

## **The Swedish Securities Council's operations**

**2015**

*In 2015 the Swedish Securities Council issued nearly one statement a week, decided on several cases in council and handled a large number of consultations. The majority of statements during the year again dealt with public takeover offers or mandatory bids.*

### **The Council's responsibilities, rules of procedure, etc.**

Through its statements, advice and information, the Swedish Securities Council promotes good practice in the Swedish stock market. The Council is managed by a not-for-profit association – the Association for Generally Accepted Principles in the Securities Market – with nine members: the Swedish Association of Listed Companies, the professional institute for authorised public accountants (FAR), the Swedish Investment Fund Association, the Institutional Investors' Association for Regulatory Issues in the Stock Market, Nasdaq Stockholm, the Swedish Bankers' Association, the Swedish Securities Dealers Association, the Confederation of Swedish Enterprise and Insurance Sweden.

Any action by a Swedish limited company which has issued shares admitted to trading on a regulated market (Nasdaq Stockholm or Nordic Growth Market NGM) or by a shareholder of such a company may be subject to the Council's evaluation if the action relates to or may be of importance to a share in such a company. The same applies to foreign limited companies which have issued shares admitted to trading on a regulated market in Sweden, to the extent such actions are governed by Swedish rules.

The Council also makes statements on issues concerning good practice in the stock market which affect companies whose shares are traded on a multilateral trading facility in Sweden, i.e., First North, Nordic MTF and AktieTorget.

The Council can issue statements on its own initiative or after receiving a petition. The Council determines itself whether a petition warrants that the issue be brought up for evaluation. In doing so, the Council takes into account whether the issue is a matter of principle or of practical importance for the applicant or the stock market. The Council also considers whether the issue is or can be expected to be treated elsewhere.

The Council is composed of a Chairman (Johan Munck), a Vice Chairman (Marianne Lundius) and around thirty other members representing various 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.

At year-end 2015 the following members stepped down from the Council: Peggy Bruzelius, Thomas Halvorsen, Peder Hasslev, Kajsa Lindståhl, Eva Persson, Annika Poutiainen and Cecilia Vieweg. On the same date the Council appointed as new members Mats Andersson, Carina Bergfelt, Richard Josephson, Ann-Christine Lindeblad, Wilhelm Lüning, Jens Nystrand and Charlotte Strömberg.

At least four and not more than eight members must be present to evaluate a case. The composition is determined according to the principles in the Council's by-laws and rules of procedure. An especially important case can be decided by a plenary session at the initiative of the Chairman.

The Chairman or the Executive Director may decide on behalf of the Council in urgent cases, where similar issues have already been considered or in cases of lesser importance.

The Council has a secretariat led by the Executive Director (undersigned) as well as a part-time rapporteur, Ragnar Boman. As of 1 February 2016 the secretariat is also assisted part-time by Karin Dahlström, LL.B.

A significant share of the Council's operations concerns public takeover offers. In this area the Council principally applies the Act on Public Takeover Offers on the Stock Market (2006:451) ("the Takeover Act") and other statutes, but also rules established through self-regulation, primarily Nasdaq Stockholm's and NGM's (identical) takeover rules and corresponding rules for the multilateral trading facilities.

In its capacity as a regulatory agency and with the support of the Takeover Act and the Financial Instruments Trading Act (2007:375), the Financial Supervisory Authority has delegated to the Swedish Securities Council the authority to take certain decisions which, according to the Takeover Act, rest with the supervisory authority. This applies, for example, to decisions on the interpretation of, and exemption from, rules on mandatory bids. Moreover, Nasdaq Stockholm and NGM have delegated to the Council the authority to interpret and evaluate questions regarding exemptions from their takeover rules.

### **The Council's international contacts, etc.**

The Council's activities involving public takeover offers are largely modelled on the British Takeover Panel. The Council's secretariat maintains continuous contact with the Panel and similar organisations in other countries such as Germany, France and Luxembourg.

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

In a different capacity, the undersigned also participated in the OECD's Corporate Governance Committee, where corporate governance issues, including public takeover offers, are regularly discussed by a global membership.

### **The Council's statements**

Since its start in 1986, the Swedish Securities Council has acted on nearly 800 cases and issued an equal number of statements. In 2015, the Council issued 45 statements, two thirds of which dealt with public takeover offers, including mandatory bids.

