

Takeover Rules for certain trading platforms

The Swedish Corporate Governance Board

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Table of Contents

INTRODUCTION

I GENERAL PROVISIONS

- I.1 Scope of the rules*
- I.2 The right for the Securities Council to interpret and grant exemptions from the rules*
- I.3 Measures taken by parties closely related to the offeror*
- I.4 Announcements*

II RULES GOVERNING THE PROCEDURE, DRAFTING THE OFFER, ETC.

- II.1 Pre-conditions to making an offer*
- II.2 Binding force of statements*
- II.3 The offeror's obligation to make an offer public*
- II.4 Possibilities for the offeror to stipulate conditions to completion of the offer*
- II.5 The offeror's obligation to honour its offer*
- II.6 The offeror's obligation to prepare and publish an offer document*
- II.7 Acceptance period*
- II.8 The shareholders' obligation to honour their acceptances of the offer*
- II.9 Revision of an offer that has been made*
- II.10 The offeror's obligation to treat equally all holders of shares with identical terms and conditions*
- II.11 Treatment of holders of shares with non-identical terms and conditions*
- II.12 Treatment of holders of equity-related transferable securities other than shares*
- II.13 Acquisitions prior to the offer*
- II.14 Acquisitions during the offer*
- II.15 Acquisitions after the offer*

- II.16 *Certain provisions regarding partial offers*
- II.17 *Role of the board of the offeree company*
- II.17a *Offer-related arrangements*
- II.18 *Conflicts of interest*
- II.19 *The obligation for the board of the offeree company to state its views regarding the offer*
- II.20 *The participation of the offeree company in a due diligence investigation*
- II.21 *Defence measures*
- II.22 *The offeror's obligation to announce the outcome of the offer*
- II.23 *The offeror's obligation to pay the consideration*
- II.24 *Limitations placed on the offeror's right to make a new offer*
- III. *Mandatory offers***
- III.1- *The conditions giving rise to a requirement to make a mandatory offer*
- III.2
- III.3
- III.4
- III.5 *The conditions for lapse of the requirement to make a mandatory offer*
- III.6 *Procedures, wording of conditions, etc. in mandatory offers*
- IV. *Rules applicable if a director or senior executive of the offeree company makes or participates in a takeover bid or if a parent company makes or participates in a takeover bid for shares in a subsidiary***
- IV.1 *Participation in an offer by a director or senior executive*
- IV.2 *Acceptance period*
- IV.3 *Valuation opinion*
- IV.4 *Offer by a parent company for shares in a subsidiary*
- IV.5 *Supplementary information in press releases*
- V *Rules concerning the structure of an offer document, etc.***

V.1 Responsibility for the offer document

V.2 Auditor's examination of the offer document

V.3 Contents of the offer document

V.4 Information brochures

VI MERGERS AND QUASI-MERGERS

VI.1 Applicability of the rules to mergers and quasi-mergers

VI.2 Provisions which are not applicable

VI.3 Decision making procedure

APPENDIX

Introduction

The Stock Market (Takeover Bids) Act (SFS 2006:451) (“TBA”) contains fundamental provisions governing takeover bids for shares in companies whose shares are admitted to trading on a regulated market in Sweden. The TBA also contains provisions regarding mandatory offers and defence measures.

Furthermore, under the Securities Market Act (SFS 2007:528) (“SMA”), a stock exchange must adopt rules regarding takeover bids for shares which are admitted to trading on a regulated market operated by the relevant stock exchange. The stock exchanges NASDAQ OMX Stockholm AB and Nordic Growth Market NGM AB have adopted such rules.

The Swedish Corporate Governance Board, which is required to promote generally accepted practices on the Swedish stock market, recommends that rules which are analogous in all material respects be applied to companies whose shares are traded on the trading platforms Nasdaq First North, Nordic MTF and AktieTorget.

The rules set out below must be observed by offerors and offeree companies. A reference in the rules to the “Marketplace” means the trading platform on which the relevant offeree company’s shares are traded following an application. It is of the utmost importance for public confidence in the stock market and in the business community that the rules are also respected by those who, in various capacities, provide advice or otherwise assist offerors, offeree companies or other parties involved in takeover bids.

The specific provisions apply to the various stages of an offer, and broadly follow the chronological order of events in the offer process. On a detailed level, the circumstances often differ from one offer to another. As a result, the provisions are, for the most part, drafted on a relatively general level. The Securities Council, whose task it is to promote generally accepted practices on the Swedish stock market by, *inter alia*, providing opinions on individual cases, may issue rulings concerning the manner in which the provisions are to be interpreted and applied and how the different parties should proceed in specific situations.

The provisions should be interpreted teleologically. This means that the purpose of the various provisions should be respected, not merely their wording.

The rules are based, *inter alia*, on certain principles derived from Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the Takeover Directive). These principles should serve as guidance in situations not covered by the rules or where the rules do not appear to be appropriate in a specific case. These principles are as follows:

- a) All holders of the same class of securities in an offeree company must receive equal treatment and, if a person has acquired control of a company, other holders of securities must be protected.
- b) Holders of securities in an offeree company must be given sufficient time and information to reach a soundly-based decision about the offer. When the board of the offeree company gives advice to the holders of securities, it must express an opinion

as to how implementation of the offer will affect the level of employment, terms and conditions of employment, and the location of the company's operations.

- c) The board of the offeree company must take into account the interests of the company as a whole and may not deprive holders of securities of an opportunity to make a decision on the offer.
- d) The markets on which securities in the offeree company, the company making the offer, or any other company affected by the offer are traded may not be manipulated in a manner that causes the price of the security to rise or fall artificially and that distorts the normal functioning of the markets.
- e) An offeror may not announce an offer until it has been ascertained that cash consideration, where offered, can be paid in full and only after all reasonable steps have been taken to ensure payment of all other forms of consideration.
- f) An offer relating to securities in an offeree company may not prevent the company from conducting its business for a period that is longer than reasonable.

To the extent possible, a takeover bid should be drafted such that it is characterised by simplicity and clarity and such that complex elements can be understood.

From a minority shareholder protection perspective, similar interests worthy of protection are relevant irrespective of whether the takeover of an offeree/transferor company is carried out in the form of a takeover procedure or e.g. through a merger procedure. Therefore, Part VI provides that, in most respects, the rules apply *mutatis mutandis* to mergers and quasi-mergers, and that certain provisions of the Swedish Companies Act (2005:551) regarding voting at general meetings shall apply *mutatis mutandis* also when these provisions are not directly applicable.

I. GENERAL PROVISIONS

Scope of the rules

- I.1 These rules apply to an offer made by any natural or legal person (the offeror) to holders of shares issued by a company which, following an application, are traded on the Marketplace (the offeree company) to sell all or some of such shares to the offeror (a takeover bid).**

With respect to such takeover bids, references to shares also apply, to the extent applicable, to convertible securities, warrants, principal-linked participating debentures, dividend-linked participating debentures, subscription rights and other equity-related transferable securities issued by the company whose shares are the target of the takeover bid (the offeree company). Holders of such securities are thereupon to be regarded as shareholders.

Provisions regarding shares shall also apply to a shareholder's rights vis-à-vis the party holding shares in safe keeping on his or her behalf (depository receipts).

