Public mergers and acquisitions in Sweden: overview

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M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

The level of public M&A activity decreased in 2015 compared to 2014. During the first half 2015, six public offers for target companies on Nasdaq Stockholm were announced compared to 12 during 2014. The public offers in 2015 included:

- Canon’s offer for Axis.
- Infinera’s offer for Transmode.
- Carter Enterprises offer for Aspiro.
- Circassia’s offer for Aerocrine.

2. What are the main means of obtaining control of a public company?

The main means of obtaining control of a public company in Sweden are the public offer and the statutory merger.

Public offer

A public offer involves a bidder company making an offer to acquire the shares held by the target company’s shareholders. The target shareholders are asked to accept the offer being made to them by the bidder.

Statutory merger

A statutory merger is conducted under the Swedish Companies Act (SFS 2005:551). The target shareholders and, almost always, the bidder shareholders are asked to vote on a merger plan prepared by the board of directors of the bidder and the target. Bidder shareholders representing at least 5% of the bidder’s share capital have a right to request that the merger plan is submitted to the general meeting of the bidder for approval (this is generally done as a matter of course). The merger consideration can consist of either (Companies Act):

- Shares.
- A combination of shares and cash, as long as more than 50% of the total value of the merger consideration consists of shares.

In a merger, the bidder and the target become one company and typically the target shareholders become shareholders in the bidder company. The statutory merger rules implement Directive 2005/56/EC on cross-border mergers of limited liability companies (Cross-border Mergers Directive), which allows cross-border mergers between companies registered in different EEA member states.

The Takeover Rules were recently amended with new rules concerning mergers and merger-like processes, including a requirement that the general meeting of the target approves the merger by no less than a two-thirds majority, exclusive of the acquirer’s votes, if any. Further, most of the provisions in the Takeover Rules now apply to mergers and merger-like processes in the same way as for takeover bids, for example, provisions concerning equal treatment. The new rules apply to mergers involving both Swedish and non-Swedish listed targets.

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

A bid can be either unsolicited or recommended by the target board. A bid may become hostile if it has been rejected by the target board. Hostile and unsolicited bids are becoming more common in Sweden with target boards inviting third parties to make alternative offers following rejection of the original bid. Several bids in recent years indicate that target boards are increasingly trying to negotiate higher offer prices following confidential approaches by potential bidders and/or market test a bid by seeking an alternative offer from a third party.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

Regulatory provisions

The two main sources of regulation in Sweden are:

- The Stock Market (Takeover Bids) Act (SFS 2006:451) (Takeover Act). Under the Takeover Act, bidders who are considering making an offer for a company listed on a Swedish exchange must provide an undertaking to that exchange that it will comply with the Takeover Rules (see below). There are also specific provisions dealing with matters including:
  - mandatory bids;
  - frustrating actions;
  - concert parties;
  - information for trade unions and employees;
  - the supervision of takeover bids;
  - sanctions.

- The Takeover Rules. These have been adopted by the Swedish exchanges (Nasdaq Stockholm and Nordic Growth Market) in compliance with the Securities Market Act (SFS 2007:528),

The Takeover Rules were recently amended with effect from 1 February 2015. A key objective is to ensure the fair and equal treatment of the target company's shareholders. The Takeover Rules are based on six general principles that are taken from the Takeover Directive. These general principles offer guidance on how to interpret the Takeover Rules. Both the spirit and the letter of the Takeover Rules must be observed. This means that the Securities Council has flexibility in interpreting the Rules. In addition, the Market Abuse Act (SFS 2005:377) provides rules for improper disclosure of inside information that require the maintenance of secrecy until an offer is made (see Question 6).

Regulatory authorities

Public takeovers and mergers are regulated by:

- **The Securities Council.** This is a private body, made up of representatives of various organisations. The Securities Council ensures compliance with good practice on the Swedish securities market. Under the Takeover Rules, it has the power to issue statements and rulings on points of interpretation and grant dispensations from compliance with the rules. The Securities Council is also authorised by the Swedish Financial Supervisory Authority (SFSA) (see below) to issue statements and rulings on matters arising under the Takeover Act, including waiving the requirement to make a mandatory offer (see Question 18).