Slightly more than one fourth of the cases during the year, 12, were dealt with in council (i.e. not by the Chairman or Director General alone), while the rest were considered by the Chairman. An average of seven members attended the Council's meetings.

Of the 45 cases in 2015, 12 were delegated wholly or in part by the Financial Supervisory Authority. The majority of these cases involved interpretations of or exemptions from mandatory bid rules.

As has been the case for some time, the majority of applications for exemptions from mandatory bids were granted. The main reasons for this, as mentioned in previous activity reports, are that the parties involved, especially the key legal advisers, today are well acquainted with regulations and the Council's practices, and that they are regularly in contact with the Council's secretariat and will discuss a case before it is submitted for evaluation. The only exemption request denied in 2015 was not preceded by such contact (that statement has not been made public).

In a statement not yet made public, the Council again took up the question of how the takeover rules' provisions on past transactions ' apply to swap arrangements between a bidder and a financial institution such as a bank. The bidder in question intended to enter into a swap agreement, whereby it would accept the full financial exposure related to an agreed-upon number of shares in the target company. To

hedge the arrangement, the bank planned to acquire a corresponding number of shares in the target company on the market. The agreement would have allowed the client to increase its financial exposure in the target company without taking ownership of the shares before the swap agreement expired. Unlike previous cases (AMN 2011:20 and 2013:19), this didn't involve an arrangement to avoid violating the competition rules.

When the swap agreement ended, the bidder would have had the right, in lieu of a cash settlement, to acquire the target company's shares from the bank. The question before the Council was essentially at what price the shares in this case – applying the rules on acquisitions prior and during an offer – would be considered as having been acquired by the bidder. The Council stated that, provided the compensation paid by the bidder to the bank for the financial costs of the arrangement is market based, the highest price that the bank pays to acquire shares in the target company is the lowest allowable bid price. There is no leeway here to use the average price at which the bank executed the acquisitions on the market.

The activity report for 2014 mentioned the spectacular bidding war that year for control of two companies, Shelton Petroleum and Petrogrand, which offered to take over each other and in a number of petitions to the Council asked for clarification of the takeover rules and challenged each other's actions. In all, the Council ruled during the year on no less than nine generally comprehensive petitions relating to Shelton and Petrogrand. The Council also took an unprecedented step and in a letter to both parties stated that their actions exceeded the limit of what could be considered acceptable for listed companies, that the ongoing conflict and the parties' actions had damaged confidence in the stock market, and that the damage could worsen if the conflict continued.

A couple of weeks later a settlement plan was presented and just before year-end the companies announced that they had reached a deal. Conditions changed once again in early 2015, however, and it wasn't until autumn of last year that the companies divested their shareholdings in each other and went their separate ways.

Based mainly on the Council's statements, Nasdaq Stockholm reported both companies to the exchange's disciplinary committee, which in December 2015 decided to delist both Shelton and Petrogrand, invoking, among other things, what the Council had stated.

The Council issued two statements on its own initiative during the year. One (AMN 2015:29) involved a single case brought on by what the Council felt was a clear violation of the fundamental principle of equal treatment in the takeover rules.

The other statement (AMN 2015:26) was a reaction to what the Council perceived to be a growing interest in changing the terms of financial instruments already in issue, particularly warrants and convertibles. During the summer the Council received several queries, mainly from financial advisers to small businesses, on the possibility of amending subscription or conversion prices or other terms. In its statement the Council reiterated what it had noted in several previous statements, i.e., that it is generally accepted in the securities market that convertibles, warrants and the like must be traded on predictable terms and that changes in those terms are acceptable only in special circumstances. That warrants are out of the money or that a company's financial situation does not allow the cash repayment of a convertible loan are not circumstances that motivate a change in subscription or conversion prices. Such changes in terms are not consistent with good practice on the stock market.

Another "issue-related" theme during the year was subscription undertakings. In a case initiated by Nasdaq Stockholm, the Council concluded that only in exceptional circumstances is it consistent with good practice to pay compensation to a shareholder for an undertaking to subscribe for a pro rata share of an issue (AMN 2015:17). The stock exchange's disciplinary committee resolved in January 2016 that the company in question had violated good practice in the stock market and ordered the company to pay a fine equivalent to two times the annual fee.