Mergers and quasi-mergers are governed by the provisions of Part VI.

Commentary

According to the *first paragraph*, the rules apply to takeover bids for shares issued by a company whose shares, following an application by the company, are traded on the Marketplace. This means that the rules apply in their entirety not only in cases where the shares are traded exclusively on the Marketplace but also in cases where the shares are traded on both the Marketplace and on a foreign marketplace. It follows from section II.21 (defence measures) and Part III (mandatory offers) that the rules which apply only to offeree companies that are Swedish limited companies have a different ambit than according to section I.1.

The offeror's national domicile does not determine whether the rules will apply, and it is also irrelevant whether the offeror is a natural or legal person.

Situations arise in which the offeror is required not only to observe the Swedish rules but must also take into account rules in one or more foreign jurisdictions. Drafting an offer to meet the requirements in all of the jurisdictions concerned may prove to be very time-consuming and expensive. In such circumstances, in accordance with section 1.2, the offeror may request an interpretation of the rules by the Securities Council and, where so required, exemption from the obligation to address the offer to shareholders in all jurisdictions and from the obligation to apply the Swedish rules in full in all respects. There is no need to apply for exemption in respect of shareholders in jurisdictions outside the European Economic Area provided that, at the time the offer is made, the number of shares held by shareholders in such a jurisdiction may be assumed to represent only a negligible proportion of the total number of shares in the company (up to three per cent), the relevant shares are not admitted to trading on a marketplace in the jurisdiction, and there are no other circumstances of sufficient weight to justify any other procedure.

The rules apply not only to offers for all of the shares in the offeree company, but also to partial offers. Section II.16 contains certain provisions that apply exclusively to partial offers.

According to the *second paragraph*, unless otherwise stated, when applying the rules references to shares also apply, to the extent appropriate, to convertible securities, warrants, dividend-linked participating debentures, principal-linked participating debentures, subscription rights and other equity-related transferable securities which are issued by the company whose shares are the target of the takeover bid. An example of the latter are call options regarding shares issued by the offeree company. Holders of such securities are to be regarded as shareholders in this context. However, the rules do not apply to takeover bids involving call options issued by a party other than the offeree company.

Securities which are not transferable securities, such as non-transferable employee options, are not covered by the rules, irrespective of whether they are issued by the offeree company or a third party.

According to the *third paragraph*, depository receipts are equated with shares.

In these rules, subject to certain exceptions, the terms “share” and “shareholder” are also used when reference is made to other securities herein equated to shares and holders of such securities, respectively.

Mergers and quasi-mergers fall outside the scope of the provisions in section I.1. However, such procedures are governed by the provisions of Part VI. The *fourth paragraph* draws attention to this.

The right for the Securities Council to interpret and grant exemptions from the rules

I.2 The Securities Council may issue rulings regarding the interpretation and application of the rules. The Council may also grant exemptions from the rules, where special cause exists. The Council may stipulate conditions for such exemptions.

Commentary

A regulatory framework for takeover bids is unable to cover in detail all of the issues that may arise in practice in connection with such offers. As a result, it is of the utmost importance that there is a body which can provide authoritative rulings on the interpretation and application of the rules. The Securities Council has been assigned this task.

The rules are to be interpreted and applied in a manner which is compatible with their aims. In many instances, the provisions expressly stipulate that the Securities Council should be consulted in order to eliminate uncertainty regarding the meaning of a

provision in a specific case. This may also be the case in other instances, even where not expressly stated.

Certain provisions provide that special cause may justify deviation from the rule. In cases where the provisions fail to provide sufficient guidance, the Securities Council should be consulted.

The circumstances in different takeover bids are rarely the same. It is not possible to take such differences into account fully when formulating rules intended for general application. As a result, it is necessary to combine the rules with a provision permitting exemptions from all rules or specific rules, where there is special cause for doing so. This is another task performed by the Securities Council. Exemption issues may arise, for example, where mandatory offers are involved (see Part III).

Within the scope of the general responsibilities of the Securities Council, the Council may also issue opinions as to generally accepted practices on the stock market in matters relating to a takeover bid.

From a minority shareholder protection perspective, similar interests worthy of protection are relevant irrespective of whether the takeover of an offeree company is carried out in the form of a takeover procedure or e.g. through a merger procedure. Part VI addresses the rules applicable in the case of mergers and quasi-mergers. As a consequence of the ambit of Part VI, the rules may conflict with company law rules applicable in countries in which relevant parties are domiciled. Furthermore, the rules in a particular foreign jurisdiction may provide satisfactory protection for minority shareholders differently from that indicated in Part VI. In these and other cases, the Securities Council may issue rulings regarding the manner in which the rules are to be applied, or grant exemptions from them

Measures taken by parties closely related to the offeror

I.3 Where stated in sections of the rules and to the extent provided therein, measures taken by:

- a) an undertaking in the same group as the offeror;**
- b) the spouse or cohabitee of the offeror;**
- c) a child of the offeror who is in the custody of the offeror;**
- d) a party with whom an agreement has been reached to take a long-term common position with the purpose of achieving a controlling influence over the management of the company through a coordinated exercise of the voting rights; and**
- e) any party who cooperates with the offeror for the purpose of facilitating the implementation of the offer; and**
- f) any party who cooperates with the offeror for the purpose of acquiring control of the company,**

shall be equated with measures taken by the offeror.

Commentary

This rule lists the parties who, in certain cases, are to be equated with the offeror. This applies in cases where so specifically stated in the rules. In determining whether or not there is a requirement to make a mandatory offer, “the offeror” means an acquirer as referred to in section III.1.

In *subsection a)*, the offeror is equated with an undertaking which is a member of the same group as the offeror. The definition of group is the same as in the Swedish Companies Act, although the statutory provisions regarding parent companies also apply in this context to natural persons and legal entities other than limited companies. This means that, *inter alia*, this rule may also apply even if the offeror is a member of a foreign group.

In *subsection b)*, the offeror is equated with the offeror's spouse or cohabitee. The definition of a cohabitee is the same as in the Cohabitees Act (SFS 2003:376), i.e. two persons living together on a permanent basis as a couple and with a joint household.

In *subsection c)*, the offeror's children who are in the offeror's custody are equated with the offeror.

A close relationship as described in *subsection d)* assumes the existence of a written or oral agreement between the offeror and another natural or legal person to take a long-term common position with the purpose of achieving a controlling influence over the management of the company, through a coordinated exercise of the voting rights. This provision may apply, for example, if there is an agreement to coordinate the exercise of the voting rights over an extended period of time, i.e. several financial years, to ensure the election of such a number of directors as is sufficient, in any event, to constitute a majority on the board. On the other hand, this provision is not designed to cover temporary or merely *ad hoc* cooperation prior to the election of a board of directors or other shareholder resolutions, for example within the scope of a nominating committee.

Subsection e) assumes that a party is cooperating with the offeror by virtue of an agreement for the purpose of facilitating the implementation of an offer. This provision may apply, for example, where a party acquires shares for the purpose of selling the shares to the offeror. Another example is where a party acquires shares in order to hold them on behalf of the offeror for a shorter or longer period of time (known as a parking arrangement). Thus, in these cases, the price paid by the cooperating party for the shares is to be “attributed to” the offeror. This provision is not intended to apply to cooperation with investment banks, lawyers, accountants or other advisers who are acting in such capacity.

