The Swedish Securities Council

2024

The work of the Swedish Securities Council 2024

2024 was a record year for the Swedish Securities Council. The Council issued 81 rulings during the year, which is approximately 30 per cent more than in any previous year in the almost 40 years since it was founded. As usual, most of the rulings concerned takeover bids in the broad sense, but the Council also heard cases concerning matters such as generally accepted practice in the event of related party transactions

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 eight members: The Institute for the Accountancy Profession in Sweden (FAR); The Association of Mutual Funds; The Institutional Owners Association; 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 liability 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 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 Swedish Securities Council can issue rulings on its own initiative or upon receiving a petition. The Council itself determines whether a petition is to be heard. In doing so, the Council takes into account whether the issue is a matter of principle or of practical importance to the petitioner or to 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 Hair 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 this can be extended.

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), as well as a rapporteur, Erik Lidman, and a secretary, Jesper Zackrisson. 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 established through self-regulation.

The Council's international contacts etc.

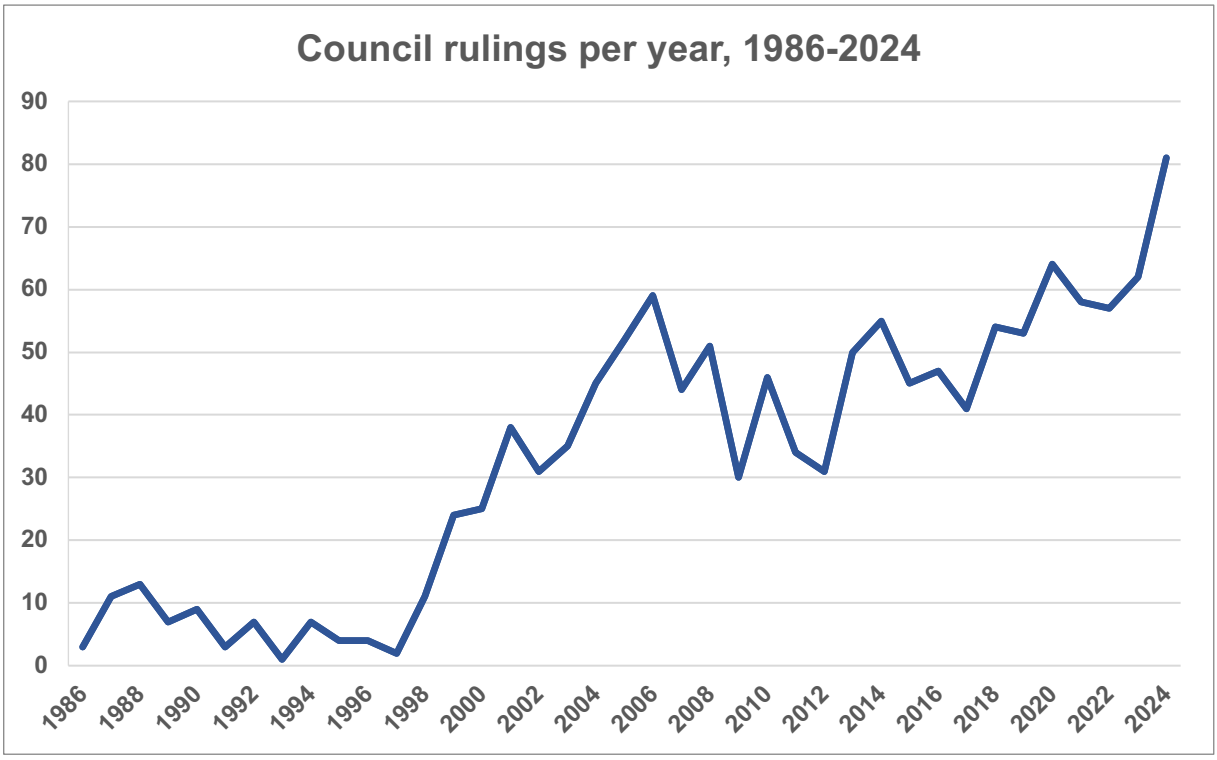
The Council's work involving public takeover bids is modelled to a large extent on that of the UK Takeover Panel. The Council's secretariat maintains continuous contact with the Panel and with equivalent bodies in other countries.

