The Swedish Securities Council

2019

The work of the Swedish Securities Council in 2019

2019 was a very active year for the Swedish Securities Council. The Council issued an average of one ruling per week. The vast majority of these were on the subject of takeover bids, with a large proportion of cases being heard by the Council in session rather than by the Chair alone.

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 rule. The Council also interprets the Takeover Rules issued by Nasdaq Stockholm, NGM and the Swedish Corporate Governance Board and hears petitions regarding exemptions from these.

The Council is run by a not-for-profit association, the Association for Generally Accepted Principles in the Securities Market. The Association is 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, Nasdaq Stockholm, the Swedish Insurance Federation; the Swedish Bankers' Association, the Swedish Securities Dealers' 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 First North Growth Market, Nordic SME and Spotlight Stock Market multilateral trading facilities.

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, 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 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.

When a petition is heard, no fewer than four and no more than eight members of the Council are to participate. A petition may be heard by a wider group of no fewer than nine and no more than twelve members if there is a compelling reason to do so. The members selected to hear each petition are determined according to principles set out in the Council's statutes and rules of procedure. As per established routines, potential conflicts of interest are also evaluated.

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 less 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 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 appropriate, 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 latter includes the Takeover Rules issued by Nasdaq Stockholm and NGM, as well as the (identical) Takeover Rules issued by the Swedish Corporate Governance Board, which apply to offers for companies whose shares are issued on the First North Growth Market, Nordic SME and Spotlight Stock Market multilateral trading facilities.

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.

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 takeover processes, are regularly discussed by a global membership.

Council rulings in 2019

Since its formation in 1986, the Swedish Securities Council has issued close to a thousand rulings. In 2019, the Council issued 53 rulings.

Two petitions were rejected unheard, the reason being that they were to a large extent matters of company law that could be the subject of court proceedings.

The majority of rulings, 45 out of 53, concerned takeover bids, including mandatory bids. This can be seen against the background of continued significant takeover activity in the stock market. In 2019, 18 companies in the aforementioned marketplaces were subject to takeover bids or mergers.

Almost half of the petitions, 25 out of 53, were heard in council, while the rest were heard by the Chair alone. On average, seven members participated in each council hearing. The high number of petitions heard in council is a reflection of the relative complexity of many cases. One petition, which was raised on the Council's own initiative, was heard in an expanded council of twelve members.

Just over a fifth of the petitions heard during the year, 11 out of 53, were delegated wholly or in part by the Financial Supervisory Authority. The majority of these cases involved interpretations of or exemptions from the rules on mandatory bids.

One of the first petitions of 2019, AMN 2019:02, concerned a matter of principle with regard to takeovers, namely the admissibility of a completion condition relating to the financing of the offeree company's operations, in this case the refinancing of loans. The Council found that the basic requirement that an offeror must have the funding of the purchase confirmed at the time of submission of the bid does not mean that

the offeror must have secured access to credit for the potential refinancing of the offeree company's loans upon completion of the offer, but it does give cause to place restrictions on the requirement of such conditions for the completion of an offer that focus on the offeree company's financial standing, at least with regard to conditions relating to limited changes in the financial position.

In AMN 2019:11, the Council was asked whether it would be acceptable according to the rules on "subsequent transactions" in section II.15 of the Takeover Rules to assume a particular theoretical evaluation of consideration shares. This is a type of question that the Council does not answer. In the opinion of the Council, it must be the responsibility of the offeror to determine in each individual bid where the consideration is not cash, taking into account all the relevant circumstances, the value of the offered consideration and, in the case of any prior, side or subsequent transactions, to report how that valuation was determined.

In a ruling that has not yet been published, the Council took up an aspect of the rules on prior transactions in section II.13 of the Takeover Rules. The fifth paragraph of this rule means, a contrario, that a bidder may conduct prior transactions for consideration in shares without offering shares as remuneration if the prior transactions together represent less than ten per cent of the shares in the offeree company. This was also applied in AMN 2010:22, which concerned a prior transaction with payment in listed shares. The 2019 case, however, involved payment with shares in a privately owned offeror company. The Council did not consider it a given that the provision, despite its wording, was intended to be applied to such a situation, and ruled that the procedure being considered would not be compatible with the Takeover Rules or with good practice in the Swedish stock market.

