

Chapter 15

Worker involvement and the EU Takeover Bids Directive: the Swedish case

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1. Introduction

In the Nordic countries the social partners are particularly strong and most workers are represented by trade unions. Agreements negotiated between the social partners are particularly important for defining workers' rights in takeover situations.

EU legislation on takeover bids applies only to companies whose shares are traded on regulated markets (stock markets). In Sweden there are two regulated markets, the OMX Nordic Exchange Stockholm and the Nordic Growth Market (NGM). The Takeover Bids Directive (2004/25) has been implemented primarily in a specific act 'Lagen (2006:451) om offentliga uppköpserbjudanden på aktiemarknaden' (Stock Market Takeover Bids Act, the 'Takeover Act'), and also through self-regulation issued by Näringslivets Börskommitté: the 'Takeover Rules'. The Swedish Corporate Governance Board now administers the Takeover rules.¹ A takeover bid is defined by the Directive as

a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law.²

The Financial Supervisory Authority supervises the application of the Takeover Act and the Swedish Securities Council interprets the Takeover Rules and oversees compliance with good practice on the securities market.³ The obligations to inform the employees according to the

1. See www.corporategovernanceboard.se

2. For an overview of the Swedish legislation see Stattin (2011).

3. See <http://www.aktiemarknadsnamnden.se>

Takeover Act are complementary to the general system of employee involvement.

2. Key elements of Swedish takeover legislation

The Financial Supervisory Authority (SFSA) is responsible for the supervision of the Takeover Act. It is a government agency that supervises public offers and monitors the companies that operate on the Swedish financial market. The SFSA is responsible for assessing and approving offer documents and all other relevant documentation. The offeror shall inform the SFSA of an intended takeover bid and within four weeks prepare an offer document, which is to be given to the same authority. In the Financial Instruments Trading Act (*Lagen (1991:980) om handel med finansiella instrument*) there is a specific provision concerning the offer document (Chapter 2a, Section 2). There it is stated that the document shall contain the offeror's view on the future and also their intentions with respect to the company's employees and management, including each material modification of the terms and conditions of employment and the strategic plans for the company, including the locations where the company conducts business.

There is a register administrated by the SFSA through which offer documents are accessible. Registered and approved offer documents from 31 October 2006 onwards may be accessed through the register.⁴

The Securities Council, which interprets the Takeover Rules and oversees compliance with good practice on the securities market, is a private body inspired to a great extent by the UK Panel on Takeovers and Mergers. Its representatives come from various private organisations. Since the implementation of the Takeover Act, the Council has certain statutory powers; for instance, it can give rulings of interpretation or grant exemptions from requirements of the Takeover Rules.

3. Workers' involvement during takeover procedures

Chapter 4 of the Takeover Act concerns information rights for employees. The Act requires the offeror to inform the representatives of their own

4. See <http://www.fi.se/Register/Prospektregistret>

employees when the bid is made public. The Act also obligates the board of the offeree company to inform their employees.

The information shall be provided to the employees' representatives. It shall also be provided to employees who are not represented by any trade union (Chapter 4, Section 3). Although it is not stated explicitly, the employees' representatives are normally the trade union with a collective agreement with the company. In general, the majority of companies whose shares are traded on regulated markets have collective agreements. There are no further obligations on how the information shall be provided and in the *travaux préparatoires* it is stated that it is sufficient if the information is provided on a notice board.⁵

The obligation to inform the employees is different for the offeror and the offeree company. The offeror's obligation applies in all cases when it makes a public takeover bid. The offeror shall (according to Chapter 4, Section 1) inform the employees regarding a launched takeover bid and the offer document and the information shall be provided as soon as they are made public.

As soon as the bid is made public, the board of the offeree company shall (according to Chapter 4, Section 2) inform its employees of the takeover bid, the offer document and its recommendations to the shareholders with respect to the takeover bid. In the Takeover Rules there are some requirements concerning what information should be provided.