Together with the Financial Supervisory Authority, the secretariat participates in a continuous European exchange of knowledge on takeovers through the 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 2024

Since its formation in 1986, the Swedish Securities Council has issued around 1300 rulings. In 2024, the Council issued 81 rulings.



Most of the rulings in 2024, 71 of the 81, concerned takeover bids, including mandatory bids. In 2024, 40 companies were subject to takeover bids. 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.

Just over a third of the petitions during the year, 28 of the 81, were dealt with by the Council in collegial composition. The remaining cases were handled by the Chair. On average, around seven members participated in each Council hearing.

Almost fifteen per cent of the petitions, 12 of the 81, were handled wholly or partly by delegation from the Swedish Financial Supervisory Authority. These cases involved interpretations of or exemptions from the legal rules on takeovers, particularly the rules on mandatory bids.

In its ruling AMN 2024:23, the Council returned to the issue of mandatory bids for acquisitions through an endowment insurance scheme. The Council reiterated that the mandatory bid rule itself does not exclude that it could be a breach of good practice in the stock market to achieve through various contractual arrangements what is in practice a change of controlling ownership without the mandatory bid rule formally becoming applicable. In line with this, the Council found in ruling AMN 2020:13, for example, that good practice required an owner to submit a takeover bid in accordance with the mandatory bid rules in a situation where the number of shares held through the owner's endowment insurance scheme meant that the owner's direct ownership - which was less than 30 per cent of the voting rights for all shares in the company - represented more than 30 per cent of the total voting rights for the shares in the company not held through the scheme. In the 2024 ruling, this was not the case, however, and a mandatory bid was therefore not necessary.

A confidential case in 2024 concerned the related issue of mandatory bids in relation to swap arrangements. In the case in question, Company A had entered into agreements on a number of total return swap (TRS) arrangements with various banks. One of the implications of the agreements was that the banks would own shares in Company B for a certain amount of time. In the view of the Council, it could be assumed that a not insignificant number of shares in Company B would thereby be rendered passive and that Company A had thus brought about a situation where it would in practice hold more than 30 per cent of the total number of active voting rights in Company B during that period. Although Company A intended to undertake to abstain from voting for part of the shares held in Company B during the term of the TRS arrangements, thereby ensuring that Company A would always exercise fewer than 30 per cent of all active voting rights in Company B, the Council felt that the legal implications of such an undertaking would be unclear. The Council also noted that it would be difficult to monitor compliance with this undertaking. Therefore, the Council ruled that the commitment was not sufficient for the TRS arrangements to be considered compatible with good practice in a situation where Company A held at least 30 per cent of the total voting rights of the shares in Company B excluding shares held by the banks. The fact that the TRS arrangements were intended to be for only a limited period of time did not change this assessment.

The same petition also raised the issue of the application of the prior transactions provision (Rule II.13 of the Takeover Rules) in the event of a winding-up of the TRS arrangements should Company A make a takeover bid for the shares in Company B. The idea was that the TRS arrangements could then be terminated prematurely and that the banks could use several methods of termination, including tendering the TRS shares into the takeover bid. If this were to happen as part of a takeover bid made by Company A, the Council concluded, the prior transactions provisions in Rule II.13 would apply.

A recurring theme in petitions to the Council regarding takeover bids is the conditions under which one or more shareholders of an offeree company can participate as offerors in a bid by "rolling over" their shares in an offeror company created for this purpose, while other shareholders are offered a cash consideration. This matter was last addressed in the 2023 Annual Report, and the Council heard several cases concerning such buy-out consortia in 2024. Some of these rulings have been made public, while others remain confidential.

Whether a procedure of the kind in question is compatible with the fundamental principle of equal treatment set out in the Takeover Rules is determined by the Council on a case-by-case basis through an overall assessment of whether the parties to the offeror company are *de facto* offerors or merely offeree shareholders given a "special deal". There are no fixed criteria for this assessment. The notes on Rule II.10 of the Takeover Code mention 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 regarding co-operation 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. The Council may, in individual cases also consider and attach different weight to the various circumstances.