- **The Swedish Financial Supervisory Authority (SFSA).** This is a governmental agency, responsible for monitoring the financial markets, investment firms, credit institutions and insurance companies. The SFSA supervises public offers and enforces compliance with the Takeover Act. It is also the competent authority for the purposes of the Swedish prospectus regime and is responsible for vetting, approving and registering offer documents, prospectuses and equivalent documents (see Question 14).

- **The Corporate Governance Board.** This is a self-regulatory body that aims to promote good practice in the Swedish securities market. The Board proposes and consults on amendments to the Takeover Rules. It has also issued rules that apply to offers for targets listed on multilateral trading facilities in Sweden.

- **The Swedish Competition Authority (SCA).** This is a governmental body responsible for the enforcement of the Swedish Competition Act (2008:579). It will intervene if transactions reach certain thresholds (see Question 25).

See box, The regulatory authorities.

**PRE-BID**

**Due diligence**

5. **What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?**

**Recommended bid**

A due diligence exercise must be carried out before the offer is made. Pre-takeover due diligence in a public offer is usually more limited in scope than on a private acquisition.

The Takeover Rules provide that if a bidder requests a due diligence exercise, the target board must decide whether to participate and on what terms. Due diligence must be limited to matters relevant to making and implementing the offer. The target board would normally have to disclose the same information to competing bidders.

**Hostile bid**

In a hostile bid, the due diligence exercise would usually be limited to a review of publicly available information (see below, Public domain).

**Public domain**

Information in the public domain includes financial and non-financial information available on a target's website as well as any information filed with the Companies Registry.

**Secrecy**

6. **Are there any rules on maintaining secrecy until the bid is made?**

Parties must restrict access to confidential information about the bid to a need-to-know basis. Improper disclosure of information is a criminal offence (Market Abuse Act (SFS 2005:377 MAA)).

A listed company can delay the disclosure of price-sensitive information where it has a legitimate reason and the delay is not likely to mislead the public. The company must be able to ensure confidentiality of the information. A listed company is not obliged to comment on rumours. However, accurate rumours about a bid may indicate the company is unable to ensure confidentiality, which may require an announcement. These rules apply to all listed companies, whether they are bidders or targets.

The Takeover Rules do not generally permit announcements to be made about a mere intention to make a bid. However, a "possible offer announcement" may be made if the bidder suspects information has been or may be leaked to the market. It must clearly state it is not a formal announcement of an offer, give the reason why it is being made, and indicate when a formal announcement is expected.

The Takeover Rules provide that if a possible offer is announced, the Securities Council may impose a deadline for an offer to be made, beyond which the bidder may be barred from making another offer for a specified period.

Under the Stock Exchange Rules for the applicable stock exchange, a target company must inform the relevant Swedish exchange about a potential bid once it can be reasonably assumed a bid will be made. A bidder listed on a Swedish exchange is also required to report a potential bid to the Swedish Exchange if the bidder has made preparations that are likely to result in an offer. This enables the relevant Swedish exchange to monitor price movements in the target company shares and suspend trading if the bid is leaked to prevent any untoward movements in share price (see Question 12).

**Agreements with shareholders**

7. **Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?**

To increase its chance of success, a bidder will often seek acceptance undertakings from key target shareholders before making an offer. Acceptance undertakings are usually discharged if there is a higher competing bid (the percentage increase may be specified), although they may also include a “matching right” for the bidder to match the competing bid.
The announcement of the bid must contain information regarding the extent to which the bidder has received acceptance undertakings from target shareholders (see Question 12).

Depending on the terms and conditions in each case, undertakings may also need to be disclosed in accordance with the shareholding disclosure requirements set out in the Financial Instruments Trading Act (SFS 1991:980).

**Stakebuilding**

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

Stakebuilding in the target is permitted under the Market Abuse Act (SFS 2005:377), provided:

- It is performed by the bidder. Anyone else who has received information about the impending offer is not allowed to acquire target shares.
- The only price-sensitive information the bidder's directors have about the target is knowledge of their own impending offer.
- Any price-sensitive information provided to the bidder by the target as part of pre-bid due diligence must be announced by the target as soon as possible if the bid is eventually made.

Swedish insider dealing legislation apply to both on and off market transactions.