In line with what was stated in the preliminary work that led to the so-called Leo rules, which are now incorporated in the Companies Act, the Council has since its start addressed a host of queries on arrangements designed to make senior executives shareholders or otherwise pay them share-based compensation.

The Leo rules affect issues by public limited companies of, among other things, shares to directors, managing directors and other employees. They also affect such issues by subsidiaries of public limited companies. Furthermore, the rules affect transfers by public limited companies of shares in subsidiaries as well as subsidiaries' transfers of shares in second-tier subsidiaries. The rules mainly tighten the procedures for such issues and transfers.

The Council has established extensive precedent from situations where good practice in the stock market have prompted the application of the procedures prescribed in the Leo rules even though the legal rules are not formally applicable. This is true, for example, of issues and transfers of certain financial instruments that are not subject to the law, of issues and transfers to persons who do not fall into any of the specified categories but are going to be appointed to or recently left such a position, of issues and transfers from a company that is a tightly controlled associate rather than a subsidiary, etc.

With respect to procedures of this kind, the Council took the first step in 2013 – in accordance with statement AMN 2012:05 on related party transactions – toward an approach where the size of an issue or transfer determines what good practice require in terms of the Leo rules' application. Further steps were taken in 2014, and in 2015 the Council again issued statements in which it clarified that good practice prompt the application of the Leo rules only if the issue or transfer in question is not insignificant to the “group” and its shareholders (cf. AMN 2015:04).

The Council's area of expertise also includes attempts to circumvent the Leo rules. The legislative preparatory work emphasised the difficulty in wording laws in a way that eliminate any possibility of circumvention while at the same time leaving enough room for transactions motivated for business reasons: “Obvious cases of circumvention should be considered ethically indefensible, however, and therefore fall under other rules” (bill 1986/87:76, p. 26). In keeping with these statements, the Council has several times rejected procedures that were perceived as circumventing the Leo rules. A few of these cases have involved a limited company that has considered establishing a jointly owned "co-investment vehicle" with one or more

executives in order to then transfer all of the shares in one or more subsidiaries to this company. In 2015 the Council maintained its view that such procedures can be considered as circumventing the Leo rules and therefore are inconsistent with good practice in the stock market. In this evaluation it is irrelevant whether the value of the shares in the subsidiary that will be attributable to the executives through this arrangement is insignificant to the listed company.

In general, the Council's statements are made public. Around 80 percent of all statements and about 85 percent of those issued in the last ten years have been publicised to date. Statements which have not been made public as a rule pertain to deals that are planned but not yet completed. In several cases it is obvious that the deal will not be finalised as planned, since the Council's decision in some critical respect went against the petitioner. Nevertheless, the Council tries, after time has passed, to obtain permission to make such statements public as well, if nothing else in anonymous form. More than 80 percent of the 45 statements in 2015 have been made public to date.

There have been occasions where statements that were intended to be made public in connection with the announcement of a transaction, e.g., a mandatory bid exemption, have been released later than otherwise would have occurred because the applicant or its proxy forgot to inform the Council. The Council is willing to consider new routines and other measures to alleviate such delays.

The Council's aim is to be accessible and quickly respond to queries. The secretariat can be reached seven days a week for consultations and formal cases. In cases handled by the Chairman, the Council generally announces its decision the day after the final petition is submitted. Even with cases evaluated by the Council, response times are usually short. During the year response times ranged from one day to a couple of weeks (in cases where the parties were given time to respond to each other's submissions).

The Council's decision in cases delegated by the Financial Supervisory Authority can be appealed to the authority. None of the Council's rulings in 2015 were appealed.



## **Consultations with the Swedish Securities Council**

The Swedish Securities Council's activities also include consultations, where companies, shareholders, advisors and marketplaces contact the secretariat by telephone or e-mail. The number of consultations was about the same as the previous year.

Some of the consultations concerned issues that were later covered in formal statements by the Council, although many never led to a ruling. The decisions made by the secretariat in consultations are not binding for the Council. If the party that consulted the Council proceeds with a request to have its issue formally evaluated, the case will be evaluated without preconditions. Therefore, the details of consultations are not made public by the Council, and its decisions cannot be publicly cited with reference to the Council.

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