Section f) only has a bearing on the issue of whether or not there is a requirement to make a mandatory offer (see Part III). The close relationship as described assumes the existence, in an acquisition situation, of a written or oral agreement between the acquirer and one or more natural or legal persons to cooperate in conjunction with the acquisition for the purpose of acquiring control of the company. “Control” means a

shareholding representing not less than three-tenths of the voting rights for all of the shares in the company.

The Securities Council should be consulted if there is any doubt as to whether a certain relationship is to be regarded as a close relationship in accordance with this rule.

Announcements

I.4 Information which is made public as a result of a planned or actual offer must be accurate, relevant and clear. The information may not be misleading.

The information must be disclosed in such a manner that it becomes available to the general public promptly and in a non-discriminatory manner. Corresponding information must simultaneously be submitted to the Marketplace, as well as to the Securities Council.

The information must state the time and date on which it was made public, and a contact person and telephone number.

The information must also be made available on the offeror's website as soon as possible after being made public, unless there are particular reasons for not doing so.

Information which is to be made public by an offeror in accordance with the rules must simultaneously be submitted to the offeree company, and must be made available on the offeree company's website as soon as possible, unless there are particular reasons for not doing so.

Commentary

It is stipulated in several places in the rules that certain information must be made public. A general requirement is that such information may not be misleading or otherwise inaccurate (*first paragraph*). The information must be adapted to, and focused on, the decision or event giving rise to the announcement.

The rules governing the manner in which publication is to take place are based on, *inter alia*, Chapter 17, section 2 of the SMA and in the Financial Supervisory Authority's Regulations governing operations on trading venues (FFFS 2007:17). In practice, the rules entail that an information distributor must be engaged in order to ensure simultaneous dissemination of the information. Distribution exclusively by email directly from the party who is obliged to publish the information is not permitted.

The *second paragraph* provides that the information which is to be made public must also be submitted to the Marketplace and the Securities Council, not later than the same time and date.

The *third paragraph* provides that the information which has been made public must state the time and date on which it was made public. The information must also state the name of the contact person in the matter.

The information which is to be made public must also be made available on the offeror's website as soon as possible after being made public. This is stipulated in the *fourth paragraph*. However, there may be particular reasons - such as the fact that the offer is not addressed to shareholders in certain jurisdictions (*cf.* the commentary on section I.1) - which may justify the information not being made universally available in this manner.

In order to make it easier for the offeree company's shareholders to receive information relating to a takeover bid for their shares, an offeror who makes information public in accordance with the rules (such as a press release in accordance with section II.3) must simultaneously submit that information to the offeree company – usually to the board of the offeree company - which, in turn, must make the information available on the offeree company's website. The *fifth paragraph* contains a provision on this. In keeping with the aims of the rules, the offeree company may be required to make the information available in such a manner as makes it easy for the shareholders to find the information. However, there may be particular reasons - such as the fact that the offer is not addressed to shareholders in certain jurisdictions - which may justify the information not being made universally available in this manner by the offeree company.

II Rules governing the procedure, drafting the offer, etc.

Pre-conditions to making an offer

II.1 A takeover bid may only be made after preparations have been made which demonstrate that the offeror is capable of implementing the offer.

Commentary

A takeover bid usually has an impact on the offeree company's share price. In some cases, it also affects the price of the shares of the offeror company. Thus, a takeover bid has a considerable impact on share trading, but it is also relevant for the offeree company's board and senior management, and it may also have an impact on the business conducted by the company.

In light of the above, it is important that an offer is made public only if the offeror seriously intends to implement the offer and has made careful preparations for implementation. "Indicative bids" or other "trial balloons" are not compatible with the rules as such, or with the principles upon which the rules are based. Such press releases (other than in connection with a leak or a risk of a leak) must not be issued without the Securities Council's consent. Note that press releases in response to a leak may be issued under certain circumstances (see section II.3). The rules only address press releases from offerors in response to leaks. However, in the event of a leak the offeree company may be obliged to disclose certain information to the market pursuant to its obligations as a listed company.

The requirement for preparations means, *inter alia*, that the offeror must have used experts familiar with the Swedish stock market and its rules and regulations.

According to this rule, the preparations made must have established that the offeror possesses the ability to implement the offer. In the case of an offer wholly or partly in cash, this means, *inter alia*, that the offeror must have ensured that it has sufficient financial resources to implement the offer (*cf.* the principle to this effect stated in the introduction to the rules).

The offeror must ensure that necessary financing will be available throughout the entire offer period, including such extensions of the acceptance period as may reasonably be expected.

The offeror must subsequently be able to show how the preparatory process has been carried out, for example by means of written documentation.

This rule should not be interpreted to mean that the offeror must have ensured, where applicable, that requisite official authorisations/regulatory clearances, will be granted. Nor does it mean that the offeror must have ensured that requisite shareholder resolutions will be passed, if so required. However, if the offeror is dependent on the implementation of a cash issue in order to finance the offer, the preparation requirement may be deemed to include that the offeror has acquired underwriting commitments necessary to ensure that the issue is sufficiently subscribed.

The binding force of statements

II.2 An offeror who announces that the offeror will or will not act in a certain manner with respect to its offer is bound thereby if the announcement is likely to create justified reliance on the market.

Commentary

The rule flows from the general stock market principle that one is not allowed, without further ado, to deviate from a declaration of intent which has been announced to the stock market. However, it also relates back to the principle stated in the introduction to the rules that the markets for the securities of the offeree company, the offeror company, or any other company affected by the offer, may not be manipulated in such a manner that the price of the security rises or falls artificially and the normal functioning of the markets is distorted.

The application of the rule does not require that the offeror's statement affects the price; rather, only that the statement is likely to create justified reliance on the market in some respect relevant to the offer.

The rule primarily contemplates situations where the offeror, through the press release, in the offer documents, or in any other manner makes public statements aimed at the stock market in general, the shareholders of the offeree company, or holders of other securities issued by the offeree company or equivalent in the offeror company. A

statement issued within the scope of private negotiations does not constitute such an announcement as referred to in the rule.

Where clear reservations or qualifications are attached to a statement when it is announced, the offeror may go back on the statement in accordance with such reservations or qualifications.

It follows from the rule that the acceptance period for the offer may not be extended if the offeror has announced that an extension will not take place; that the offer may not be increased if the offeror has announced that no increase will take place; and that conditions to completion may not be withdrawn if the offeror has announced that withdrawal will not take place.

The rule applies only to certain statements announced by the offeror. However, the Securities Council is entitled, within the scope of the Council's general mandate, to express an opinion regarding the circumstances in which parties involved in an offer process may or may not deviate from public statements made by them as a consequence of the offer. Thus, the Council is also required to issue opinions regarding the scope, in a takeover situation, of the general stock market principle that it is not possible to deviate from a declaration of intent without further ado.

The Securities Council is also required to determine the circumstances under which a party remains bound by a particular statement after the offeror has withdrawn its original offer and made a new offer (cf. section II.24).