Swedish has implemented the disclosure rules for the purchase and sale of target shares and purchase rights under Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market (Transparency Directive). The bidder must notify the SFSA and the target by the next trading day when it reaches, exceeds or falls below any of the following percentages of the target's total shares or voting rights (including shares held in treasury):

- 5% and every subsequent 5%, up to and including 30%.
- 50%.
- 66⅔%.
- 90%.

These rules apply not only to acquisitions of shares, but also to acquisitions of financial instruments that entitle the holder to subscribe for newly issued shares are not caught by the shareholding disclosure rules.

The SFSA will make the relevant information public by no later than noon on the next trading day following notification. The bid announcement must set out the bidder's:

- Target shareholdings and voting rights.
- Holdings of long cash-settled derivatives.

Any subsequent purchase of cash-settled derivatives by the bidder would require a separate announcement (see Question 12).

Stakebuilding may affect both the value and the form of the bid consideration (see Question 17). If the bidder acquires target shares carrying 30% or more of the voting rights, the bidder must make a mandatory offer (see Question 16).

**Agreements in recommended bids**

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

The target cannot agree to any break fee without a dispensation from the Securities Council (see Question 9).

**Break fees**

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

Break fees (where the target undertakes to pay a fee to a bidder if the transaction is not completed) have been agreed in some public bids. The Takeover Rules do not specifically address break fees, but have provisions for deal protection measures, which state that:

- They must comply with applicable law.
- They must be in the target shareholders’ best interests.
- The target must ensure that there are special reasons to justify such arrangements.

There are no court precedents, Securities Council rulings, or clear consensus among practitioners on break fees.

Break fees in cash offers have in recent years typically been capped at an amount equal to the bidder’s actual costs incurred in preparing the bid. A break fee would not normally be payable if the target board recommends a higher competing bid that is not completed within a certain period of time.

**Committed funding**

11. Is committed funding required before announcing an offer?

Cash consideration does not have to be specifically guaranteed and, in practice, it would be very rare to see a bank guarantee.

However, a public offer must only be made if the bidder has made the necessary preparations to implement the offer. The bidder must ensure, in particular, that it can meet any cash consideration in full (Takeover Rules).

An offer can be made subject to a financing condition. The bidder can only rely on its failure to raise finance if its financing bank is in breach of the relevant loan agreement. Any debt financing the bidder relies on must, in practice, be agreed on a “certain funds” basis, so that it does not include any conditions that are not effectively within the bidder’s control (see Question 13).

**ANNOUNCING AND MAKING THE OFFER**

**Making the bid public**

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

Once the bidder has decided to make an offer, it must make an announcement as soon as possible through a public press release. The announcement must include, among other things:

- The main terms of the offer such as:
  - the price;
- any premium and its calculation;
- how the offer is to be financed;
- the conditions of completion of the offer;
- confirmation by the bidder that the Takeover Rules apply;
- the reasons for the offer;
- where the consideration consists of securities, the short-term and long-term effect of the acquisition on the bidder’s earnings and financial position;
- when the offer document is expected to be announced: a timetable for the offer.

- The number and percentage of target shares and voting rights held or controlled by the bidder.
- The holdings of financial instruments that give the bidder a financial exposure corresponding to the holding of shares in the target company.
- The extent to which the bidder has received binding or conditional undertakings to accept the offer.
- The extent to which target shareholders have expressed favourable opinions about the offer.
- The extent to which the target has committed itself to offer-related arrangements.

Once an offer has been announced, the bidder has four weeks to prepare and submit the offer document to the SFSA (see Question 4). The offer document must include all the terms of the offer and additional information, such as:

- Details of the offer consideration.
- How the offer is to be financed.
- The number of shares held by the bidder and concert parties.
- Reasons for the offer.
- The bidder’s intentions with regard to the future business of the target and, to the extent it is affected by the public bid, the bidder.
- The bidder’s intentions with regard to both the target’s and bidder’s employees and management, including material changes to the conditions of employment.
- The bidder’s strategic plans for the target and the bidder.
- Likely consequences for employment and the location of the companies’ places of business.
- The national law that will govern contracts concluded between the bidder and the target shareholders.

