

MEMORANDUM



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The regulatory framework for takeover bids changes on 1 July 2006

Introduction

Due to the implementation of the takeover-directive¹ the regulatory framework for takeover bids changes from self-regulation to a mix of legislation and self-regulation on 1 July 2006. A takeover bid will be regulated by the Swedish Act on Takeover Bids² (the "Takeover Act") and by the rules of the stock exchange or the authorised market place where the shares of the target company are listed. In addition to the changes in the regulatory framework, the role of Finansinspektionen will also change.

Takeover bids

A takeover bid is defined in Chapter 2, section 2, subsection 1 of the Takeover Act as a public offer made to the holders of shares issued by a Swedish or a foreign company to acquire all or some of those shares. The Takeover Act is applicable on shares issued by a Swedish and, with some exceptions, a foreign company listed on a stock exchange or an authorised market place in Sweden.

The regulatory framework

The Takeover Act sets out the duties of the bidder (Chapter 2), when the offer becomes mandatory (Chapter 3) and the information to be given to employees in relation to an offer (Chapter 4). It furthermore restricts defensive action taken by the target company (Chapter 5) and sets out provisions regarding breakthrough (Chapter 6), i.e. that certain provisions of the articles of association and certain contractual agreements regarding the shares of the target company are not applicable in relation to a takeover bid. However, the breakthrough provisions are only mandatory if so specified in the articles of association of the target company.

¹ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (Official Journal L 142, 30.4.2004, p. 12)

² Lagen om offentliga uppköpserbjudanden på aktiemarknaden (Regeringens proposition 2005/06:140)

In accordance with Chapter 2, section 1 of the Takeover Act, a bidder is required to undertake to follow the rules on takeover bids of the market place where the target company's shares are listed and to submit to the sanctions that the market place may impose for the violation of such rules. In connection with the announcement of its offer the bidder is obliged to inform Finansinspektionen of the offer and its undertaking (section 2). This can for instance be done by providing Finansinspektionen with the press release by which the offer is announced. The same applies to planned offers. The bidder shall draw up an offer document to be submitted to Finansinspektionen for its approval within four weeks of the announcement (section 3).

A mandatory offer, i.e. the duty to make an offer for all the shares of a company, is at hand when a person, either alone or with a closely related person³, attains, either by an acquisition or when a group relationship is established, a holding of shares that represents three tenths of the votes.

According to Chapter 4 of the Takeover Act, a bidder with a registered office in Sweden and a Swedish target company that is listed on a stock exchange, authorised market place or another regulated market are obligated to inform their employees and, if applicable, the trade unions of the employees about the offer as soon as the offer has been made public. The same applies to the offer document as soon as it has been published. The target company is also obligated to inform its employees of its recommendation regarding the offer.

According to Chapter 5, the target company shall obtain the prior authorisation of its general meeting of shareholders before taking any action, other than seeking alternative offers, which may result in an impediment to the offer if such action is taken on the basis of information originating from the bidder.

Finansinspektionen has handed over its authority to make certain decisions regarding mandatory offers and defensive action that are regulated by the Takeover Act to the Swedish Securities Council.⁴ The authorisation is based on Chapter 7, section 10 of the Takeover Act. The Securities Council is run by the Association for good practice in the securities markets⁵ and works for good practice in the Swedish stock market by issuing statements, advice and information.

In accordance with Regulations FFFS 2006:4 of Finansinspektionen and the co-operation agreement between Finansinspektionen and the Association for good practice in the securities markets, the Securities Council shall decide upon:

³ The Swedish term for such a person is "närstående".

⁴ In Swedish "Aktiemarknadsnämnden".

⁵ In Swedish "Föreningen för god sed på värdepappersmarknaden".

- the extension of the time allowed for the drawing up of the offer document and the application for its approval (Chapter 2, section 3, subsection 2);
- whether the duty to make an offer arises for a party close to the bidder (Chapter 3, section 4);
- whether a duty to make an offer has arisen according to the provisions of Chapter 3 (Chapter 7, section 4)
- whether an action is against the provisions regarding defensive action in Chapter 5 (Chapter 7, section 4);
- exemptions from the provisions regarding mandatory offers (Chapter 7, section 5); and
- exemptions from the provisions regarding defensive action (Chapter 7, section 5).

The regulations and the co-operation agreement enter into force 1 July 2006.

From 1 July 2006 all stock exchanges and authorised market places in Sweden shall have adopted rules on takeover bids that fulfil the requirements of the takeover-directive and are suited to their purpose in accordance with the Swedish Exchange and Clearing Operations Act.⁶ The Stockholm Stock Exchange, Nordic Growth Market and AktieTorget have adopted such rules and have designated the Securities Council to be the body responsible for the interpretation and the application of such rules and to decide upon exemptions from the same. The exemptions can be combined with conditions.

The market places are responsible for supervising that their rules on takeover bids are followed.

The role of the Swedish Financial Supervisory Authority

As the Takeover Act enters into force 1 July 2006 Finansinspektionen's responsibility for the supervision of the securities markets will increase. In addition to having the responsibility to review the offer documents, Finansinspektionen will act as the first level of appeal for the rulings of the Securities Council and will supervise that the provisions regarding mandatory offers are followed.