Another as yet unpublished statement concerned section II.17a of the Takeover Rules, which prohibits an offeree company from committing itself to offer-related arrangements vis-à-vis an offeror. The commentary on this provision states that the Swedish Securities Council may grant exemptions from the provision, but the commentary also makes it clear that the Council will generally be restrictive in its use of such rulings. The commentary states, however, that the circumstances in

individual cases may be such that dispensations may be allowed. “This may, for example, be the case where reciprocal undertakings are involved in amalgamation agreements between parties of equal strength.” In the case heard by the Council, an operational Swedish company was to merge with a foreign company that did not conduct any actual operations. In the view of the Council, this could not be regarded as a merger between “parties of equal strength”.

As reported in previous annual reports, the vast majority of cases relating to exemption from the mandatory bid rule are relatively straightforward in the sense that preparatory legislative texts and the large number of previous rulings by the Council normally support the granting of dispensations, on certain standard conditions stipulated by the Council. In cases where exemptions are sought in order to solve an internal financial crisis in a company, for example by conducting a rights issue, the circumstances cited may be such that the Council does not believe that they justify an exemption. It may be, for instance, that the Council deems the company’s situation to be not sufficiently urgent or that the company has not investigated other funding options sufficiently thoroughly. In a ruling from 2019 that has not yet been published, the Council stated that the situation justified an exemption from the mandatory bid rule for lenders' participation in a set-off issue. The lenders in question, however, also wanted to ensure that certain executives would remain in the company, and to that end they would be given an option to acquire shares in the company in the future. Since exercising these options would result in a mandatory bid situation for the executives in question, this scenario was also covered by the application for exemption. The Council did not find sufficient grounds for exemption in this part of the submission.

One of the most extensive cases in 2019, (AMN 2019:13), concerned in principle issues of corporate governance in Swedish listed companies. In this case, the board of directors of a listed company had been working in various ways to thwart the company's major shareholder’s request for an extraordinary general meeting to appoint a new board. The EGM therefore took place significantly later than would otherwise had been the case. The Council ruled that good practice in the stock market clearly requires that the provisions of the Companies Act are complied with,

but also that the purposes underlying the rules on the fundamental rights of shareholders and the allocation of competences between the corporate bodies are respected - in this case, the rules on the unconditional right of shareholders to bring about a shareholders' meeting to handle a specific issue. "It is not for the board of directors to determine whether the new directors proposed by the shareholders are suitable for membership of the board, and even less so for the board to counteract election of these candidates by the shareholders", stated the Council.

Prior to the EGM, the company's board also decided, with the support of a previously issued authorization from the shareholders' meeting, to conduct a share issue directed to certain investors, which meant that the number of shares in the company increased by over ten per cent. With reference to the provisions in the Swedish Takeovers Act regarding the actions of a target company's board in a takeover bid, the Council stated that, in such a situation as this board found itself after a shareholder had requested a shareholders' meeting to elect a new board of directors, there is reason for the board to be restrictive in any measures it takes that may affect the composition of the shareholders' group and thereby the conditions for decisions made or elections conducted by the shareholders' meeting. Should the board consider it necessary to take measures that may have such an impact, for example to resolve an urgent need for financing in the company, it should strive for such a level of transparency that the shareholders can be certain that the board has not acted in order to achieve such an impact. It was the opinion of the Council that the board in the case at hand had not done so.

Several of the cases that did not concern public takeover bids related to various aspects of issuing of, or trading in, shares or other financial instruments. One of these was AMN 2019:52, which involved a kind of heavily discounted rights issue of shares in a small company. The shareholders in the company would be granted subscription rights in proportion to their shareholdings, but the company did not intend to list or to otherwise arrange organised trade in the subscription rights. The question was whether this could be considered compatible with good stock market practice.

The Council ruled that, while it understood that it may be time-consuming and relatively costly for small and medium-sized listed companies to conduct preferential rights issues, the arguments and reasoning included in the petition regarding the effects of traditional preferential rights issues and the kind of rights issue that the company intended to carry out were not sufficiently strong to justify a general departure from established practice to ensure that organised trade in subscription rights can take place. Nor were the circumstances of this particular case such that a departure from established practice could be considered compatible with good stock market practice. In summary, the Council found that, unless a Council ruling is made with regard to a specific case, good stock market practice requires subscription rights issued in a company listed on a multilateral trading facility or regulated market to be listed or otherwise made available for organized trading.