The SFSA’s review and approval procedure lasts ten business days. Once the offer document has been approved and registered by the SFSA, it must be announced. Under the Takeover Rules, the initial acceptance period must be at least three weeks but not more than ten weeks. If the offer is a management buyout (MBO), the minimum acceptance period is four weeks. A bidder generally reserves the right to extend the acceptance period where the satisfaction of a condition remains outstanding. The acceptance period can be extended beyond the ten week period but cannot extend beyond three months unless the receipt of necessary regulatory approvals are still pending, in which case the acceptance period can be extended up to nine months.

The Securities Council may grant a waiver from the requirement to submit the offer document to the SFSA within four weeks, for example, where the bid triggers filing requirements in other jurisdictions.

If the bidder is issuing securities as consideration in either a bid or statutory merger:

- The offer document must contain information regarded by the SFSA as equivalent to that of a prospectus under the Prospectuses Regulation ((Regulation (EC) 809/2004) implementing Directive 2003/71/EC as regards prospectuses and dissemination of advertisements).
- The SFSA is likely to apply a full vetting process to equivalent documents, although there may be some discretion over what information is considered equivalent.
- A bidder will need to consider whether to elect to use a prospectus or an equivalent document.

The Takeover Rules contain additional content requirements for bid documents in both cash and exchange offers, including a requirement to disclose the conditions of any debt financing that the bidder is relying on.

The launch of a competing offer does not automatically have an effect on the acceptance period of the original bid. It is possible for the original and the competing bidders to increase their bids, provided the revised bid is kept open for acceptance for at least two weeks.

There are likely to be additional press announcements and circulars in the case of a hostile bid, for example, where the acceptance period is extended or the offer consideration is increased. If the offer consideration is increased the bidder must also draw up a supplement to the offer document (see Question 14).

### Offer conditions

#### 13. What conditions are usually attached to a takeover offer?

**Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?**

The Takeover Rules do not provide for pre-conditions to an offer, and pre-conditions are not generally used. Once the offer has been announced, it cannot be withdrawn unless:

- The offer contains an acceptance condition and it is evident that this condition has not been, or cannot be, satisfied.
- The offer has been made subject to any other condition, and it is evident that:
  - this condition has not been, or cannot be, satisfied; and
  - it is of material importance to the bidder’s acquisition of the target company.

In addition, the conditions must:

- Be objective (that is, it is possible to determine objectively whether or not they have been fulfilled).
- Not give the bidder decisive influence over whether they are fulfilled (except where a condition relates to regulatory approvals, such as anti-trust clearances).

Offer conditions in voluntary bids vary, but will usually include the following conditions:

- The bidder receiving acceptances of the offer in the form of more than a certain percentage of the shares (and possibly also voting rights) in the target company.
- Obtaining all necessary approvals and clearances, including any competition clearances on terms acceptable to the bidder.
14. What documents do the target's shareholders receive on a recommended and hostile bid?

There are a number of key documents involved in a public takeover bid common to both a recommended and a hostile bid:

- Announcement of the offer (see Question 12).
- Notice of general meeting of the bidder/target (if applicable).
- Offer document (and any supplement subsequently required) (see Question 12).
- Prospectus for bidder shares where required (if the offer document is not an equivalent document) (see Question 12).
- Information brochure (if applicable), which may be drawn up by the bidder as a summary of the offer document or prospectus, particularly in exchange offers.
- Acceptance form, which is generally posted together with the offer document.
- Target board response with a recommendation to accept or reject the offer to the target's shareholders.
- Announcement of the result of the offer by the bidder.

There may be further press announcements, for example, where the acceptance period is extended or the offer consideration is increased, in which case the bidder must draw up a supplement to the offer document.

In a hostile bid, the number and style of the documents can vary greatly and the parties are likely to publish additional announcements or (sometimes) circulars (see Question 12).

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

The implementation of the Takeover Directive included obligations on the part of the target (and the bidder) to provide information about a bid to employee representatives and employees who are not members of any trade union. They do not create consultation rights for employees.

Where a Swedish bidder is bound by a collective bargaining agreement with a trade union, the bidder may be required to consult with the relevant union before making an offer. A trigger for the obligation to consult is that the intended acquisition would entail a significant change to the business of the bidder. Consultation is normally carried out on a confidential basis. Once completed, the bidder is free to take its own decision in the event of a disagreement with the union. However, failure to consult with the relevant trade union could result in punitive damages being imposed on the offeror.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

A person who (alone or together with any concert party) acquires shares carrying 30% or more of the voting rights in the target company must make a public offer for the remaining shares in the target company (Takeover Act).