The obligation in the Takeover Act differs in many ways from employers' general obligations found in the Codetermination Act.⁶ The presence of a collective agreement seems to be irrelevant both for the obligation to inform and for the question of who should be informed. There are no particular details on how the information should be provided and there is no obligation that this information has to be in writing.

According to the Act, the Swedish Financial Supervisory Authority (SFSA) may order a company to comply with the legislation. Such an order may be combined with a fine (Chapter 7, Section 6). The SFSA has, to the knowledge of the author, never issued such an order. The enforcement mechanisms are thus of a public-law nature and disconnected from the

5. Prop. 2005/06:140, p. 108.

6. lagen (1976:580) om medbestämmande i arbetslivet.

general industrial relations strategy for enforcement that normally applies to labour law in Sweden.

Takeover bids are primarily a question of company law and the interests of the employees are not given much attention in the legislation. In the Swedish *travaux préparatoires* it is stated that the motives behind the obligations in the Codetermination Act and those in the Takeover Bids Directive are different. The provisions of the Codetermination Act aim at providing the employees with a real influence over the employer's activities. The right to information in the Takeover Bids Directive has another motivation. The questions that the employees are informed about concern matters in which a party other than the employer takes the decision.⁷

3.1 Self-regulation: takeover rules

According to the law on securities, a stock market shall have rules on takeovers supplementing the legislation on takeover bids mentioned above. These rules were developed by Näringslivets Börskommitté (NBK) and aim at the application of good practices on the Swedish stock market. The Swedish Corporate Governance Board administers the rules and is currently responsible for developing them.⁸

The Swedish Securities Council is responsible for interpreting the rules. It may be mentioned that the rules changed status from 'recommendations' to rules in 2003. The Takeover Rules do not have any far-reaching regulations concerning the provision of information to the employees in either the offeror or the offeree company. The only explicit mention of employee representatives is found in Section II.19. A Swedish offeror must inform the trade unions – and the employees not organised in a trade union – of the takeover bid and the offer document as soon as the bid and the offer have been announced. The provisions require the board of the offeree company to inform the relevant trade unions – and unorganised workers – of the bid and present the board's opinion about the bid to the employees. An opinion has to be presented two weeks before the end of the bid's period of acceptance and shall contain an assessment of the impact of the bid, especially on employment.

7. Prop. 2005/06:108, p. 55.

8. The Takeover Rules may be accessed at <http://www.corporategovernanceboard.se/takeover-rules>

The second paragraph requires the board to attach any opinion from the employees' representatives on the effects of the bid on employment to the public response statement made by the board. The (deviating) opinion has to be received in reasonable time prior to the announcement of the response. The provisions are a copy of the Directive's Article 9.5. In the *travaux préparatoires* to the Swedish act implementing the Directive it was stated that this was something that the legislator assumed would be done through self-regulation.⁹

There appears to be no obligation to inform the employees that they have an option to present their own opinion and that this shall then be attached to the board's opinion. The takeover rules for a regulated market are something that are not used regularly in the daily activities of the local trade union representatives, and it is unclear to what extent they are familiar with this possibility. It is also something that has to be presented within a specific time limit.

According to the Takeover Rules there is some form of two-way communication between labour and management. The way this exchange of opinions is to be undertaken, however, deviates from the regular form of interaction through 'negotiations'. This exchange of views, however, is not something that may be considered as consultations, as defined in for instance Article 2.j, Directive 2001/86.

3.2 General obligations on information and consultation in a takeover situation

The specific provisions that implemented the Takeover Bids Directive have been described above. The extent of further obligations on employee involvement in connection with a takeover bid is debated. And the obligations described here differ between the offeror and the offeree company. It should be stated that the obligations are not a result of implementation of the Takeover Bids Directive, but rather of the previously existing regulation of employee involvement in Sweden.

One general comment is that there are no possibilities for the employees in the offeree company to demand information and consultation with the offeror. The Codetermination Act is applicable to the relationship between

9. Prop. 2005/06:108 p. 108.

the employer and the employees. According to Section 11 of the Codetermination Act, the employer is obligated to initiate consultations with the trade unions before any significant change of their activities. A prerequisite for the application of Section 11 of the Codetermination Act is that the company is bound by collective agreement.

