

## **The Swedish Securities Council's operations 2017**

*2017 was another very active year for the Swedish Securities Council, with 41 statements issued and several times that number of consultations. As usual, the predominant issue was public tender offers.*

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

The Swedish Securities Council constitutes one part of the self-regulation system in the Swedish private sector. 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 Swedish 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.

The Council's overarching mission is to promote good practice in the Swedish stock market through statements, advice and information.

Any action by a Swedish limited company which has issued shares that are quoted on a regulated market (Nasdaq Stockholm or Nordic Growth Market NGM) or by a shareholder of such a company may fall under the Council's purview 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 traded on a regulated market in Sweden, to the extent that such actions must comply with Swedish rules.

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

The Council can comment on issues 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 for the stock market in general. The Council also considers whether the issue is or can be expected to be dealt with elsewhere.

The proceedings of the Council are based on what is stated in the petition. As such, it is the responsibility of the applicant and, where appropriate, the applicant's advisor to provide a true and fair description of the circumstances relevant to the Council's evaluation. It also means that the Council's statements apply only to the conditions cited in the petition.

The Council has a Chair, a Vice Chair 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.

The Chair of the Council is former Supreme Court President Marianne Lundius. The Vice Chair is Supreme Court Justice Ann-Christine Lindeblad. The members of the Council in 2017 are listed in the appendix.

At least four but not more than eight members must be present to evaluate a case. The Council's Chair or Vice Chair always participates. The other members assigned to a case are chosen based on the nature of the case, with the aim, according to the Council's by-laws, that the members rotate and that their experience and knowledge is put to the best use. As per established routines, potential conflicts of interest are also evaluated.

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

The Council has a secretariat, consisting of the Director General (the undersigned) and a part-time rapporteur, Ragnar Boman.

A significant part of the Council's work concerns public tender offers. The Financial Supervisory Authority has delegated to the Council the authority to take decisions on the interpretation of, and exemptions from, certain rules in the Takeover Act, primarily the rules on mandatory bids. In addition, Nasdaq Stockholm and NGM have delegated to the Council the authority to interpret and consider issues relating to exemptions from the takeover rules issued by these marketplaces. The Council also interprets and considers issues relating to exemptions from the takeover rules issued by the Swedish Corporate Governance Board for First North, Nordic MTF and AktieTorget.

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

The Council's operations involving public takeover offers are to a large extent 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 and France.

Together with the Financial Supervisory Authority, the secretariat continuously exchanges knowledge on European public takeover offers through the Takeover Bids Network (TBN) within the European Securities and Markets Authority (ESMA).

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

In 2018, the Council will host the International Takeover Regulators' Conference – a global conference for regulatory authorities and other governing bodies with responsibility for designing and monitoring compliance with takeover rules. The previous conference was held in London in 2014.

### **The Council's statements during the year**

Since its formation in 1986, the Swedish Securities Council has issued 865 statements. In 2017, the Council issued 41 statements, (compared with 47 statements in 2016), of which four fifths dealt with public takeover offers, including mandatory bids.

As in the previous year, a relatively large share of the cases, 11 of 41, were dealt with in council, while the rest were considered by the Chair. On average, seven members participated in each council.

A quarter of the statements issued during the year, 11 of 41, were delegated wholly or in part by the Financial Supervisory Authority. The majority of these cases involved interpretations of, or exemptions from, the mandatory bid rules.

As has been the case for some time, the majority of the applications for exemption from mandatory bids were granted. The main reason for this, as mentioned in previous reports, is that the parties involved, especially the key legal advisers, are well acquainted with the regulations and the Council's practices: They are in regular contact with the Council's secretariat and will discuss a case before it is submitted for evaluation.

In general, the Council's statements are made public, subject to permission from the companies to which the statement pertains. Around 80 per cent of all statements have been published to date. As a rule, statements which have not been made public pertain to deals that are planned but have not yet been completed or that have been cancelled. In several cases it is obvious that the deal will not be finalised as planned, since the Council's decision went against the petitioner in some critical respect.

Nevertheless, the Council tries, after some time has passed, to obtain permission to make such statements public, even if they are done so without naming the parties involved. Three quarters of the 41 statements in 2017 have been made public to date.

The Council's aim is to be accessible and to respond to queries quickly. The secretariat can be reached seven days a week for consultations and formal cases. In cases handled by the Chair, the Council generally announces its decision the day after the final petition is filed. Even for cases which are evaluated collectively by the Council, response times are usually short. During the year, they 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 2017 were appealed.

