

The Swedish Securities Council

2021



The work of the Swedish Securities Council in 2021

2021 was another very active year for the Swedish Securities Council. A continued high level of stock market activity, admissions of more companies to the stock exchange and a large number of takeover bids were some of the reasons why the Council issued 57 rulings during the year, which is an average of more than one per week.

The Council's responsibilities, rules of procedure etc.

The Swedish Securities Council has three main tasks. It promotes good practice in the Swedish stock market through rulings, advice and information. The Financial Supervisory Authority, *Finansinspektionen*, has delegated to the Council the authority to issue rulings on 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[[*står det så i den svenska?*]] and hears petitions regarding exemptions from these.

The Council is run by the Association for Generally Accepted Principles in the Securities Market. The Association is a representative body made up of 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 for Regulatory Issues in the Stock Market; 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 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 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 rulings 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 rulings 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 dealt with elsewhere, for example in a court of law. It is very rare that a submission is rejected without a hearing.

The Council consists of a Chair, a 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 the term can be extended.

The Chair of the Council is former Supreme Court President Marianne Lundius. The acting Vice Chair is Supreme Court Justice Sten Andersson.

When a petition is heard, no fewer than four and no more than eight members of the Council are to participate. Some petitions may be heard by a wider group of no fewer than nine and no more than twelve members or in a plenary session with no fewer than half of the Council members. The members selected to hear each petition are determined according to principles set out in the Council's statutes and rules of

procedure. In accordance with established routines, potential conflicts of interest are also evaluated before each hearing.

The Chair or the Director General may issue a ruling 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 minor 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 a special adviser to the Council.

The proceedings 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 applicable, 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 rulings 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 Council's international contacts etc.

The Council's work involving public takeover bids is modelled to a large extent on that of the British Takeover Panel. The Council's secretariat maintains continuous contact with the Panel and with equivalent bodies 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 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 takeovers, are discussed regularly by a global membership.

Council rulings in 2021

Since its formation in 1986, the Swedish Securities Council has issued over a thousand rulings. In 2021, the Council issued 57 rulings.



The vast majority of the rulings in 2021, 48 out of the 57, concerned takeover bids, including mandatory bids. This can be seen against the background of continued significant takeover activity in the stock market. In 2021, over 20 companies were subject to takeover bids, and several of these transactions gave rise to one or more petitions to the Council.

More than a third of the petitions, 20 out of the 57, were heard in Council, while the rest were heard by the Chair alone. On average, seven members participated in each Council hearing.

Five of the petitions heard during the year were delegated wholly or in part by the Financial Supervisory Authority. These cases involved interpretations of or exemptions from the rules on mandatory bids.

One of the mandatory bid-related rulings at the beginning of the year concerned a planned transfer of a major shareholding in a listed company within a corporate

group. In its ruling, the Council stated that such a transfer - from one subsidiary to another within the same group - does not trigger a requirement to make a mandatory bid. The ruling has not been published and is entirely in line with the established principles of the Council. However, it may be worth restating that such and similar transfers between related parties do not require an exemption. If, however, there is a transfer of a major shareholding between different units in, for example, a "family sphere", where the entities in question are not formally related parties but the transfer can de facto not be regarded as a transfer of ownership control, an exemption is required.

In another ruling concerning mandatory bids, (AMN 2021:34), the Council reiterated that a party that has been granted an exemption to establish a holding at a level above 30 per cent of the voting rights as a result of a certain transaction cannot freely reduce and then re-increase its holding in the range of 30 to, in the case in question, 44 per cent without triggering the requirement to submit a mandatory bid. However, the circumstances of the individual case may justify the granting of an exemption for such an increase in the holding.