Another as yet unpublished case concerned convertible securities. A company that had issued convertible securities, which were then available for trading, wished to bring forward the conversion date in order to ease the company's debt burden. However, this would not occur through a change in the terms of the convertible securities, but through an offer whereby any holder who converted during a certain period of time before the original conversion date would also receive a cash payment. The Council ruled that this in practice meant a change in conditions, and that no reasons were provided which would make such a change acceptable according to the normal procedures approved by the Council. The procedure would therefore contravene good practice in the stock market.

The Council also issued a ruling on its own initiative, AMN 2019:25. This ruling was prompted by requirements issued by the European Union, which led to the introduction on 10 June 2019 of new provisions in the Swedish Companies Act concerning related party transactions in companies whose shares are admitted to trading on a regulated market. As a result, the Council’s previous statement of principle regarding related party transactions, AMN 2012:05, became redundant in practice with regard to related party transactions in such companies. Ruling AMN 2019:25 superseded ruling AMN 2012:05 in its entirety, i.e. not only for companies in regulated markets, but also for companies whose shares are listed on a multilateral

trading facility. Good practice in the stock market requires that provisions regarding related party transactions in such companies essentially correspond to what is prescribed in the Swedish Companies Act.

A recurring theme in submissions to the Council is under what circumstances it is compatible with good practice in the stock market to apply for delisting of a company's shares. In most of the cases previously heard by the Council, it has been a matter of delisting shares for which the listing requirements are still met. In the interests of shareholders, the Council has set certain conditions in these cases for an application for delisting to be considered compatible with good practice in the stock market. See for example AMN 2014:33 and, in 2019, AMN 2019:03, where the Council also refers to an unpublished statement mentioned in the 2016 annual report.

In 2019, the Council heard three delisting petitions, (AMN 2019:15, AMN 2019:30 and AMN 2019:36), where the listing requirement for sufficient distribution of the shares was not met, and where the marketplace notified the company that the share would be delisted if the company did not take steps to fulfil the distribution requirement. In view of the Council's previous position that it cannot be considered good stock market practice to require a company to take measures to comply with the listing requirements, the Council ruled in these cases that it did not see any obstacles from a good practice perspective to the companies' application to delist, but that such an application is to be made no earlier than three months after the company has informed the market of its plan to delist.

On several occasions, the Council has issued reminders regarding advisers' responsibility to respect rules and good practice in the stock market. In its 2018 Annual Report, the Council reiterated how important it is that when companies and other market actors refer to rulings and statements by the Council in press releases or other documents they do so in a fair and balanced manner, and that in these contexts it is vital that advisers, who should often have greater knowledge of stock market regulation than the market actors, provide clear guidance.

In one of the cases heard in 2019, AMN 2019:13, a financial adviser claimed that the company's chief executive had been misquoted in the media in a way that pertained to the Council. The Council ruled that the adviser should have ensured that the quotation was correct and, when it had been published anyway, should have requested that it be corrected.

In another ruling, AMN 2019:33, the Council gave a reminder of an offeror's obligation under the Takeover Rules to utilise expertise which is familiar with the Swedish stock market and its regulatory framework in an acquisition process.

In AMN 2019:52, previously referred to above, the Council stated that uncertainty about what constitutes good stock market practice should be removed by submitting a petition to the Council, if possible in sufficient time for the market to avoid the risk of misunderstanding planned measures. In the case in question, the Council ruled that the petition should have been submitted earlier than had occurred.

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 53 rulings issued in 2019, around two thirds are currently publicly available.

The Council strives to be highly 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 2019, 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.

Council rulings on cases delegated by the Financial Supervisory Authority can be appealed to the Authority. None of the Council's rulings in 2019 were appealed.

Consultations

The Swedish Securities Council also provides a consultation service, whereby companies, shareholders, advisers and marketplaces can consult the secretariat via 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, the case 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.

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Director General

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