The offeror's obligation to make an offer public

II.3 Following a decision to make an offer as referred to in section I.1, the offeror must announce the offer as soon as possible through a press release containing the following information:

- **the offeror's identity;**
- **the number of shares in the offeree company held or otherwise controlled by the offeror, and the proportion of the share capital and voting rights for all of the shares in the offeree company represented by these shares;**
- **any holdings of financial instruments which give the offeror financial exposure equivalent to a shareholding in the offeree company;**
- **the extent to which the offeror has received binding or conditional commitments to accept the offer from shareholders of the offeree company, or whether shareholders have expressed favourable opinions concerning the offer and the extent to which the offeree company has committed to an offer-related arrangement vis-à-vis the offeror;**
- **bonus arrangements or the equivalent offered by the offeror to employees of the offeree company prior to the announcement of the offer;**
- **which securities are covered by the offer;**
- **the main terms and conditions of the offer, including the price, premium (if any), and the basis for calculating such a premium;**
- **the manner in which the offer is to be financed;**
- **possible conditions to completion of the offer (conditions to completion);**

- an assurance that the offer is governed by these rules;
- rulings by the Securities Council of relevance to the offer which the Council has ordered the offeror to describe in the offer;
- the extent to which the offeror has received information indicating that shareholders of the offeror company intend to vote in favour of a requisite resolution regarding the offer at a general meeting of the offeror company;
- subscription or underwriting commitments received in respect of a cash issue necessary for completion of the offer;
- a brief summary of the reasons for the offer and, if the consideration is to consist of shares or equity-related securities issued by the offeror, to the extent practicable, the impact of the acquisition - immediately and in the future - on the offeror company's earnings and financial position, where relevant, also expressed on a per-share basis;
- the anticipated publication date of an offer document and a timetable for implementation of the offer that is as precise as possible; and
- information as referred to in section IV.5, if any person as referred to in section IV.1 is making or participating in the offer or if a parent company is making or participating in an offer for the shares in a subsidiary.

A person who is considering making an offer may issue a special press release (a press release in response to a leak), for the purpose of establishing a level informational playing field, if the offeror knows or has justified reason to believe that information about the offer has been, or may be, leaked. This press release must clearly state that it is not a press release regarding an offer as referred to in the first paragraph. It must also state the reason why the press release is being issued. If the press release contains information corresponding to information which, in accordance with the first paragraph, must be contained in a press release regarding an offer which has been made, the provisions of the first paragraph shall, as far as possible, apply *mutatis mutandis*. The press release should also state, if possible, the date when an offer is expected to be made. The Securities Council may set a deadline by which the offer must be made and, in connection with this, in the event the offer is not made, may also set the earliest date on which the offeror, or a party which is closely related to the offeror according to section I.3, may subsequently make an offer for the shares in the company.

Commentary

Following a decision to make a takeover bid, it is of the utmost importance that the offer be made public as soon as possible, *inter alia* in view of the impact on the share prices. This must take place through a press release which, as far as possible, presents facts relevant to the share price. The *first paragraph* stipulates the contents of the press release.

The press release must disclose the *offeror's identity*. If the offeror is a listed company, it is generally sufficient to indicate the offeror's name. In other cases, the offeror must be presented in a manner which is relevant to the shareholders of the offeree company and to the stock market. The presentation must, *inter alia*, indicate the offeror's legal corporate domicile, the address of its head office, an outline of its ownership structure,

and the nature and scope of its business. The latter requirement also entails that certain relevant financial key ratios be reported.

The press release must also indicate *the number of shares in the offeree company held or otherwise controlled by the offeror*, for example pursuant to option contracts, and the proportion of the total number of shares and voting rights in the offeree company represented by these shares. Any terms and conditions relating to an option arrangement must be reported so that the circumstances under which the offeror's option will not apply are evident. If the offeror holds warrants or convertible securities issued by the offeree company, details of these must be provided within the scope of the report of the number of shares controlled by the offeror.

In the press release, the offeror must also disclose *any holdings of financial instruments which give the offeror financial exposure equivalent to a shareholding in the offeree company*, such as cash-settled equity swaps.

If the offeror has secured conditional or unconditional acceptances from shareholders of the offeree company, this must be stated in the press release. If this is not the case, no specific statement is required. An example of a conditional acceptance is a declaration by the shareholder that he will accept the offer provided that no other party makes a more favourable offer. In such cases, the conditions must be reported so that the circumstances under which the shareholder is not bound by his acceptance commitment are evident. If approaches to shareholders to sound out their views on the offer have only resulted in favourable opinions, this must be stated. In this case, it is important that the press release clearly states that such expressions of opinion do not constitute binding undertakings. If the offeree company has, vis-à-vis the offeror, committed to an offer-related arrangement (see section II. 17a, according to which rule such an arrangement may not occur as a starting point), this must be stated in the press release so that the essential purport of the arrangement is evident.

If the offeror has offered employees of the offeree company a *bonus arrangement or the equivalent* prior to the announcement of the offer, an arrangement which is conditional on the prior approval of the board of the offeree company (see the commentary on section II.17), details of the arrangement must be provided in the press release. This may include, for example, an arrangement whereby employees are promised in advance that they may participate in a bonus programme after the implementation of the offer or that they may receive a certain cash payment if they remain with the company for a certain shorter or longer period of time after the offer is implemented.

The press release must disclose *which securities are covered by the offer*. If, for example, the offer applies to shares, warrants or convertible securities issued by the offeree company, this must thus be disclosed in the press release.

The press release must also state the *main terms and conditions of the offer*, for example the form and amount of consideration. Details must be provided of any premium which the offered consideration entails as compared with the trading price. The premium must be indicated relative to the share price immediately prior to the announcement of the offer and relative to the average share price during an

appropriate period of time immediately prior to announcement. The basis for calculating the premium must be stated.

If the offeror reserves the right to extend the acceptance period or postpone the payment of consideration, this must be stated in the press release and the offer document (see section II.7).

The press release must also disclose *the manner in which the offer is to be financed*. This means, *inter alia*, that the press release must state the extent to which the offer is being financed from the offeror's own resources or from borrowed funds. If the offeror's implementation of the offer is dependent on contributions or other financing by shareholders or third parties, the relevant information must be provided. Disclosure of the financing arrangements is particularly important if the offer is made by a company established specifically for this purpose.

If the offeror's implementation of the offer is dependent on external financing and the lender imposes conditions for disbursement of the loan or the equivalent, a description of the financing terms must be provided in the press release. This is the case irrespective of whether or not the offeror makes the offer conditional on the loan being disbursed by the lender. It is not necessary to provide details of all of the terms and conditions; a summary is sufficient. The important thing is that the market receives information about all of the terms and conditions which may be of relevance for assessing the offeror's ability to make full payment in respect of the offer. If the financing terms make reference to other agreements entered into between the offeror and the lender, details of the relevant terms and conditions of those agreements must also be provided. For details of the conditions which may be imposed by the lender or invoked by the offeror for not completing the offer (see sections II.4 and II.5). The disbursement terms and conditions may not be drafted in such a way as to conflict with the requirement in section II.1 that the offeror ensure that it has sufficient financial resources to implement the offer.