In ruling AMN 2021:22, the Council returned, as it often has before, to the basic principle in the Takeover Rules that shareholders in an offeree company must be treated equally. This principle is expressed, for example, in Rule II.10, which states that all holders of shares with identical terms are to be offered a consideration per share that is identical in form and value. Rule II.11 refers to a situation in which the offeree company has shares with non-identical terms, i.e. different classes of share. Also in these cases, the principle of equal treatment places strict requirements on the structure of the bid. With regard to the form of consideration, the first paragraph states that consideration in the same form is to be offered for shares of all kinds. The provision does not prevent a bidder from offering shares with a high voting value in the offeror company as consideration for shares with a high voting value in the offeree company and offering shares with a lower voting value as consideration for shares with a lower voting value in the offeree company, but this does not mean that the principle of equal treatment can be circumvented. If a bidder offers shares with a high voting value in the offeror company as consideration for shares with a high voting value in the offeree company and offers shares with a lower voting value in the

offeror company as consideration for shares with a lower voting value in the offeree company, the bidder must ensure that the consideration per share is the same, regardless of share type. In the ruling in question, the Council found that, in order to comply with the Takeover Rules in this respect, the bidder was required to adjust the bid it had already made so that the number of consideration shares offered for the offeree company's class B shares was the same as that offered for the offeree company's class A shares.

A recurring theme in submissions to the Council is share issues, especially those that deviate from the shareholders' preferential rights, i.e. private placements/directed share issues. Basic provisions on issues of shares are found in the Swedish Companies Act. It is not the role of the Council to interpret these; the responsibility for ensuring that these provisions are respected rests with the board of the issuing company.

To supplement the provisions of the Companies Act, the Swedish Corporate Governance Board issued a recommendation in 2014 regarding what in some respects is good practice in the stock market for private placements. In its 2020 annual report, the Council wrote that it is the responsibility of the company's board to ensure that this recommendation is also respected, in both letter and purpose.

In ruling AMN 2021:41, the Council stated that it had repeatedly observed a certain casualness in the market when deciding on share issues, and therefore reiterated the importance of companies fully respecting the recommendation when considering cash issues. As is also stated in the recommendation, rights issues are the primary rule according to the Companies Act, and private placements are a deviation from that primary rule. It is therefore not compatible with the recommendation to decide on a private placement without the required analysis of the conditions for conducting a rights issue. Good practice in the stock market, the Council stated, requires that the company's board report to the shareholders regarding its reasoning when it decided to deviate from the primary rule that new cash issues are to be conducted with preferential rights for the shareholders.

On 1 December 2020, the Swedish Corporate Governance Board issued its new Remuneration Rules. These rules provide a comprehensive regulatory framework for good practice in the Swedish stock market with regard to remuneration of a company's board and executive management and with regard to share-related and share price-related incentive programmes. The Rules are intended to codify the rulings of the Council on incentive programme matters, and the Rules are to be interpreted by the Council. As the Rules address the same matters as Council ruling AMN 2002:01 and subsequent statements regarding incentive programmes, these old rulings no longer provide guidance in matters regulated by the Remuneration Rules. In 2021, the Council issued two rulings on interpretation of the Remuneration Rules and what is to be regarded as such an incentive programme and thus to be decided upon by the shareholders' meeting – see AMN 2021:57

The Rules do not cover the Council's established practice with regard to the "Leo rules" in Chapter 16 of the Swedish Companies Act. Accordingly, to supplement the Remuneration Rules and with the aim of bringing greater clarity, the Council issued ruling AMN 2021:09 at the beginning of 2021. Subject to certain stated exceptions, this ruling replaces previous statements from the Council relating to the Leo rules.

As a general rule, the Council's rulings are to be made public. To date, around 80 per cent of all Council rulings and approximately 85 per cent of rulings issued in the past ten years have been published. Normally, rulings which have not been made public pertain to processes that are planned but have not yet been completed. In some cases, it is clear that the transaction will not be completed as planned, as the Council ruled against the petitioner in some crucial respect. Nevertheless, the Council also tries to obtain permission to publish such rulings after some time has passed, even if this is done without naming the parties involved. Of the 57 rulings issued in 2021, 45 are currently publicly available.

The Council strives to be easily 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 cases heard collectively by the Council, response times are usually

also short. During 2021, 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 has shown that the processing time is often shorter if a petition is preceded by informal direct contact with the secretariat.

Council rulings on matters delegated by the Swedish Financial Supervisory Authority can be appealed to the Authority. None of the Council's rulings in 2021 were appealed.

Consultations with the Council secretariat

The Swedish Securities Council also provides a consultation service, whereby companies, shareholders, advisers and marketplaces can consult the secretariat by telephone or email.

Some of these consultations concern issues that are later covered in formal rulings 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, it 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.

Rolf Skog

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