In a confidential case in 2024, a shareholder, the Founder, planned to form a bid consortium with a party that was referred to as the Sponsor. The Founder had long been the offeree company's major shareholder and, according to the petition, had

special knowledge of the company. The petition also stated that it was the Founder who had initiated the establishment of the bid consortium.

In the opinion of the Council, the above and most of what was stated in the petition regarding the conditions for the establishment of the consortium, for the parties' co-ownership and collaboration and for the parties' scope to withdraw from the consortium indicated that the Founder could be regarded as a de facto offeror. However, one circumstance gave rise to a contrary assessment, namely that the Founder, with the Sponsor’s approval, would be permitted to sell shares in the offeror company to a third party during the first three years following the execution of the offer. With such an arrangement in place, the Council ruled that the Founder could not be regarded as fulfilling the requirements to be deemed a de facto offeror.

In another confidential case, a group of senior executives, (the Co-Investors), who together also owned a relatively large proportion of the shares in the offeree company, intended to form a consortium with Company X to submit a bid to acquire all the shares in the offeree company through an offeror company formed for that purpose. Upon completion of the bid, the Co-Investors would transfer their shares in the offeree company to the offeror company through an issue in kind, and Company X would contribute the cash required for the offeror company to acquire the remaining shares in the offeree company. Neither the Co-Investors nor Company X would be under any obligation to provide additional funding to the offeror company or the offeree company.

The individual holdings of the Co-Investors varied considerably in size, with the smallest holding representing just 0.25 per cent of the shares and voting rights. In the Council's view, it was clear that a party that makes such a limited contribution to a takeover bid cannot normally be regarded as a *de facto* offeror but must be regarded as a shareholder enjoying special treatment. The circumstances presented in the petition did not give rise to an alternative conclusion, and on that basis the Council ruled that the planned procedure was not compatible with the principle of equal treatment set out in Rule II.10 of the Takeover Rules.

In another and somewhat similar case, (but without such a small notional co-investor as in the above-mentioned case), there were a number of factors in favour of considering the parties referred to in the petition as the Founders as *de facto* offerors. However, the proposal included an option arrangement which would give the Founders the right to transfer their shares to the larger consortium member, X, (and would give X a corresponding right to acquire the Founders' shares), three years after execution of the offer. The price upon exercise of these rights would be calculated according to profit multiples determined in advance by the parties. In the opinion of the Council, the fact that the Founders would thus be guaranteed the possibility to leave the co-operation in the offeror company by transferring their shares to X weighed so strongly against the Founders being regarded as *de facto* offerors that, when viewed as a whole, the planned buyout was not deemed to be compatible with Rule II.10.

The Council liaised with the UK Takeover Panel on several occasions on issues related to buyout consortia again in 2024. Another issue that the Council discussed with the Panel on several occasions is whether, for example, a shareholder of an offeree company may acquire certain assets of the offeree company during an ongoing bid. Within the framework of the offer, such arrangements are not permitted, irrespective of the value. See, for example, Council rulings AMN 2007:32 and AMN 2008:18.

The Swedish Takeover Rules do not contain any equivalent to Rule 16.1 of the UK Takeover Code, under which a shareholder of an offeree company may be permitted in certain circumstances to acquire assets of the offeree company in connection with a bid if the transfer is preceded by an independent valuation of the assets and is approved by the other shareholders at a shareholders' meeting of the offeree company. However, in a confidential case in 2023, the Council ruled that an arrangement substantially similar to the UK rule could be considered compatible with the Swedish Takeover Rules. This means that a transfer of the type in question is usually acceptable if (1) it has been preceded by an independent valuation of the assets to be transferred, (2) it is approved by the other shareholders at a shareholders' meeting of the company and (3) the decision at shareholders' meeting is approved by a qualified majority - normally corresponding to at least two thirds of

the votes cast and the number of shares represented at the meeting - excluding shares held by the acquirer. A confidential case in 2024 concerned an asset transfer of a specific type, namely of shares in a subsidiary of a potential offeree company, which would be transferred to directors of the board of the subsidiary. The Council also deemed that transfer acceptable under the above conditions, but with the stricter majority requirement (nine-tenths) that is required under the so-called Leo rules in the Swedish Companies Act if the transfer is of a certain magnitude.