If the offeror stipulates *conditions to completion of the offer*, these conditions must be stated in the press release. Conditions to completion of this nature must normally be stated in detail. Very extensive conditions may apply - based on practices in other jurisdictions - particularly in the case of cross-border offers. Conditions to completion of this nature may be stated in a summarised form, provided that the essential meaning is clear.

According to the fifth paragraph of section II.4, if conditions to completion are stipulated, it must also be indicated that the offeror may, in principle, withdraw the offer based on an express condition to completion only if non-fulfilment of the condition is of material importance to the acquisition of the offeree company by the offeror.

Sections II.4 and II.8 provide that the offeror may reserve the right to control, i.e. waive in whole or in part, one or more of the stipulated conditions to completion. If a reservation of this nature has been made, this must be stated in the press release and in the offer document.

The offeror must also state *that the offer is governed by these rules issued by the Swedish Corporate Governance Board*. These rules thereby also become part of the contractual relationship between the offeror and the shareholders of the offeree company. It also means that the offeror and the offeree company's shareholders are bound by the Securities Council's ruling if the Council has issued a ruling on the interpretation or application of the rules with regard to a specific issue (*cf.* section I.2). This is the case irrespective of whether the Council has issued a ruling at the direct request of the offeror or a third party as regards the specific case, or whether the ruling has been issued in another context but addresses a question of interpretation which is also of immediate relevance to the current situation. Clearly, in the latter case, it must be assumed that the Council's ruling has been made public, thus enabling the offeror to be aware of the ruling.

If the Securities Council has issued a *ruling of relevance to the offer* and the Council has ordered the offeror to provide details of the ruling at the time the offer is made, such details must be provided in the press release.

If the offeror is dependent on the adoption of a specific resolution regarding the offer at a general meeting of the offeror company, for example a resolution to *issue new shares which are to constitute consideration under the offer*, the press release must contain details of the extent to which the offeror has received information that the company's shareholders intend to vote in favour of such resolution at the general meeting. Correspondingly, the offeror must disclose *subscription or underwriting commitments received in respect of a cash issue necessary to implement the offer* (*cf.* the commentary on section II.1).

The offeror must state *the anticipated publication date of an offer document and a timetable for implementation of the offer that is as precise as possible*. If the latter indicates that the offer document will be published significantly later than stated in the press release, it is appropriate that this be notified in a separate press release.

Section IV.5 contains provisions regarding supplementary information in the press release when *any person as referred to in section IV.1 is making or participating in the offer or if a parent company is making or participating in an offer for the shares in a subsidiary*.

In light of section II.1, as a starting point no party need announce an intention, or that it is considering, to make a takeover bid (a pre-announcement). However, this does not prevent a person who is considering making an offer from issuing a special press release aimed at establishing a level informational playing field, if such person knows or has reason to believe that information about the offer has been, or may be, leaked before an obligation to issue a full press release has been triggered. The *second paragraph* supports the view that, under such circumstances, a press release in response to a leak should be issued, something which is probably appropriate in most situations where there has been a leak.

The press release should clearly state that it is not such a press release regarding an offer which has been made as referred to in the first paragraph. It should also state the reason for issuing the press release. The amount of detail which the press release

should contain is to be determined on a case-by-case basis in light of, *inter alia*, the information which has been leaked and how far advanced the planning relating to the offeror is. If the press release in response to a leak contains information corresponding to information which, in accordance with the first paragraph, must be contained in a press release regarding an offer which has been made, the provisions of the first paragraph shall apply, as far as possible, *mutatis mutandis*. The more detailed the information provided in the press release in response to a leak, the more important it is that the press release also contain information as to the date on which an offer is expected to be made and which steps need to be completed before the offer can be made. In order to avoid any extended period of uncertainty in this matter, the Securities Council can, upon request or on its own initiative, set a deadline by which the offer must be made. In keeping with, *inter alia*, the principle stated in the introduction to the rules that an offer may not prevent the company from conducting its business for a period that is longer than reasonable, in this context the Securities Council may also set the earliest date on which – in the event the offeror does not make an offer within the stipulated period - the offeror (including closely related parties as referred to in section I.3) may subsequently make an offer to acquire the shares in the company. Such a decision by the Council may be combined with terms, for example, that an offer may be made before the stipulated date if a third party makes an offer to acquire shares in the offeree company.

It is the Securities Council's responsibility to determine whether there are grounds for setting a deadline by which an offer must be made in cases other than when a press release is issued in response to a leak. Such grounds might, for example, be that a planned offer is preventing the offeree company from conducting its business for a period that is longer than is reasonable (cf. the principle to this effect stated in the introduction to the rules).

As stated in the commentary on section II.1, press releases regarding an intention, etc. to make an offer (other than in connection with a leak or risk of a leak) are not to be issued without the Securities Council's consent.

Possibilities for the offeror to stipulate conditions to completion of the offer

II.4 The offeror may stipulate conditions to completion of the offer (conditions to completion).

A condition to completion must be drafted such that it can be determined objectively whether or not the condition has been satisfied. The condition may not be drafted such that the offeror has a decisive influence over its satisfaction.

Notwithstanding the first sentence of the second paragraph, completion of the offer may be conditional on the offeror being granted the requisite official authorisations/regulatory clearances on terms which are acceptable to the offeror.

The offeror may make the offer conditional on a lender disbursing the acquisition loan. However, conditions for disbursement of the loan which are stipulated in the acquisition loan agreement may not be invoked by the offeror as grounds for

not completing the offer. In order to be invoked, such conditions must be stipulated as conditions to completion of the offer and must therefore satisfy the requirements set forth in the second paragraph.

If conditions to completion are stipulated, the offeror must state that the offer may be withdrawn based on a condition to completion only if the non-fulfilment of the condition is of material importance to the acquisition of the offeree company by the offeror. However, this does not apply to conditions regarding achievement by the offeror of a certain level of acceptances of the offer.

A condition to completion may be waived, in whole or in part, if the offeror has reserved the right to do so.

Commentary

Takeover bids in the stock market have considerable implications for the pricing of the shares of the companies concerned and, as a result, for trading in such shares. By definition, a takeover bid is addressed to a wide group of shareholders with varying ability to assess the offer. Thus, it is important that, to the extent possible, offers are characterised by simplicity and clarity. Against this must be weighed the fact that a decisive factor for the offeror's interest in, and ability to complete, the offer may be that certain circumstances pertain when the offer is completed and, as a result, the offeror may need to stipulate conditions to completion of the offer. The *first paragraph* states that such conditions are, in principle, permitted. This may, for example, involve conditions providing that a specific level of acceptances of the offer be achieved, that requisite official authorisations/regulatory clearances be granted, that no other party announces an offer to acquire shares in the offeree company on terms which are more favourable for the holder than the offeror's offer, or that the offeree company not take any measures referred to in section II.21.

The *second paragraph* states that a condition to completion must be drafted in a manner which makes it possible to determine objectively whether or not it has been satisfied. Consequently, the determination of this question is not a matter for the offeror's subjective judgement. The aim should be that it is possible for a third party to verify whether or not the condition has been satisfied. According to the second sentence of the paragraph, a condition to completion may not be drafted in a manner which gives the offeror a decisive influence over its satisfaction. Consequently, the offeror may not stipulate conditions which, in practice, entitle the offeror to determine in its discretion whether or not it wishes to complete the offer. Obviously, the offeror is obliged to endeavour to ensure that the stipulated conditions are satisfied, for example by seeking clearance from a competition authority if the offer is conditional on such clearance being obtained.