A mandatory offer is not triggered by:

- The mere holding of rights to acquire shares. It does not include obtaining irrevocable undertakings, the acquisition of call options, warrants or convertible debt instruments. However, case law suggests there are circumstances where the parties to a derivative contract may be considered to be acting in concert so that the aggregate of their holdings may trigger a mandatory offer if they exceed 30%. The relevant case law offers little guidance on how to determine whether parties are acting in concert except that it is unlikely to include parties to a cash-settled derivative contract, resulting in the mere non-exercise of voting rights by the counterparty to a cash-settled derivative contract.
- Actions by the target company that cause a shareholding that was below 30% to rise above that threshold, for example through the redemption of shares. However, any subsequent acquisition of shares would then trigger the mandatory bid requirement. If the shareholding is reduced below 30% within four weeks, the requirement ceases to apply.

The Securities Council may waive the requirement to make a mandatory offer where the holding arises as a result of:

- A gift or inheritance.
- A “rescue operation” for a company that is in serious financial hardship.
- The target company issuing new shares as consideration for the acquisition of a company or a business.
- Restructuring or an ostensible change of control (such as the target company's control by a new generation of family members) but where there has been no de facto change of control.
- The relevant shareholder exercising his or her pre-emptive rights in a rights issue.
- An underwriting commitment in a rights issue.

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In addition, the requirement may be waived if the target's articles of association provide for capped voting rights that limit the number of votes each shareholder may exercise at a general meeting, irrespective of their possession of a 30% or greater shareholding.

(See also Question 22)

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

The consideration in voluntary offers commonly consists of cash, securities, or a combination of the two. There are no restrictions on what sort of consideration may be offered. There may be restrictions as a consequence of the bidder obtaining shares in the target before announcement of the bid or during the bidding process:

- A bid cannot be made on less favourable terms than the highest price paid by the bidder for target shares during the six-month period before the announcement of the bid or during the bidding process.
- If the bidder acquires more than 10% of the target shares for cash within six months of the bid announcement or during the bidding process, the bidder must make a cash alternative available at not less than the highest price paid.
- If the bidder has acquired more than 10% of the target shares in exchange for securities in the six months preceding the bid or during the bidding process, a securities exchange offer will be required.

A mandatory bid must always be accompanied by a cash alternative (see Question 16).

18. Are there any regulations that provide for a minimum level of consideration?

There is a substantial difference between voluntary and mandatory bids:

- A voluntary offer. The bidder is free to offer whatever price it wishes. In practice, unless the offer price exceeds the current market price of the target's shares, it is unlikely to be a successful bid. The offer price must not be less than the highest price paid by the bidder for shares in the target within six months prior to the announcement of the offer or during the course of an offer (Takeover Rules) (see Question 16).
- A mandatory offer. It must be accompanied by a cash alternative and, as with voluntary bids, the offer price must not be less than the highest price paid by the bidder or any person acting in concert with it for any shares in the target within six months prior to the announcement of the offer (see Question 16).

In certain circumstances, the offer price must not be less than the average (volume-weighted) stock market price of the target shares during a period of 20 trading days prior to the announcement that the 30% mark has been reached or exceeded, for example where:

- the holding has arisen as a result of the:
  - exercise of warrants;
  - conversion of convertible debt instruments;
  - subscription for new shares.

- there has been no relevant pre-offer acquisition, such as an indirect acquisition.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no special restrictions on the type of consideration that a foreign bidder can offer to the target's shareholders. Domestic and foreign bidders are treated equally in this respect.

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

A bidder (acting alone or with any of its subsidiaries) can acquire minority shareholdings on a compulsory basis if it owns more than 90% of the shares in the target, whether or not those shares represent more than 90% of the voting rights in the target (Companies Act).

The bidder initiates the squeeze-out by sending a letter to the target board requesting that the procedure be settled by arbitration under the Swedish Arbitration Act (SFS 1999:116). The arbitration panel consists of three arbitrators.

The bidder typically requests the transfer of title to the minority shareholders' shares (advance title) that will be granted, making it the sole shareholder, if:

- The arbitration panel determines that the bidder is entitled to squeeze-out the minority shareholdings.
- The bidder provides satisfactory security for the price of the shares, including interest.