Authority of approval

As of 1 July 2006 a bidder is obliged to submit its offer document to Finansinspektionen for approval and if the offer document fulfils the requirements of law, Finansinspektionen shall approve and register it within 10 to 20 business days in accordance with the Swedish Financial Instru-

⁶ Lagen om börs- och clearingverksamhet (1992:543)

ments Trading Act.⁷ According to the Takeover Act the offer document shall contain the information set out in Chapter 2 a, section 2 of the Financial Instruments Trading Act in order to enable the shareholders to reach a properly informed decision. If securities are offered as consideration, the offer document shall also include information equal to what is required in a prospectus for securities of the same kind. Moreover, the offer document shall include an undertaking from the bidder to follow the rules on takeover bids of the market place and to submit to the sanctions that the market place may impose for the violation of such rules (Chapter 2, section 1 of the Takeover Act).

Finansinspektionen does not review whether offer documents comply with the rules on takeover bids of the market places. Such revisions are carried out by the market places themselves.

Authority of appeal

The rulings of the Securities Council may be appealed to Finansinspektionen in accordance with Chapter 8, section 1 of the Takeover Act. If the person who applied for the ruling from the Securities Council wishes to appeal, he should file his claim with the Securities Council within three weeks from the day he took part of the ruling. If a person other than the applicant wishes to appeal, he should file his appeal with the Securities Council within three weeks from the day the ruling was published on the website of the Securities Council. If the Securities Council dismisses an appeal as being late, such a dismissal may be appealed to Finansinspektionen.

The right of appeal for persons other than the applicant is limited to *the person the ruling concerns, if it went against him*. It is therefore required that the ruling concerns the appellant (interest in matter) and is against him (contrariety). According to Government bill 2005/06:140 p. 125 it should normally only be the applicant who can appeal a negative ruling or a refusal to grant an exemption by the Securities Council and that a right of appeal for persons other than the applicant should normally only arise in matters concerning mandatory offers and defensive action. In other respects, the bill refers to general rules and principles for standing, i.e. the right to speak before a court.

The rulings of Finansinspektionen may be appealed to a general administrative court (Chapter 8, section 3).

According to Chapter 8, section 2 of the Takeover Act, the Securities Council and Finansinspektionen have the right to rule that a ruling shall enter into effect immediately. In such cases it is therefore not required to wait until the ruling enters into effect by means of law. Section 29 of the Swed-

⁷ Lagen om handel med finansiella instrument (1991:980)

ish Administration Act (1986:223) grants Finansinspektionen the power to rule that a ruling may not be executed for the time being.

Supervisory Authority

Since the provisions on mandatory offers will be part of statutory regulation in the Takeover Act as of 1 July 2006, Finansinspektionen has been given the responsibility to supervise that the provisions are followed.

According to Chapter 7, section 1 of the Takeover Act, Finansinspektionen is responsible for supervising that the provisions regarding duties of the bidder (Chapter 2), mandatory offers (Chapter 3), information to employees (Chapter 4) and defensive measures (Chapter 5) are followed. It is also the duty of Finansinspektionen to supervise that the rules on takeover bids of the market places fulfil the requirements of the takeover directive and are suited to their purpose. The supervision will be carried out via revision of the contents of the offer documents, supervision and monitoring of the market and the market places, interventions and sanctions.

In cases of breaches Finansinspektionen has the power to intervene by requiring information, conducting interrogations, forbidding an offer and forbidding advertisement of offers in accordance with Chapter 6, sections 1 a, b and d of the Financial Instruments Trading Act. An intervention may be combined with an order to pay a fine. Moreover, the Takeover Act grants Finansinspektionen the power to impose certain sanctions.

Finansinspektionen may not approve an offer document that does not contain the undertaking required by Chapter 2, section 1 of the Takeover Act (Chapter 7, section 3 of the Takeover Act). Finansinspektionen may order a person who does not carry out its duty to make a mandatory offer to remedy its breach by carrying out its duty to make a mandatory offer, dispose of a specified number of shares or go out of a close relationship so that a duty to make a mandatory offer no longer exists. The order may be combined with a fine (Chapter 7, section 6 of the Takeover Act).

Finansinspektionen may rule that a bidder that has not undertaken to follow the rules on takeover bids of the market place and which offer Finansinspektionen has forbidden is required to pay a special fee of a minimum of SEK 50,000 and a maximum of SEK 100 million (Chapter 7, section 2 of the Takeover Act).

Finansinspektionen may forbid a bidder to represent its shares if Finansinspektionen has forbidden the offer and ordered the bidder to carry out its duty to make a mandatory offer (Chapter 7, section 7 of the Takeover Act).

Finansinspektionen is responsible for supervising that bidders and boards of target companies specified in Chapter 4, sections 1 and 2 of the Takeover Act inform their employees and, if applicable, the trade unions of the

employees about the offer and the offer document. It is also responsible for supervising that the target company carries out its duty to inform its employees of its recommendation regarding the offer. Finansinspektionen may order a person that does not inform its employees to remedy its breach by carrying out its duty to inform. The order may be combined with a fine.

Finansinspektionen is responsible for supervising that action taken by the target company, other than seeking alternative offers, that may result in an impediment to an offer has obtained the prior authorisation of the general meeting of shareholders of the target company if such action is taken on the basis of information originating from the bidder.