The offeror often stipulates a condition to completion that the offeror be entitled to withdraw the offer if, after the offer has been made public, information concerning the offeree company comes to light which differs significantly from what the offeror had reason to expect given the information published or provided by the offeree company. Such a condition must also be drafted with sufficient precision to allow for an objective determination of whether the condition has been satisfied or not.

A certain degree of subjective assessment must be accepted for some types of conditions where it is not possible to rely solely on objective criteria. Official authorisations/regulatory clearances in respect of which the offeror has stipulated a proviso may be associated with such requirements that only the offeror can determine whether or not the pre-conditions to completing the offer still apply. This may be the case, for example, with respect to decisions by competition authorities. Consequently, the *third paragraph* makes an exception from the principle stated in the second paragraph, specifically relating to official authorisations/regulatory clearances.

The offeror may make the offer conditional on a lender disbursing the acquisition loan. A condition to completion of this nature gives the offeror an opportunity not to complete the offer in the event the lender fails to disburse the loan, in breach of the loan agreement, for example due to the lender's insolvency. According to the fourth paragraph, conditions for disbursement of the loan contained in the acquisition loan agreement may not be invoked as grounds for not completing the offer. In order to be invoked, such conditions must be stipulated as conditions to completion of the offer.

As a result, reliance on the condition may be subject to an assessment of materiality by the Securities Council in accordance with section II.5. However, notwithstanding the aforementioned, the offeror may accept that the lender stipulates conditions for disbursement of the loan which are not included as conditions to completion of the offer. However, in order to ensure that such conditions do not conflict with the requirement in section II.1 that the offeror must have ensured that it has sufficient financial resources to implement the offer, the conditions must be such that the offeror is personally able to ensure that the conditions can be satisfied in practice. This may include, for example, conditions that agreed security will be provided and the requisite loan documentation signed. Non-fulfilment of such conditions may not constitute the basis for withdrawing the offer and, consequently, the offeror itself bears the risk that the loan will not be disbursed for such reasons. Section II.3 states that the offeror must provide details of any loan terms and conditions in the press release regarding the offer.

Section II.5 states that, subject to a certain specified exception, the offeror may withdraw an offer based on a stipulated condition to completion only if the non-fulfilment of the condition is of material importance to the acquisition of the offeree company by the offeror. The *fifth paragraph* provides that this must be stated together with conditions to completion enumerated in a press release and offer document. If, in actual fact, non-fulfilment of a particular condition can never be assumed to be of material importance for the offeror's acquisition, the condition may not be stipulated other than where the Securities Council has granted an exemption due to the circumstances in the individual case. A condition to completion that the offeree company's board recommends that the shareholders accept the offer is usually not deemed to be of material importance to the acquisition of the offeree company and therefore may not usually be stipulated. This is also applies to a condition to completion that the board of the offeree company not withdraw a positive recommendation which it has made.

The sixth paragraph states that a condition to completion may be waived if the offeror has reserved the right to do so. If a reservation of this nature has been made, it must be stated in the press release regarding the offer and in the offer document.

The offeror's obligation to honour its offer

II.5 The offeror may not withdraw an offer which has been made.

Notwithstanding the first paragraph, the offeror may withdraw the offer if:

- **the offeror has made the offer conditional on the offeror achieving a given level of acceptances of the offer and it is clear that this condition has not been, or cannot be, satisfied; or**
- **the offeror has made the offer conditional on some other condition, and it is clear that this condition has not been, or cannot be, satisfied, and this is of material importance to the offeror's acquisition of the offeree company.**

If the offeror decides to withdraw the offer in accordance with the second paragraph, this must be made public immediately.

Commentary

The rules are based on the offeror being bound by its offer. Consequently, the *first paragraph* stipulates that, as a general rule, the offeror may not withdraw an offer which has been made.

The *second paragraph* provides for two exceptions from the principle that the offeror is obliged to honour its offer, based on the offeror having stipulated conditions to completion. Firstly, the offer may be withdrawn if the offeror made the offer conditional on the offeror achieving a certain level of acceptances of the offer and it is clear that the condition has not been, or cannot be, satisfied.

Secondly, an offeror who has stipulated some other condition to completion, in accordance with section II.4, is entitled to withdraw the offer, if it is clear that the condition has not been, or cannot be, satisfied. However, the right to withdraw the offer is in this case not uncircumscribed. The offeror must carefully consider whether developments justify withdrawal of the offer. The offer may be withdrawn only if non-fulfilment of the condition is of material importance to the offeror's acquisition of the offeree company. What is considered to be of material importance may be determined in light of the nature of the condition and the circumstances in the particular case. However, more stringent demands are usually imposed regarding the offeror's ability to demonstrate that non-fulfilment of the condition is of material importance to the acquisition of the offeree company if the condition is drafted in relatively general terms.

It is not uncommon for an offeror to make the offer conditional on no other party announcing an offer to acquire shares in the offeree company on terms which are more favourable for the holder than the offeror's offer. The use of alternative forms of consideration as well as increasingly complex consideration structures often makes it difficult to determine immediately whether one offer is more favourable than another.

The non-fulfilment of a condition of this nature does not automatically confer a right to withdraw the offer. Rather, the situation may be assessed based on the second point.

It is also not uncommon for an offeror to make completion of the offer conditional on the adoption of a certain resolution regarding the offer by shareholders at a general meeting of the offeror company or the offeree company. An assessment of whether the non-fulfilment of such a condition entitles the offeror to withdraw the offer may also be made pursuant to the second point. In certain cases, it may be clear that non-fulfilment is of material importance to the acquisition of the offeree company by the offeror, such as where the relevant shareholder resolution is required to issue the shares which are to constitute consideration under the offer.

In case of any doubt as to whether a stipulated condition to completion can be invoked in order to withdraw an offer, the offeror should request that the Securities Council issue a ruling on the matter.

The Securities Council can also grant exemptions from the requirement of material importance. Under certain circumstances, for example, this may be justified in the case of negotiated offers and offers which take the form of a merger between two companies. The Securities Council is the appropriate body for advance or *ad hoc* decisions regarding whether the circumstances justify a waiver of the materiality requirement without neglecting the interests of the shareholders.

The purpose of this rule provides that the offeror must always actively endeavour to implement the offer. Such active conduct on the part of the offeror is particularly important if withdrawal of the offer would be detrimental to the offeree company's shareholders. It may, for example, be deemed incumbent on an offeror who has made its offer conditional on certain official authorisations/regulatory clearances being obtained to submit or supplement an application for such official authorisations/regulatory clearances. On the other hand, it cannot be required that the offeror take measures which would more than marginally increase the costs of implementing the offer. The offeror is at no time obliged to pay a higher price for the shares or to buy shares on the market in order to satisfy a condition requiring a specific level of acceptances of the offer. The offeror is also not obliged to extend the acceptance period in order to make it possible for a condition to be satisfied (see, however, the commentary on section II.7 as regards a particular situation).