Where a public offer has been made to acquire all shares not already held by the bidder and acceptance rates for more than 90% have been tendered, the consideration for the remaining shares will be equivalent to the value of the offer consideration, unless there are any special reasons to justify a different amount (Companies Act). Special reasons include:

- Where a long time has passed since the offer was completed.
- Where a material change affecting the value of the offer consideration has occurred.

If such a special reason applies, the consideration must reflect the market value of the shares at the time of the initiation of the squeeze-out procedure.

Where the 90% shareholding mark is exceeded, a minority shareholder has a reciprocal right to be bought out by the bidder and can commence the procedure by sending the bidder notice.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

If a bid fails, the bidder is prevented from making another offer or acquiring target shares that would take the bidder to 30% or more of the voting rights within 12 months of the unsuccessful offer. This restriction does not apply where the bidder announces a new offer that is recommended by the target.
If the bidder decides to waive acceptance conditions and declares the offer unconditional, there are certain restrictions on subsequent acquisitions of target shares. The bidder cannot acquire shares in the target for a period of six months from the payment of the consideration in a public offer, at a higher price than the offer price (either by means of a new public offer or otherwise), unless the bidder pays additional consideration to the shareholders who accepted the original offer to make up for the price difference.

De-listing

22. What action is required to de-list a company?

Whether a target company can be de-listed depends on the size of the shareholding the bidder acquires:

- **Where the bidder owns more than 90% of the shares in the target.** Typically, the board of the target submits and announces (usually at the request of the bidder) an application to the relevant Swedish exchange to de-list the target shortly after the offer was declared unconditional. The relevant exchange normally de-lists the target about four weeks after the announcement of the decision to de-list. It is market practice for a bidder to state in its offer document an intention to de-list if it acquires the necessary percentage.

- **Where the bidder has not become the owner of more than 90% of the shares in the target.** The situation in this case is more complex. The Securities Council appears to take the view that shareholders in a listed company invest in the company on the assumption that there will be a functioning market in the shares until the continuing listing requirements for the distribution of shares are no longer satisfied. In effect, the practice of the Securities Council implies that a delisting would not normally comply with good market practice, unless the squeeze-out right has been triggered.

TARGET’S RESPONSE

23. What actions can a target’s board take to defend a hostile bid (pre- and post-bid)?

If an offer has been made (or a target board or its managing director has good reason to believe an offer is about to be made), any action the target board makes that may frustrate the making of the offer or its successful outcome, must be approved by a general meeting of the target’s board (Takeover Act). The Takeover Act contains a specific exemption for a target board seeking competing bidders.

There is no exhaustive list of frustrating actions under the Takeover Act. The rule is whether the action would be likely to frustrate the making or completion of the bid. However, frustrating actions will generally include:

- Issuing shares on a non-pre-emptive basis.
- Acquiring or disposing of material assets.
- Carrying out share buy-backs.
- Making a takeover offer for the bidder or another company.

The Securities Council has stated that to qualify as frustrating, actions must be relatively far-reaching and of material significance. The target board is not obliged to facilitate the bidder’s offer or assist the bidder in obtaining regulatory approval. It would usually be acceptable for the target board:

- To argue against accepting the offer.
- To seek a “white knight” alternative purchaser and explore other alternatives.

- To announce financial information and forecasts not previously disclosed.

Structural protection is not common for Swedish companies though certain measures can be taken in advance of an announcement of an offer or the commencement of negotiations with a bidder. (See Question 16)

Sweden has opted out of implementing the breakthrough provisions in the Takeover Directive. Therefore, there are no restrictions on Swedish companies such as transfer restrictions, voting and other rights in their articles of association that might have an impact on a takeover.

However, a Swedish company can voluntarily opt in to the breakthrough provisions by passing a shareholder resolution and including provisions in its articles of association. This requires:

- Shareholder approval by a super-qualified majority.
- The relevant resolution to be supported by all shareholders present at the general meeting.
- These shareholders represent at least nine-tenths of all issued shares.

