The Swedish Securities Council

2020

The work of the Swedish Securities Council in 2020

The activity of the Swedish Securities Council in 2020 was more extensive than in any previous year. The decline in the number of cases anticipated by many when the pandemic broke out in the spring never realised. Increased stock market activity, a large number of IPOs and public takeover bids contributed to the Council issuing not less than 64 statements during the year. Accordingly, since its foundation, the Council has made more than 1,000 statements.

The Council's responsibility, rules of procedure, etc.

The Swedish Securities Council has three main tasks. It promotes good practice in the Swedish stock market through statements, advice and information. The Financial Supervisory Authority, Finansinspektionen, has delegated to the Council the authority to issue rulings on the interpretation of, and exemptions from, legislation within the field of takeovers, including the mandatory bid rules. 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 a representative body with 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, Nasdaq Stockholm, 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 liability 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 statements 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 statements 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 ruled on elsewhere, e.g., in a court of law. It is very rare that a submission is rejected without a hearing.

The Council consists of a Chair, 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 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 and in plenary with not less than half of all members. The members selected to hear each petition are determined according to principles set out in the Council’s statutes and rules of procedure. Before every hearing, potential conflicts of interest are also evaluated as per established routines.

The Chair or the Director General may issue a statement 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, Erik Lidman, who is employed part-time. The secretariat also retains Council member Erik Sjöman as special adviser to the Council.

The rulings 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 statements 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, as well as rules that have been formulated through self-regulation. The latter includes the Takeover Rules issued by Nasdaq Stockholm and NGM, as well as the Takeover Rules issued by the Swedish Corporate Governance Board, which apply to offers for companies whose shares are traded on the Nasdaq First North Growth Market, Nordic SME or Spotlight Stock Market trading platforms.

The Council's international contacts, etc.

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

The Council's statements

Since its founding in 1986, the Swedish Securities Council has issued more than 1,000 statements. In 2020, the Council issued 64 statements.

The vast majority of these statements, 54 of 64, addressed matters relating to takeover bids, including mandatory bids. This volume correlates with the continued significant takeover activity in the Swedish stock market. In 2020, 21 listed companies were subject to takeover bids. Several of these transactions were preceded by one or more petitions to the Council.

Just over one third of the total number of cases, 23 of 64, were heard in Council, while the rest were heard by the Chair alone. On average, seven members participated in each Council hearing.

Nearly one quarter of the cases during the year, 14 out of 64, were delegated in whole 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 important statement relating to mandatory bids at the start of the year was AMN 2020:13. In the statement, the Council addressed the question of whether the mandatory bid rule was triggered in a situation in which an individual shareholder who held just under 30 per cent of the votes in a listed company subsequently acquired a sufficient number of shares through an endowment insurance policy so that the shareholder's direct holdings combined with the holdings via the endowment insurance policy together represented nearly 44 per cent of the votes in the company. As in previous statement, the Council assumed that no voting rights would be exercised on the basis of the shares held through the endowment insurance policy. However, since the block of shares held by virtue of the policy was so large,

and since the voting rights of these shares would not be exercised, this gave rise to a situation in which the owner's direct holdings would represent more than 30 per cent of the number of votes for all shares in the company which could be cast. Therefore, the Council stated that the acquisition constituted a flagrant circumvention of the mandatory bid rules. According to the Council, good practice in the stock market compelled the owner in question to submit a takeover bid to the other shareholders in accordance with the mandatory bid rules. This statement is reflected in the revised takeover rules which entered into force in January 2021.

In another statement concerning mandatory bids (AMN 2020:14) the Council addressed two issues regarding the detailed meaning of the condition normally imposed by the Council for mandatory bid exemptions according to which, in the event that the party to whom an exemption has been granted subsequently acquires additional shares in the company with a consequential increase in votes, the mandatory bid requirement is triggered. The first question submitted to the Council was whether such a condition is to be interpreted and applied in the same manner as in Chapter 3, Section 1, first paragraph of the Swedish Takeovers Act (which would mean that the party who has been granted the exemption acquires additional shares with a consequential increase in votes must immediately publish the size the new shareholding and, within a four-week period, submit a mandatory bid for the remaining shares in the company). The Council answered this question in the affirmative.

