

The Swedish Securities Council's operations

2008

In 2008, the Swedish Securities Council's operations were again dominated by issues concerning public takeover offers in the stock market, though it also issued a couple of statements on other topics. Nearly a third of its cases were delegated by the Swedish Financial Supervisory Authority.

The Swedish Securities Council

Through its statements, advice and information, the Swedish Securities Council promotes good practices in the Swedish stock market. The Council is managed by a not-for-profit association – the Association for Good Practices in the Securities Market – with ten members: the Swedish Association of Listed Companies, FAR SRS (the institute for the accountancy profession in Sweden), the Swedish Association of Listed Companies, the Institutional Owners Association for Regulatory Issues in the Stock Market, NASDAQ OMX Stockholm Exchange AB, the Stockholm Chamber of Commerce, the Swedish Bankers' Association, the Swedish Association of Stockbrokers, the Confederation of Swedish Enterprise and the Swedish Insurance Federation.

Any action by a Swedish limited company which has issued shares that are quoted on a regulated market 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 quoted on a regulated market in Sweden, to the extent such actions must comply with Swedish rules.

The Council may also offer, to the extent it deems appropriate, to issue statements on topical issues concerning companies whose shares are traded on a trading platform in Sweden.

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 in question 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 to the stock market. The Council also considers whether the issue is or can be expected to be treated in another rule. Most petitions are submitted by shareholders, companies or a marketplace.

The Council principally applies the Act on Public Takeover Offers on the Stock Market (2006:451) ("the Takeover Act") and other statutes, but also uses rules established through self-regulation, primarily the NASDAQ OMX Stockholm Exchange AB's rules on public takeovers on the stock market. However, the Council may also comment on issues where there is no written rule to apply or self-regulations.

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, OMX and NGM have delegated to the Council the authority to interpret and evaluate questions regarding exemptions from their takeover rules.

The Council is composed of a Chairman (Bo Svensson), a Vice Chairman (Marianne Lundius) and 22 other members representing various sectors of the Swedish business community. The members are appointed by the Association for Good Practices in the Securities Market.

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 considered 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.

The Council's operations involving public takeover offers are largely modeled after the British Takeover Panel. The Council's secretariat in fact maintains continuous contact with the Panel. Contacts are also maintained with similar bodies in other countries, such as Germany and France. The secretariat also participates, together with the Financial Supervisory Authority, in the Committee of European Securities Regulators (CESR), a consultative body that addresses public takeovers. The Executive Director participates in the OECD's corporate governance work, where issues regarding public takeovers are frequently discussed by a global membership.

For the second time, the Financial Supervisory Authority has completed a follow-up evaluation of its delegation of cases to the Council. The evaluation comprises the period 1 October 2007 through 30 September 2008. In summary, the Financial Supervisory Authority states that the Council fulfills the duties it is delegated well and that the FSA's previous observations have been acted upon in a satisfactory manner. Based on the results of a questionnaire, the FSA also states that confidence in the Council's methods and its role in interpreting rules is high. The evaluation is available on the Financial Supervisory Authority's website, www.fi.se.

The Council's statements

In total, the Council has issued around 500 statements. In 2008, it issued 51 statements. As in previous years, the majority were issued in response to

petitions from companies or their advisers. Two statements were issued on the Council's own initiative (2008:06 and 39). Two statements were issued after a petition from OMX Nordic Exchange Stockholm AB (2008:19 and 30).

In 2008, the Council issued 17 statements delegated by the Financial Supervisory Authority, corresponding to one third of all its statements during the year, unchanged from 2007.

Of the 51 cases, about half, 26, were considered by committee. This represents a higher share than the previous year. Of the remaining cases, 18 were considered by the Chairman and 7 by the Executive Director.

Practically all the petitions pertained to impending or ongoing public takeover offers or changes in ownership that could necessitate mandatory bids. As has been the case in recent years, one specific takeover offer (Q-Med) generated several statements.

Among cases not concerning public takeover offers were a couple where statements were issued on the application of the so-called Leo rules in connection with the transfer of shares in subsidiaries and a couple of statements on incentive programs (see AMN 2008:06, among others). One statement concerned the interpretation of the Code of Corporate Governance.

Nearly half of the Council's statements involved exemptions from the takeover rules. Fourteen cases concerned exemptions from the rules on mandatory bids, while the others involved exemptions, for example, from having to offer to buy financial instruments other than shares or from the four-week respite to prepare offer documentation. The basis for granting exemptions was largely the same as in previous years.

In the public debate there have been accusations that the Council always grants exemptions to mandatory bids to those who request them. This is not the case. Over the years, the Council has denied petitions for exemptions from mandatory bids, but only rarely have they become known to the public since the law allows the Council to

disclose only those rulings that wholly or in part include an approval. The law does not prevent the Council from making public a decision where an exemption request has been denied, but the Council must have the petitioner's permission to do so. In 2008, one such decision was made public after the petitioner granted permission and did not request that the case be kept confidential.

It should also be noted that the grounds for exemption are described relatively well in the legislative history of the Takeover Act and that the Council now has considerable practical experience in the area. For a professional adviser, it is therefore relatively easy in most cases to judge the prospects of an exemption and, depending on how what they determine, advise their client whether or not to request one. Against this backdrop, it is not surprising that most exemption requests are approved.

In other countries, legislators have chosen to stipulate the exceptions from the mandatory bids directly in the law without the possibility of applying for an exemption. Swedish legislators have rejected such an arrangement because it would create far too many opportunities to circumvent the mandatory bid rules.

Lastly, it should be noted that approval of an exemption request is not infrequently conditional on various terms for the applicant. For example, the Council can grant an exemption from a mandatory bid in connection with an issue for non-cash consideration pending the approval of a qualified majority of the general meeting.

Of the 51 statements issued during the year, 30 have been made public to date. In general, confidential statements usually concern deals that have been planned but not yet implemented. In certain cases, it is obvious that the takeover will not be completed, although the Council will always try, after the fact, to obtain the petitioner's permission to release these statements, if not in their entirety than at least anonymously.

The Council is almost always "open." For initial contacts regarding a case or consultation, the secretariat is usually accessible by telephone daytime or evenings seven days a week. The Council tries to respond promptly to queries. In a third of the cases in 2008 the Council announced its decision the same day or the day after a

final petition was submitted. Obviously most of these cases were decided by the Chairman or the Executive Director. Even for those evaluated by the Council the response times were short and only in a few cases exceeded one week. The cases requiring longer consideration generally involved another party that was offered an opportunity to respond.

Consultations with the Swedish Securities Council

As in previous years, a significant part of the Swedish Securities Council's operations consisted in 2008 of consultations by telephone or e-mail. Consultations often concern impending or ongoing public takeovers or other large-scale transactions, which usually demand expedited review. Some consultations related to issues that would later be treated in a formal statement, though the majority never lead to a ruling by the Council. The rulings made in consultation are not binding for the Council, which evaluates each case without preconditions, if the party that consulted the Council proceeds with a request to have its issue evaluated. Details of consultations are not made public by the Council, and its decisions may not be publicly cited with reference to the Council or in other contexts.

Besides consultations, there are a growing number of contacts with the Council's secretariat for information, in particular regarding applicable rules in the stock market. Questions of this type come from the public, the media and, to a growing extent, Swedish and international asset managers.

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