Sweden has also rejected the reciprocity principle in the Takeover Directive on the basis that it would add too much complexity to the implementing provisions and it is unlikely Swedish companies would opt in to the breakthrough provisions in their articles of association in any case. As a result, any such provisions in articles of association would continue to apply even if the bidder is not subject to the same or similar restrictions and is a "non-virtuous" bidder.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

A bidder is not liable to pay stamp duty on the acquisition of shares in the target.

In the event of a capital gain for selling shareholders, taxation will normally arise for shareholders who are tax resident in Sweden. In exchange offers a tax deferral is available if certain requirements are met.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

The European Commission has exclusive jurisdiction to review transactions of a certain size. However, where EU turnover thresholds are not met, a bid must be notified to the SCA (see Question 4), if it constitutes a concentration and satisfies both of the following:

- The combined aggregate turnover in Sweden of the undertakings in the preceding financial year exceeded SEK1 billion.
- Each of at least two undertakings concerned had turnover in Sweden in the preceding financial year exceeding SEK200 million.
Obtaining approval from the SCA has an impact on the public offer timetable:

- On receipt of a complete notification, the SCA conducts a preliminary investigation (Phase I) within 25 business days. If an entity offers undertakings during this period with a view to having the offer cleared by the SCA, the preliminary investigation period is increased to 35 business days. If the SCA decides against an in-depth investigation, the offer is deemed to have been cleared.

- If the SCA conducts an in-depth investigation (Phase II), it must, within three months of the initiation decision, either clear the offer or bring an action before the Stockholm District Court for an injunction prohibiting the takeover. If no action is brought within the time period, the offer is deemed to have been cleared. The Stockholm District Court can extend the three-month period with the parties' consent or for other compelling reasons.

- During the review period, a standstill obligation prohibits any action by the parties to complete the offer. A bidder can, if it wishes, acquire shares in the target during the period, as long as it does not exercise any voting rights. (In practice, the bidder would be unlikely to make such acquisitions.)

- An offer will generally need to be open for a time period that allows the SCA to conclude a Phase I review, but a bidder cannot be required to extend the acceptance period if the offer becomes subject to a Phase II investigation.

- There is no requirement to include a term in the offer that it will lapse if Phase II proceedings are initiated. A bidder can choose to extend the acceptance period for up to nine months if there are competition clearances to be obtained.

- The SCA may sometimes require undertakings from the bidder as a condition of clearing the acquisition. The Takeover Rules provide that, in exchange offers, the target shareholders are entitled to withdraw their acceptances where compliance with such undertakings would result in a material change to the bidder’s or target’s business.

- In practice shareholders are reluctant to tender their shares when an offer is still subject to a regulatory condition. It is therefore crucial to obtain competition clearance as soon as possible.

- To gain time, it is advisable to make early pre-notification contact with the SCA before submitting a formal notification (notification cannot be made before announcement of the bid). Any information provided by the parties to the SCA during pre-notification contacts is subject to absolute secrecy.

Regardless of a target’s nationality, a bid may also trigger filing requirements in other jurisdictions, if the applicable turnover and other thresholds in those countries are met.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

The manufacture of war equipment requires a licence from the Swedish Inspectorate of Strategic Products. Conditions will usually be attached to the grant of a licence, such as limits on the percentage of shares that can be owned directly or indirectly by non-Swedish entities.

Parties domiciled outside the EEA must generally hold (directly or indirectly) less than 50% of the shares or votes in an air traffic operator licensed under the Swedish Aviation Act.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on the repatriation of profits or exchange control rules that apply to foreign companies in Sweden.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

The shareholding disclosure requirements set out in Question 8 apply to the bidder and other parties alike so long as the target company remains listed. It is possible to acquire shares in the target in parallel with an offer, subject to the normal rules on insider dealing and disclosure.

REFORM

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are no current proposals for reform of takeover regulation in Sweden.
THE REGULATORY AUTHORITIES

Securities Council

Address. Aktiemarknadsnämnden, Box 7680, 103 95 Stockholm, Sweden
T +46 8 50 88 22 70
E info@aktiemarknadsnamnden.se
W www.aktiemarknadsnamnden.se

Main area of responsibility. The Securities Council ensures compliance with good practice on the Swedish securities market. Under the Takeover Rules, it has the power to issue statements and rulings on points of interpretation and grant dispensations from compliance with the rules.