If the offeror decides to withdraw the offer, the *third paragraph* states that this must be made public immediately.

The offeror's obligation to prepare and publish an offer document

II.6 The offeror must publish an offer document within six weeks of making the offer.

If, prior to the expiry of the acceptance period of the offer, an event occurs, new circumstances arise or any factual error or omission is discovered in the offer document which may affect the assessment of the offer, a supplement to the offer document must be published immediately.

The offeror may prepare an information brochure to supplement the offer document. Provisions concerning the contents of the offer document and the information brochure are presented in Part V.

Commentary

According to the *first paragraph*, the offeror must publish an offer document within six weeks of making the offer. Publication must be in the manner stated in the Financial Instruments Trading Act (SFS 1991:980) (“FITA”) as regards such offer documents as are referred to in Chapter 2(a) of the FITA.. Chapter 2(a), section 11 of the FITA which, in turn, refers to Chapter 2, sections 29-31 states that the offeror may publish the offer document on its website, however shareholders who so request are entitled to receive a hard copy of the offer document free of charge. The publication is also governed by section I.4. This means, *inter alia*, that the offer document must also be submitted to the Marketplace and the Securities Council, as well as to the offeree company in order to be made available on its website.

The circumstances in a specific case may be such that it is impossible to adhere to the six-week deadline, as in the case of an offer where consideration is to consist of newly-issued shares or an offer that involves foreign markets. In such cases, the Securities Council may grant an exemption upon request by the offeror.

According to the *second paragraph*, a supplement to the offer document must be prepared if, prior to the expiry of the acceptance period of the offer, new circumstances arise or any factual error or omission is discovered in the offer document which may affect the assessment of the offer.

According to section II.8, fifth paragraph, there is an entitlement to withdraw an acceptance within at least five business days of the publication of a supplement. The supplementary offer document must provide information regarding the right of withdrawal and the applicable withdrawal period, at least five business days.

According to the *third paragraph*, the offeror may prepare a shorter information brochure as a supplement to the offer document to facilitate the dissemination of information concerning a takeover bid and make the contents of the offer more easily accessible. Provisions concerning the contents of the information brochure are presented in section V.4. An offer acceptance form may be included with both the offer document and the brochure.

Acceptance period

II.7 The acceptance period for the offer must be not less than three weeks and not more than ten weeks. The period may not start to run until the offer document has been published. Section IV.2 states that in certain cases the acceptance period must be not less than four weeks.

The acceptance period may be extended if the offeror has reserved the right to do so or if payment of consideration to those who have already accepted the offer is not delayed by the extension. Payment of the consideration may only be

postponed if a reservation thereon is specified. The acceptance period may not be extended for an indefinite time.

The total acceptance period may not exceed three months. If the offer is conditional on official authorisations/regulatory clearances being obtained, the total acceptance period pending such authorisation/clearance may not exceed nine months.

Notwithstanding the above, the acceptance period may be extended without limitation once the offeror has completed the offer.

Commentary

According to the *first paragraph*, the acceptance period for the offer must be not less than three weeks (or, in respect of offers covered by Part IV, four weeks) and not more than 10 weeks. The acceptance period may not start to run until the offer document has been published. The rule does not stipulate a deadline by which the acceptance period must start to run. In keeping with, *inter alia*, the principle stated in the introduction to the rules that an offer may not prevent the company from conducting its business for a period that is longer than reasonable, the acceptance period should usually start to run close to publication of the offer document, but the circumstances in a specific case may be such that it is justifiable for the acceptance period to start to run at a later date.

In determining the duration of the acceptance period, the offeror must take into consideration the conditions to completion stipulated for the offer. For example, if the offeror stipulates a condition for completion as regard official authorisation/regulatory clearance, the acceptance period must be at least long enough to ensure that there is a reasonable opportunity to obtain requisite official authorisations/regulatory clearances in such time that the offer can be completed in connection with the announcement of the outcome after the expiry of the initial acceptance period. Where the offer is conditional on clearance from a competition authority, the initial acceptance period may be determined without taking into consideration the delay which arises if the competition authority initiates a special investigation or an equivalent in-depth investigation (known as a Phase 2 investigation). As stated in the commentary on section II.5, the offeror is not obliged to extend the acceptance period to make it possible for a condition to completion to be satisfied. However, with respect to a requisite official authorisation/regulatory clearance, the situation is different if the offeror has reason to expect prompt handling by a competition authority and, consequently, establishes a shorter initial acceptance period than the authority's longest Phase 1 handling procedure, but the decision is delayed nonetheless. In this case, the offeror may be deemed obliged to extend the acceptance period until such time as the Phase 1 decision has been made.

The *second paragraph* states that the acceptance period may be extended if the offeror has reserved the right to do so or if payment of consideration to those who have already accepted the offer is not delayed by the extension. The period may not be extended for an indefinite time. The *second paragraph* also states that payment of the consideration under the offer may only be postponed if a provision is stipulated to this

effect. If the offeror reserves the right to extend the acceptance period or to postpone payment of the consideration, this must be stated in the press release regarding the offer and in the offer document.

In keeping with, *inter alia*, the principle stated in the introduction to the rules that an offer may not prevent the company from conducting its business for a period that is longer than reasonable, the *third paragraph* stipulates that the total acceptance period may not exceed three months. However, if the offer is conditional on official authorisations/regulatory clearances being obtained, the total acceptance period pending such authorisation/clearance may not exceed nine months. The Securities Council may grant an exemption from the time limits at the request of the offeror (*cf.* section I.2).

The *fourth paragraph* provides that the rule does not prevent the offeror from extending the acceptance period once the offeror has announced the completion of the offer, since such an extension can be viewed as a service to shareholders.

The shareholders' obligation to honour their acceptances of the offer

II.8 A shareholder who has accepted the offer may not withdraw his acceptance other than in circumstances specified in this section.

If the offeror has made the offer conditional on the satisfaction of certain conditions, which the offeror has reserved the right to control, the shareholder is entitled to withdraw his acceptance until the offeror announces that all such conditions have been satisfied, or until the date stated in the offer as the deadline for acceptances, if no such announcement is made. If conditions in accordance with the first sentence continue to apply in the event of an extension of the acceptance period for the offer, the right to withdraw acceptances applies in a corresponding manner during the extension period.

If the total acceptance period following an extension exceeds 10 weeks, any shareholder who accepted the offer is entitled to withdraw his acceptance as from the eleventh week.

If an offer involving consideration in the form of shares or equity-related securities issued by the offeror has been reviewed by a competition authority and clearance by the authority requires material changes being made to the businesses of the offeree company or the offeror, the shareholder is entitled to withdraw his acceptance. The offeror must announce that there is a right to withdraw acceptances, stating the period during which the right of withdrawal may be exercised. The period during which the right of withdrawal may be exercised may not be less than one week from the date of the announcement.

A shareholder is entitled to withdraw his acceptance within at least five business days of the publication of a supplement to the offer document pursuant to section II.6, second paragraph.