### **Certain statements in depth**

Among the Council's 2017 statements that have been made public, the ones concerning Knorr-Bremse's bid for Haldex (2017:15, 25 and 27) stood out in several respects. First, the Council was faced with a new substantive issue – namely, how the rules on the maximum length of an acceptance period and the possibility of an extension are applied in a situation where the planned acquisition is subject to an in-depth Phase II investigation by the EU Commission. Extensive contacts were necessary between the Council and colleagues in other countries, especially the UK, as well as with the EU Commission. The Council also faced a new procedural issue when the offeree company requested that the Council rule whether the offeror company was eligible to request an extension of the acceptance period. That request was denied. When the offeror company did request an extension anyway, it was not granted, but the Council did break new ground in a sense when it announced that, if the competition investigation continued after the conclusion of the acceptance period, Knorr-Bremse would be free to make a new offer within three weeks of the Competition Authority's decision, even if it falls within the one-year restricted period,

pursuant to Rule II.24 of the takeover rules. See also below under the heading “Regulatory work relevant to the Council’s operations”.

As regards the unpublished statements in 2017, the following can be noted.

As has repeatedly been the case in recent years, the Council in 2017 received requests to amend the terms of financial instruments that have already been issued. The Council reiterated that in the securities market it is generally accepted that convertibles, warrants and the like must be traded on predictable terms and that changes to those terms are acceptable only in special circumstances. That warrants, for example, no longer have financial cover or that a company’s financial situation does not allow cash repayment of a convertible loan are not circumstances that justify a change to a subscription or conversion price. Such changes of terms are not consistent with good practice in the stock market.

Another recurring theme is the question of under what circumstances it is acceptable from the standpoint of good practice to apply to delist a company’s shares from a marketplace despite the company still meeting the listing requirements. The Council has issued several statements on this over the years, including AMN 2014:33, and has taken the view that the company’s board of directors should ensure that, after the last listing day on Nasdaq Stockholm, for example, the company’s shares can be traded on a comparable marketplace, (regulated market or trading platform).

In an unpublished statement in 2017, the Council addressed a new situation. The case involved a company that had issued various classes of shares which were publicly traded. According to the company, the low spread and very limited trading volume in one of the classes had caused its price to fall substantially over an extended period, even though nothing had happened to the company or its industry to motivate such price movement. Against this backdrop, the company was considering whether to apply to delist the class of share in question. The Council stated that a request to delist only one of several classes of shares in some respects may warrant a different view than in previous statements on delistings. From the standpoint of good practice in the stock market, however, the

Council did not find the reasons given by the company in the case sufficient to justify a delisting.

Another unpublished statement related to a planned spinoff in the form of a distribution in kind, where all the shareholders were to receive shares in a foreign subsidiary in the form of a dividend. There was no problem from the standpoint of good practice. In this case, however, one of the owners, who did not wish to remain a shareholder in the subsidiary, had been given the right to sell the subsidiary's shares back to the subsidiary, (applying foreign law). The Council found this to constitute unequal treatment of the shareholders and, as such, inconsistent with good practice in the stock market.

With regard to public takeover bids, it is worth mentioning one unpublished statement where the issue was basically whether it is consistent with the takeover rules and good practice in the stock market to issue a partial takeover offer for shares of only one class, in this case class A shares with higher voting rights, provided that the offeror company did not as a result exceed the limit for a mandatory bid. The Council stated that individual investors are free to acquire class A shares in a listed company not only through private transactions or market purchases, but also through a partial takeover offer. Rule II.16 of the takeover rules states that a partial takeover bid can be issued provided that it does not conflict with the rules on mandatory bids. As worded, the provision does not prevent the offer from being limited to shares of only one class. Nor do the comments to the provision suggest such a limitation. Thus, a partial offer for only the class A shares would not violate the takeover rules, and according to the Council there was no reason from the standpoint of good practice to otherwise further comment on this matter.

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

The Swedish Securities Council also provides consultations, where companies, shareholders, advisers and marketplaces consult the secretariat by telephone or e-mail. The number of consultations was about the same as in the previous year.

Some of the consultations concerned issues that were later covered in formal statements by the Council, but many did not lead to a formal ruling. The responses given 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.

### **Regulatory work relevant to the Council's operations**

The Swedish takeover rules have been partly shaped over the years by the Council's rulings. When the Council is faced with new issues that have not yet been regulated, its statements have on a number of occasions eventually led to regulatory changes. In most of these cases, it has been a question of "codifying" the Council's rulings, but in some cases the rules have been worded differently.

On 1 November 2017, the overlap between the Council's rulings and the takeover rules resulted in certain changes to the takeover rules on indirect changes of control. The changes, which tighten the rules slightly, go back to the statements issued by the Council in 2016 on the change of control in the company Rezidor.

In a similar way, the Council's deliberations in 2017 regarding the Haldex bid led to the launch of a review of the rules that apply when a competition authority evaluation of a bidding company's acquisition takes an extremely long time. Regulatory changes in this area are scheduled to take effect on 1 April 2018.

Lastly, it should be mentioned that work is currently being done under the auspices of the Ministry of Justice to implement the EU directive amending the Shareholders Rights Directive in Swedish law. This work impacts, among other things, executive compensation and related party transactions. The necessary legislation is scheduled to be in place by the summer of 2019, which might also be an appropriate time to review the Council's statements in both of these areas.



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