The second question was whether the mandatory bid obligation falls away if the shareholder disposes of so many shares during the four-week period that the shareholding returns to or falls below the shareholding immediately prior to the acquisition of additional shares. The Council found no persuasive reason for such a regime, but, rather, found that the obligation to present a mandatory bid only falls away if the shareholder disposes of so many shares during the four-week period that the shareholding represents less than 3/10 of the votes for all shares in the company (cf. Chapter 3, Section 6 of the Swedish Takeovers Act).

A recurring theme addressed by the Council concerning public takeover bids is the issue of whether the principle of equal treatment is respected in so-called buy-out

bids in which one or several shareholders in the target company participate in a takeover bid in their capacity of owners of the bidding company. According to the comment to Point II.10 in the takeover rules, the question of whether this is consistent with the principle of equal treatment must be determined on a case-by-case basis through an overall assessment in which the main question is whether the parties in the bidding company are *de facto* bidders or favourably treated shareholders of the target company. The considerations in such an evaluation may include how many shareholders have been contacted about partnership in the bidding company, what type of shareholders are involved, on whose initiative and when the discussions on a collaboration began, in what way the shareholders in question have contributed to the bidding company's financing and the conditions that apply to partnership in and divestment from the bidding company. The list is not exhaustive, and in individual cases, the Council may also take into account other circumstances and ascribe different weight to different circumstances.

In 2020, the Council issued several statements pertaining to buy-out bids, two of which have been published to date. In such contexts, the Council has also had contact with the British Takeover Panel. The statements confirm that the principle of equal treatment is central in the regulation of takeovers and, in each case of a buy-out where certain shareholders in the target company will also become parties in the consortium making the bid or owning the bid vehicle, such as a private equity firm, the offeror is obliged to be able to demonstrate that the circumstances as a whole are such that one or more shareholders do not enjoy special treatment. In this context, it is naturally the contents of the consortium agreement (the term of the agreement, exit rights, etc.) which are of central importance but also, for example, the manner in which the consortium was created. In the latter regard, it is often important that there exists clear documentation of the contacts which were taken between the potential consortium members.

Another matter related to offeror consortiums addressed the interpretation of the related-party rule in Chapter 3, Section 5, paragraph 5 of the Swedish Takeovers Act. In brief, the circumstances were such that the buy-out consortium was formed by shareholders each of whom held less than 30 per cent but together held more than 30 per cent of the votes in the target company. The question was whether one of the

parties, after the consortium had been established, would be able to individually acquire additional shares in the target company without triggering the mandatory takeover rule provided, naturally, that the purchaser had not thereby reached a personal shareholding of 30 per cent in the target company. The Council confirmed the interpretation which is expressed in AMN 2015:30, namely that it involves a situation in which several parties cooperate for the purpose of acquiring control and that such cooperation does not per se entail that control has already been acquired. An offeror consortium in which the cooperation has the sole aim of acquiring the target company and control of the target company, and in which control thus does not pass to the consortium prior to the completion of the acquisition, does not prevent the parties, either prior to or during the bid period, from acquiring shares in the target company without triggering the mandatory bid rule.

Recurring matters addressed by the Council which do not involve takeover bids include amendments to the terms of financial instruments that have already been issued. In a series of statements from 1988 and forward, the Council has addressed issues regarding amendments to the terms of convertibles and warrants. In several of these statements, including AMN 2015:26, the Council has adopted the position that there are many reasons to exercise restraint in amending the terms of such instruments (see, also the Council's Annual Reports for 2016 and 2019). It is generally accepted in the securities market that convertibles, warrants and the like must be traded on predictable terms. Changes in those terms are acceptable only in special circumstances. The Council has stated that an example of such circumstances can be to the protection of holders' rights to planned, exceptional dividends distributed to the shareholders and in conjunction with the execution of programmes for the redemption of shares. On the other hand, the fact that a company's financial situation does not allow cash repayment of a convertible loan, or that the market price of the share has fallen below the subscription price in a warrant, do not constitute circumstances which justify a change to the conversion or subscription price. Such changes in terms are not consistent with good practice on the stock market.

In an unpublished statement in 2020, the Council addressed an issue regarding

amendments to the terms applicable to preference shares. The Council observed that there is no reason to view the interest in protecting trading in such instruments any differently from the interest in protecting trading in convertibles and warrants. As regards both shares and share-related instruments traded on the stock market, trading must, as a starting point, be able to take place on predictable terms, and term amendments are acceptable only under special circumstances. In the view of the Council, such circumstances do not include developments in the market price of the instrument in a manner which, for example, render a share issue in the company more difficult.