Swedish Financial Supervisory Authority

Address. Finansinspektionen, Box 7821, 103 97 Stockholm, Sweden
T +46 8 787 80 00
F +46 8 24 13 35
E finansinspektionen@fi.se
W www.fi.se

Main area of responsibility. The FSA supervises public offers and enforces compliance with the Takeover Act.

Corporate Governance Board

Address. Kollegiet för bolagsstyrning, Box 7680, 103 95 Stockholm
T +46 8 508 822 71
E bjorn.kristiansson@bolagsstyrningskollegiet.se
W www.bolagsstyrning.se

Main area of responsibility. The Corporate Governance Board proposes and consults on amendments to the Takeover Rules. It has also issued rules that apply to offers for targets listed on multilateral trading facilities in Sweden.

Swedish Competition Authority

Address. Konkurrensverket, SE-103 85 Stockholm, Sweden
T +46 8 700 16 00
F +46 8 24 55 43
E konkurrensverket@kkv.se
W www.kkv.se

Main area of responsibility. The Competition Authority is responsible for the enforcement of the Swedish Competition Act.

ONLINE RESOURCES

Securities Council
W www.aktiemarknadsnamnden.se

Description. This is the Securities Council website, where statements and rulings issued by the Securities Council are available.

Swedish Parliament
W www.riksdagen.se

Description. This is the Swedish Parliament website, where the Takeover Act is available.

Corporate Governance Board
W www.bolagsstyrning.se

Description. This is the Corporate Governance Board website, where the Takeover Rules are available, including an English translation for guidance.
Practical Law Contributor profiles

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**Professional qualifications.** Member of the Swedish Bar Association (advokat) University of Stockholm, LLM, 1990; Duke University, LLM, 1991; New York Bar, admitted 1992

**Areas of practice.** Mergers and acquisitions; equity capital markets.

**Recent transactions.**
- Representing SSAB in the exchange offer for Rautaruukki (2014).
- Representing Skanska in the sale of its 50% share of the Chilean highway concession Autopista to Alberta IMC (2011).
- Representing Tricorona in the recommended tender offer by Barclays (2010).
- Representing China Petroleum & Chemical Corporation (Sinopec) in the recommended public cash offer for Tanganyika Oil (2008).
- Representing IBM in the recommended public cash offer for Telelogic (2007).
- Representing NASDAQ OMX in the tender offer for Copenhagen Stock Exchange (2005).
- Representing Outokumpu in the combination of Outokumpu’s mining and smelting operations within with Boliden (2003).
- Representing Swedbank in the proposed merger with SEB (2001).
- Representing Outokumpu in the merger between Outokumpu Steel and Avesta Sheffield and the listing of the merged group AvestaPolarit (2001).
- Representing Zeneca PLC in the merger of equals with Astra AB and listing of Astra Zeneca (1999).

**Languages.** English, Swedish

**Professional associations/memberships.** IBA Securities Law Committee, Vice Chair; Regional Representative EMEA; Member of Stockholm Centre of Commercial Law; Research Section for Company and Securities Law; New York State Bar Association.

**Publications.**
- IBA Securities Committee Newsletter, Enforcement of bondholders’ rights – why is bondholder activism so rare when issuers default? 2012.

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**Professional qualifications.** Member of the Swedish Bar Association (advokat) and International Bar Association; LLM, University of Stockholm, 1998; LLM, University of Cambridge, 2000

**Areas of practice.** Public takeovers and mergers; equity offerings and IPOs; advises listed companies on corporate governance and disclosure matters.

**Recent transactions.**
- Advised Altor Fund IV on its acquisition of a 24.5% stake in Transcom (2015).
- Advised Canon Inc on its recommended bid for Axis (2015).
- Advised the Independent Committee of Scania on the offer by Volkswagen AG (2014).
- Advised ÅF on its merger with Epsilon (2012).
- Advised Caro on mandatory bid by ASSA ABLOY (2010).
- Advised Munters on the competing bids by Alfa Laval and Nordic Capital/Cidron Intressenter (2010).
- Advised Tricorona on the recommended bid by Barclays (2010).
- Advised Tricorona on the hostile bid by Opcon (2010).

**Languages.** English, Swedish

**Professional associations/memberships.** Member of the Swedish Bar Association; member of the International Bar Association.

**Publications.**