accept the offer. The board's view was that the company should instead transfer its entire assets and liabilities, (real estate), to a third party. Since this would be a defensive measure as defined in the Takeover Rules, it could only occur after a decision by the

shareholders’ meeting. In the petition, the board requested that the Council rule on whether such a shareholders’ meeting decision can be taken with the customary simple majority of the votes cast at the meeting.

The Council confirmed that this is the case, but also stated that the planned transfer of assets and liabilities must be assessed from the perspective of generally accepted principles in the stock market without regard to the fact that it would take place in a takeover situation. The question was, in short, whether there is reason to place particular requirements on a decision on such a transfer of assets and liabilities from the perspective of acceptable practice. The case had similarities with the case described above, which was heard just a few weeks earlier, but there were also significant differences. In the new case, the transfer was for a consideration in cash, which would be passed on to the shareholders through the subsequent redemption of shares. The board then intended to propose to the shareholders’ meeting that the company be liquidated. The Council therefore did not see such similarities to a merger as in the previous case, so did not believe it was necessary to require the same decision-making procedure and documentation as in the case of a merger. In the opinion of the Council, the planned procedure was in practice a liquidation divided into three stages: a transfer of assets and liabilities, a redemption procedure and a liquidation of the "empty" company. The Council ruled that generally accepted principles in the stock market require that the board in such a situation must not pre-empt the meeting's decision to liquidate the company by disposing of the company's assets before the shareholders can consider the plans. The first step in the process, the transfer of assets and liabilities, must therefore be put to decision by the shareholders at the shareholders’ meeting, observing the same majority requirement as that for a decision on liquidation, i.e. a simple majority of the votes cast. The shareholders must also receive sufficient information before the meeting to be able to make a decision on the proposal, i.e. information not only about the transfer of assets and liabilities, but also about the planned redemption procedure and liquidation, and in this particular case also information that enables a meaningful comparison with the existing bid. In the view of the Council, this case further underlined the importance of considering whether the Takeover Rules should be supplemented with rules on acquisitions of assets and liabilities.

A couple of the rulings related to mandatory bids during the year concerned petitions regarding planned private placements or similar measures intended to rescue a company from financial difficulties. The Council has heard such issues on repeated occasions. In some cases, exemptions have been granted, e.g. AMN 2019:53, 2019:24 and 2018:26, but in other cases exemptions have not been granted. The latter rulings have often remained confidential and are thus not widely known. In short, the Council's rulings in these cases were often based on the fact that it was not sufficiently clear from the petition either that the company was in such financial difficulties that the Council considered it justifiable to disregard the obligation to make a mandatory bid or that the planned placement was in practice the only realistic option to resolve the situation. This is an area where it can be considered particularly important to contact the Council and submit the petition in good time so that the company and its stakeholders are not harmed unnecessarily by a possible ruling against the petition.

In petitions concerning exemptions from mandatory bid rules, for example for a transfer of property as consideration in an equity issue, reference is sometimes made to one or more "side transactions". For example, the seller of the property in question will also acquire shares from the company's primary owner in connection with the transfer to the company. In such cases, the Council is very restrictive about allowing the exemption to also cover the ancillary transactions. It is not sufficient to present them as a "package" in the petition. In an as yet unpublished ruling during the year, an exemption application was rejected with regard to the side transaction.

A recurring theme in applications for exemption is succession through generational change, where a primary owner plans to donate all or parts of their shareholding to one or more children or to a holding company controlled by them. If in such a case there is already a formal close relationship between the giver and the recipients of the shares, the question of a mandatory bid normally does not arise. Should no such close relationship exist, and the recipient or recipients acquire a shareholding that represents at least three-tenths of the number of votes in the company, the mandatory bid obligation may indeed be triggered. The Council normally grants an exemption from the mandatory bid rule in such cases however, because there is no actual change of controlling owner. Such a generational change was the subject of

ruling AMN 2022:55, regarding a planned gift of shares. The Council therefore worded the exemption so that it also included future acquisitions, in the same way as the donor had been able to increase their voting share in the company without a mandatory bid.

Exemptions from the mandatory bid rules are normally granted without conditions for shareholders who acquire shares by subscribing for their pro rata share in a rights issue. In AMN 2022:56, the Council took a similar approach to a situation where the shareholders of a company were offered the opportunity to acquire shares (and warrants) in a subsidiary in proportion to their shareholdings when the subsidiary was divested.

Private placements are among the most closely related subject areas in the Council hearings that do not concern takeover offers. Basic provisions on the issuing of shares can be found in the Swedish Companies Act. To complement the provisions in the legislation, the Swedish Corporate Governance Board issued a recommendation in 2014 regarding what in certain respects is generally accepted practice in the stock market in the case of private placements.

In ruling AMN 2021:41, which was also referenced in the Council's 2021 annual report, the Council noted that it had on several occasions observed a degree of laxity in the market when making decisions on private placements, and therefore reiterated the importance of companies taking full account of the recommendation when considering targeted issues. The Council stated that good practice in the stock market requires that the board clearly inform the shareholders about its reasoning when it decides to deviate from the main rule that a cash issue must give preferential rights to the shareholders.

A large number of private placements occurred on the stock market in 2022. In ruling AMN 2022:36, at the request of Nasdaq Stockholm, the Council addressed the provision of information to the shareholders and the stock market in two of these placements. With regard to both companies concerned, the Council found that the information provided did not meet the requirement set out in the recommendation that the board provide a clear account of its reasoning when it chose to deviate from the

main rule that new cash issues must give preferential rights to the shareholders. In order to fulfil the requirement, the Council ruled, the account of the board's reasoning must give the shareholders an opportunity to assess the board's deliberations in the light of the circumstances of the specific company. An almost routine statement that the deviation from the preferential right is a time- and cost-effective way of acquiring capital is not sufficient, the Council concluded. The Council also stated that the information provided in connection with these issues did not fulfil the recommendation's requirement to provide information on how the issue price was determined and how the board had ensured that it was the correct price given the market conditions. In both cases, there was insufficient information on the grounds for the board's opinion.

It is not unlikely that the experiences related to private placements in recent years will lead the Stock Market Self-Regulation Committee (ASK), which is now responsible for the recommendation on private placements, to conduct a review of the recommendation.

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. In some cases, it is clear that the transaction will not be completed as planned, as the Council 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 57 rulings issued in 2022, 42 are currently publicly available.

The Council strives to be easily 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 alone, the Council normally announces its decision no later than the day after the final version of the petition is submitted. For cases heard collectively by the Council, response times are usually also short. During 2022, 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. Experience has shown that the processing time is often shorter if a petition is preceded by informal direct 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 rulings in 2022 were appealed.

Consultations with the Council secretariat

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.

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The Securities Council

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