Another recurring theme addressed by the Council relates to the issuance of shares, particularly those which deviates from the shareholders' pre-emptive rights. In 2014, the Swedish Corporate Governance Board issued a recommendation regarding good practices in such context (so-called private placements). It is the view of the Council that it is the responsibility of the board of directors to ensure that the recommendation is respected both in spirit and letter. This applies not only in connection with traditional directed issues but also in various types of combined issuances, e.g. such issuances as have been initiated in recent times as "over-allotment issuances".

Since the very beginning, the Council has addressed matters regarding share issues within the context of various types of incentive schemes and remuneration systems, principally for senior executives. In the course of the years, the Council has issued a great many statements on this subject, including the extensive statement AMN 2002:01. These opinions frequently relate to the so-called Leo rules in the Swedish Companies Act. Over time, certain rules governing compensation were adopted in the Swedish Corporate Governance Code.

On December 1, 2020, the Swedish Corporate Governance Board issued the Rules on Remuneration of the Board and Executive Management and on Incentive Programmes. The rules are an expression of good practice in the Swedish stock market on share and share price-related incentive programmes. Among other things, the rules are intended to codify the statements of the Council on issues involving incentive schemes, and the rules are to be interpreted by the Council. Since the rules address the same issues as the Council statement made on its own initiative, AMN

2002:01 and subsequent statements regarding incentive programmes do no longer serve as guidance in the matters addressed by the remuneration rules.

The rules, however, do not cover the Council's practices pertaining to the Leo rules in Chapter 16 of the Swedish Companies Act. Accordingly, to supplement the rules and for the purpose of adding clarity, the Council issued a statement on its own initiative, AMN 2021:09, at the beginning of 2021. Subject to certain stated exceptions, it replaces previous statements from the Council relating to the Leo rules.

The vast majority of the Council's statements concern Swedish limited liability companies. However, it does occur that the Council receives queries and petitions regarding planned corporate actions in foreign companies listed on the Swedish market. Examples include stock issuances to be decided in accordance with the corporate law regime in the company's home country and in which the company wishes to know whether the issuance is compatible with good practice on the Swedish stock market. In short, the Council's practices entail that the Council, from the perspective of good practice, do not add amendments to applicable foreign company law in general. In certain cases, however, the Council has imposed more far-reaching requirements on a planned action relating to the trading in the shares or instruments. However, there is no clear boundary, and such matters must be determined on a case-by-case basis (see, during the year, statement AMN 2020:27 and 2020:52).

On several occasions, the Council has issued reminders regarding advisers' responsibility to respect rules and good practice in the stock market, and the responsibility of issuers and offerors to employ expertise familiar with the Swedish stock market and the regulation thereof. In 2020, the Council again found a reason to remind of these responsibilities (see, among others, statement AMN 2020:13). In this context, the Council wishes to emphasise how important it is that petitions submitted to the Council be formulated in such a manner that the subject matter and relevant circumstances are clear. It has happened that the Council found a petition so difficult to understand that the applicant was compelled to re-write it.

As a general rule, the Council's statements are to be made public. To date, around 80 per cent of all Council statements, and approximately 85 per cent of the statements issued in the past ten years, have been published. Normally, statements which have not been made public pertain to processes that are planned but which have not yet been completed. In some cases, it is clear that the transaction will not be completed as planned because the Council ruled against the petitioner in some crucial respect. Nevertheless, the Council also tries to obtain permission to publish such statements after such time has passed, even if this is done without naming the parties involved or in a redacted form. Of the 64 statements issued by the Council in 2020, 54 are currently publicly available.

The Council strives 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 alone, the Council normally announces its decision no later than the day after the final version of the petition is submitted. For matters heard collectively by the Council, response times are usually also short. During the year, 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 shows that the response time is often shorter if a petition is preceded by informal contact with the secretariat.

Council statements on matters delegated by the Swedish Financial Supervisory Authority can be appealed to the Authority. None of the Council's statements in 2020 were appealed.

Consultations with the Council's secretariat

The Swedish Securities Council activities also consist of consultations in which companies, shareholders, advisors and marketplaces can contact the secretariat by telephone or e-mail.

Some of these consultations concern issues that are later covered in formal statements 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.

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