

## **The Swedish Securities Council's operations 2016**

*The Swedish Securities Council was very active in 2016. The Council issued nearly one statement a week. The statements spanned several areas, and an unusually large share of them were decided in council.*

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

The Swedish Securities Council has three main responsibilities. Through its statements, advice and information, the Council promotes good practice in the stock market. The Swedish Financial Supervisory Authority has delegated to the Council the authority to interpret and grant exemptions from the rules on mandatory bids. The Council has been delegated the authority to interpret the takeover rules of Nasdaq Stockholm, the Nordic Growth Market (NGM) and the Swedish Corporate Governance Board and consider issues relating to exemptions from the rules.

The Council is managed by a non-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, currently 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 proceedings of the Council reflect 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 is composed of a Chairman, a Vice Chairman 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 Chairman of the Council for more than twenty years, with a brief hiatus, has been former Supreme Court Chairman Johan Munck. On 1 September 2016 Johan handed the Chairman's gavel to former Supreme Court Chairwoman Marianne Lundius, who until then had been the Council's Vice Chairman. On the same day Supreme Court member Ann-Christine Lindeblad was named the new Vice Chairman of the Council.

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. The possibility of a conflict of interest is examined as well, in accordance with established routines.

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.

A significant share of the Council's work concerns public tender offers, as mentioned above. 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 uses rules established through self-regulation. The latter primarily applies to Nasdaq Stockholm's and NGM's takeover rules and the (identical) takeover rules issued by the Swedish Corporate Governance Board that apply to offers for companies whose shares are traded on the trading platforms First North, NGM Nordic MTF, and AktieTorget.

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 consider issues relating to 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 and France.

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

In a different capacity, the undersigned participated in the OECD's Corporate Governance Committee, where corporate governance issues, including public takeover offers, are regularly discussed by a global membership. At the Committee's meeting in autumn 2016, the undersigned led a roundtable session on public takeover offers.

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

Since its start in 1986, the Swedish Securities Council has acted on over 800 cases and issued an equal number of statements. In 2016, the Council issued 47 statements, two thirds of which dealt with public takeover offers, including mandatory bids.

A relatively large share of the cases, 19 of 47, was dealt with in council, while the rest of the cases were considered by the Chairman (i.e. not by the Chairman or Director General alone). An average of seven members attended the Council's meetings.

Half of the cases during the year, 23 of 47, 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 the mandatory bid rule were granted. The main reason for this, as mentioned in previous activity reports, is that the parties involved and especially the key legal advisers 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.

One of the applications for an exemption that was denied in 2016 dealt with a company in which two owners together held more than three tenths of the votes of all the shares. According to the information they provided, the owners were not related parties in a legal sense but had voted in unison at the general meeting for some time. A third owner was considering increasing its holding to more than three tenths of the votes and applied for an exemption to increase to a level just below the combined holding of the two other owners. The Council stated that, based on how the two owners actually exercised their influence, an increase in the holding to such a level would not necessarily result in a shift in controlling owners, but under the circumstances the Council also had to take into account that the owners in question at any time could, in relevant respects, act differently than they had until then. Consequently, the Council did not feel that the third owner qualified for an exemption from the mandatory bid. The statement has not yet been made public.

In another statement that has not been made public, the Council returned to the well-known problem in connection with takeovers of whether the principle of equal treatment is being respected when a shareholder of a target company participates in a public takeover offer in its capacity as a shareholder 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 where 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. It is also stated in the comment that it would be considered incompatible with the rule if a shareholder acts as a bidder by participating in the bidding company while at the same time retaining all or part of its shareholding in the target company and thus is also a recipient of the offer.

In the case in question, the principal owner of a listed company intended to bid together with a private equity firm on the shares in the listed company. In the opinion of the Council, certain circumstances suggested that the owner in question could be considered the bidder. A major obstacle, however, was that the owner intended to transfer the majority of its shares in the target company to the private equity firm for cash and assign only a small portion of the shares to the bidding company. In this way the principal owner, in the opinion of the Council, would be both the de facto bidder and bid recipient. Therefore, the Council stated, the offer would violate the principle of equal treatment, since the principal owner, in contrast with other shareholders, would be offered cash consideration for the majority of the transferred shares in the target company and shares in the bidding company for the rest of its shares in the target company.

In light of what the Council saw as a growing interest in changing the terms associated with listed financial instruments, especially warrants and convertibles, the Council issued a statement on its own initiative in 2015 in which it reiterated what it had stated 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 cash repayment of a convertible loan are not, the Council stated, circumstances that motivate a change in the subscription or conversion price. Such changes in terms are not consistent with good practice on the stock market.

Changes in terms were a topic the Council again addressed in 2016. In no less than three cases involving the same company the Council had reason to repeat its restrictive view.

Another recurring theme for the Council is under what conditions it is acceptable from the standpoint of good practice on the stock market to apply to delist a company's shares from a marketplace despite that the listing requirements are met. The Council has issued several statements on this over the years, including AMN 2014:33, and taken the view that the board of directors should ensure that the company's shares, after the last listing day on Nasdaq Stockholm, for example, can be traded on a comparable marketplace (regulated market or trading platform). In a couple of statements in 2016 that have not been made public, the Council maintained this view, but in one of the statements it also noted another possibility, i.e., to let the shareholders with a qualified majority make the decision. In the opinion of the Council, a parallel can be drawn to the provisions of the Swedish Companies Act on changes to the articles of association that limit the transferability of shares already in issue. Such a decision is valid if taken by the general meeting with the support of all the shareholders present and that they together represent at least nine tenths of all the shares in the company. The same majority requirement applies to a decision to switch from a public to a private company. In the case in question, the Council ruled that a decision to apply to delist the company's shares from First North would be consistent with good practice if it is supported by the above-mentioned majority of the shareholders attending the general meeting and that the shareholders were clearly notified of the majority requirement in the notice of the meeting.

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 published 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. Just over 60 percent of the 47 statements in 2016 have been made public to date.

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 filed. Even with cases evaluated by the Council, response times are usually short. During the last 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. One of the Council's rulings in 2016 was appealed, but the appeal was subsequently withdrawn.

### **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 the secretariat's decisions cannot be publicly cited with reference to the Council.

*Rolf Skog*  
*Executive Director*