There is a rather broad consensus that there is an obligation for the offeror to initiate consultations with the relevant trade unions in accordance with Section 11 before a takeover bid. The takeover of another company is considered to be a significant change of the offeror's activities. One could say that, under the Codetermination Act, an offeror that is bound by a collective agreement may be required to negotiate a possible bid before the launch with the trade unions in case of significant changes to the offeror's own business. Consultations in accordance with Section 11 shall take place before a decision is taken.

In accordance with Section 21 of the Codetermination Act, information that is provided may be confidential. The extent of the confidentiality obligation is decided through negotiations between the employer and trade union. If they cannot reach agreement the Labour Court may decide. It is stated explicitly that trade union representatives who receive confidential information may disclose this information to members of the executive of the relevant trade union, who in turn are also bound by confidentiality (see Section 22 of the Codetermination Act).

For the offeree company the situation is different. There is no general obligation to initiate consultations according to Section 11 of the Codetermination Act. The question is not regarded as occurring in the context of the relationship between employer and employee.

If the takeover is connected to changes foreseen by the new owner, and if those changes themselves may be regarded as a 'significant change of the employer's activities' there is an obligation according to the Codetermination Act to initiate consultations with the employee representatives. Apart from the employer's obligations to initiate consultations in accordance with Section 11, consultation may also be initiated by workers' representatives, namely trade unions with collective agreements. It appears that the employee representatives in both the offeror and the offeree company may demand negotiations under Sections 10 and 12 of the Codetermination Act. Breaches of the Act are sanctioned with damages, economic as well as punitive (see Sections 54–55 Codetermination Act).

In Sweden employees have a right to appoint members of the board in limited companies, if the company has more than 25 employees on average and a collective agreement. The rules on employee board-level representation will not be affected as long as the company has a collective agreement. The new owners have no say on whom the employees appoint as their representatives on the board.

4. Conclusions

The main provisions on the information and consultation of workers' representatives about a (possible) takeover bid are defined in two legal instruments: the Takeover Act and the Codetermination Act. Obligations to inform the employees are different for the offeror and the offeree company. Some provisions on the involvement of employees are also found in the Takeover Rules.

There is a fairly broad consensus that there is an obligation for the offeror to initiate consultations with the relevant trade unions in accordance with the Codetermination Act, as a takeover of another company is considered to be a significant change of the offeror's activities. A prerequisite is that the company is bound by a collective agreement.

For the offeree company the situation is different; there is no general obligation to initiate consultations based on the Codetermination Act. However, if the takeover is connected to changes foreseen by the new owner, and if those changes themselves may be regarded as a 'significant change of the employer's activities', there is an obligation to initiate consultations with the employee representatives. The Takeover Act states that employees of target companies have to be informed by their own management and have the right to formulate their own opinion on the effects of the bid on employment. The fact that the employees of a target company have the option to present their own opinion, and that this shall then be attached to the board's opinion, is not well known and therefore, it is difficult to state what practical relevance it has.

References

- Bjerner A. and Sjöman E. (2010) Arbetsrättslig förhandlings- och informationsskyldighet vid offentligt uppköpserbjudande, *Svensk Juristtidning*, 563–572.
- Broneus S. and Stattin D. (2010/2011) Aktiemarknadsbolags förberedelser inför takeover-erbjudanden, *Juridisk Tidskrift*, 1, 34–52.
- Nyström G. (2012) Takeover-reglerna: en kommentar till lagen om offentliga uppköpserbjudanden på aktiemarknaden och börsernas takeover-regler, 2. uppl., Stockholm, Norstedts Juridik.
- Stattin D. (2009) Takeover: offentliga uppköpserbjudanden på aktiemarknaden enligt svensk rätt, 2 uppl., Stockholm, Thomson Reuters.