A fundamental provision of the Takeover Rules is that a takeover bid may only be made after preparations have been made which demonstrate that the offeror has the capability to implement the offer, see Rule II.1.The notes on the rule state that it is not necessary for the offeror to have secured credit facilities for any refinancing of the offeree company's debts upon completion of the takeover bid, but also that "the scope for making the offer subject to completion conditions related to the offeree company’s financing, and thus in practice making the offeree company’s shareholders bear the risk, is very limited". In a confidential case in 2024, the question arose of whether an unlisted company, Company A, could make the completion of a merger with a listed company, Company B, subject to conditions related to "the merged group's need for refinancing as a result of the merger". The Council found that Rule II.1 of the Takeover Rules would apply to the merger and ruled that the condition in question was incompatible with Rule II.1.

In its ruling AMN 2024:50, the Council stated that there are no obstacles to a takeover bid being structured in such a way that all shareholders are offered the choice of accepting it in the usual manner or accepting it on condition that the offeror becomes the owner of over 90 per cent of the shares in the offeree company. The Council pointed out, however, that a takeover bid structured in such a way places particular demands on the clarity of the information provided to the offeree company's shareholders.

In a confidential case, the question was whether it would be compatible with good practice in the stock market for an offeree company to make an offer to acquire own shares during the period of six months after the execution of a takeover bid (Rule II.15 of the Takeover Rules). The Council concluded that although the offeror held

less than half of the shares and voting rights in the offeree company, due to its shareholding it must be regarded as having *de facto* control over it. Even if any repurchase transactions that the offeree company were to make during the period were not made at the direction of the offeror for the purpose of further increasing its ownership in the offeree company, which would be directly impacted by Rule II.15, the Council ruled that it would not be consistent with good practice for the offeree company to acquire its own shares through transactions on terms which are more favourable than the terms of the takeover bid, (for any purpose other than to ensure the delivery of shares within the framework of incentive schemes). See also Council ruling AMN 2020:07.

When it comes to matters outside the field of takeover bids, the Council would like to draw attention to its published ruling AMN 2024:69, which concerned the transfer of shares in an associated company from a listed company's wholly owned foreign subsidiary to a party related to the listed company. The Council concluded that good practice, "particularly in obvious cases of circumvention, but also in other special cases", may require that the decision-making procedure prescribed in Chapter 16(a) of the Swedish Companies Act be observed even though the transaction falls outside the scope of the Act. In the case in question, where the transferring subsidiary's main business consisted of owning shares in group and associated companies, the Council ruled that good practice required the listed company to approve the transfer in the same manner as would have applied under the Act if the subsidiary company had been Swedish.

One of the most frequently recurring topics in petitions to the Council that do not concern takeover bids is questions of good practice when a company applies for its shares to be delisted in a situation where the marketplace deems the listing requirements still to be satisfied. The Council's long-standing practice in this area is very restrictive. In 2024, an arrangement was presented to the Council in which the company in question intended to make, or arrange for another party to make, an offer to remaining shareholders in connection with a delisting application. The petitioner sought guidance from the Council, including on the matter of how such an offer should be structured in order for it to be consistent with good practice in the stock market. The Council concluded that this question would require thorough deliberation

and impact analyses of the kind that should not be conducted in the context of a Council ruling. The Council drew the matter to the attention of the Stock Market Self-Regulation Committee (ASK), and the Committee intends to present a proposed set of delisting rules.

As a rule, the Council's rulings are to be made public. To date, around 80 per cent of all Council rulings 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 81 rulings issued in 2024, 61 are currently publicly available.

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 for formal cases. In cases dealt with by the Chair, the Council normally announces its decision no later than the day after the final version of the petition is submitted. As a rule processing times are also for cases handled by a collegiate Council. During 2024, the processing time in such 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 is 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 rulings in 2024 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 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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