Commentary

The main principle is that a shareholder who has accepted the offer is bound by his action. This applies in all cases where the offer does not contain any conditions which the offeror has reserved the right to control (i.e. waive in whole or in part). If, on the other hand, the offeror has stipulated conditions which the offeror has reserved the right to control, the shareholders should be allowed to withdraw their acceptances (see the *first and second paragraphs*). One example of such a condition is where the offer is conditional on the offeror achieving a holding of more than 90 per cent of the shares in the offeree company, but the offeror also reserves the right to complete the offer in the event of a lower level of acceptances. Section II.4 states that implementation of an offer may be made conditional on the offeror being granted requisite official authorisations/regulatory clearances on terms which are acceptable to the offeror. The fact that a condition of this nature contains a subjective element does not mean that the offeror is deemed to have reserved the right to exercise control over the condition.

In order to avoid any uncertainty as regards the obligation to honour an acceptance, if such conditions are stipulated the offeror must clearly state in the offer document the pre-conditions to withdrawal of acceptances by shareholders (*cf.* the Appendix).

An acceptance may normally be withdrawn until the deadline for acceptances stated in the offer. However, in certain cases, the right to withdraw lapses prior to this deadline; in other cases, it remains in force after the deadline. If the offeror's conditions are satisfied prior to the expiry of the acceptance period and the offeror has announced this, it is not reasonable for a shareholder to continue to be able to withdraw his acceptance after this date. The second paragraph has been drafted with this in mind. For the sake of clarity, it should be emphasised that a shareholder's right to withdraw his acceptance does not cease simply because the offeror has announced during the acceptance period that it is renouncing a condition stipulated by the offeror.

The right to withdraw an acceptance remains in force after the deadline for acceptances stated in the offer if the offeror's conditions and the reservation regarding the control of the conditions also remain in force during an extension of the acceptance period.

The provision does not prevent the offeror, in the offer, from granting shareholders the right to withdraw acceptances in cases other than those stated.

According to section II.7, the acceptance period may not exceed 10 weeks, but may be extended if the offeror has reserved the right to do so or if the payment of consideration to those who have already accepted the offer is not delayed by the extension. The *third paragraph* provides that an extension which results in the total acceptance period exceeding 10 weeks is only permitted if the shareholders who have already accepted the offer, or who will accept the offer during the extension, are granted the right to withdraw their acceptances from the beginning of the eleventh week. The rule does not apply if the offeror has completed the offer (declared the offer unconditional) and thereupon extended the acceptance period or if the offer was unconditional when it was made.

In connection with a takeover bid, a competition authority may sometimes require undertakings regarding divestments of certain operations or similar measures as a condition to granting clearance for the acquisition. If such a requirement is so far-reaching that the satisfaction of the requirement would result in a material change in the business of the offeree company or the offeror, but the offeror nonetheless wishes to complete the offer, it is reasonable (with respect to offers for shares) that shareholders who have accepted the offer be given the opportunity to reconsider their decision. A rule of this nature is stated in the *fourth paragraph*. If there is any doubt as to whether the authority's requirements may be considered to constitute a requirement for a material change in the business, the Securities Council should be consulted. The offeror must announce that there is a right to withdraw acceptances, stating the period during which the right of withdrawal may be exercised. The period during which the right of withdrawal may be exercised must be not less than one week from the date of the announcement. This also applies if the acceptance period has expired.

The *fifth paragraph* states that there is a right to withdraw an acceptance within five business days of the publication of a supplement to the offer document pursuant to section II.6, second paragraph. An equivalent provision is included in Chapter 2, section 34 of the FITA, to which reference is made in Chapter 2(a), section 11 of the FITA. . The withdrawal period in the instant provision is longer than required in the Act. The supplementary offer document must provide information regarding the right of withdrawal and the applicable withdrawal period, at least five business days.

Revision of an offer that has been made

II.9 The offeror may amend conditions of an offer that has been made if, as a result, the offer becomes more favourable for the shareholders and there remain not less than two weeks of the acceptance period following the amendment.

The first paragraph does not prevent the offeror, after having made reservation for this in the offer, from adjusting the value of the consideration in light of any dividend paid or other value transfer made by the offeree company during the offer period.

Commentary

There are several reasons why the conditions of an offer that has been made may need to be amended. An amendment may, for example, be necessary because the offeror has carried out one or more transactions on the side at a price which is higher than the consideration under the offer. As a result, the offer must be adjusted on the basis of the side transactions (*cf.* section II.14, first paragraph). It may also be the case that, in respect of an offer where the consideration consists of shares in the offeror company, the extent of the side transactions carried out by the offeror in exchange for cash consideration is such as to require the inclusion of a cash option in the offer (*cf.* section II.14, fourth paragraph). An offeror may, of course, also voluntarily wish to amend the conditions.

According to the *first paragraph*, amendments to conditions are permitted, provided that the offer becomes more favourable for the shareholders as a result of the

amendments and that not less than two weeks of the acceptance period remain following the amendment. The assessment as to whether the offer becomes more favourable for the shareholders as a result of an amendment must be made based on each individual condition. For example, it is permitted to increase a cash offer or to increase the cash component of an offer which consists of a combination of shares and cash. On the other hand, it is not permitted to reduce the share component and, at the same time, increase the cash component. It is for the Securities Council to determine whether an amendment is permitted in each individual case.

This rule does not apply to the situation where the offeror stipulates in the original conditions to the offer that a certain alternative form of consideration will lapse after a certain period of time and, consequently, will not be available throughout the entire acceptance period. The principles underlying sections II.7 and IV.2 provide that the acceptance period for all alternative forms of consideration must be not less than three weeks or, in respect of offers covered by Part IV, not less than four weeks. Furthermore, this rule does not apply to the situation where the offeror, according to a provision to this effect, waives or moderates one or more of the stipulated conditions to completion, e.g. where a condition which provides that completion of the offer is conditional on the offeror holding more than 90 per cent of the shares in the offeree company is amended so that a holding of more than 50 per cent of the shares in the offeree company is required.

The requirement that at least two weeks of the acceptance period must remain following the amendment means that the offer may not be amended during the last two weeks of the acceptance period, unless the offeror extends the acceptance period in connection with the amendment of the offer and in accordance with the provisions of section II.7.

Provisions regarding the obligation for the board of the offeree company to state its opinion also on a revised offer are contained in the final paragraph of section II.19.

The *second paragraph* states that an offeror may, in the offer, reserve the right to adjust the value of the consideration in light of any dividend paid or other value transfer made by the offeree company during the offer period. Such an adjustment is compatible with the principle of equal treatment as it is expressed in, *inter alia*, the rules concerning prior transactions. There is nothing to prevent the offeror, if it so wishes, from reserving the right to rely upon the value transfer instead as grounds for withdrawing the offer. However, it should be noted that the possibility to withdraw the offer on this ground is conditional on the event being of material importance to the offeror's acquisition of the offeree company (*cf.* section II.5).

The offeror's obligation to treat equally all holders of shares with identical terms and conditions

II.10 The offeror must offer all holders of shares with identical terms and conditions identical consideration per share. However, if special cause applies for certain shareholders, they may be offered consideration in a different form, but of the same value.

Commentary

A fundamental principle is that shareholders of the offeree company must be treated equally. The principle is reflected, *inter alia*, in the current provision that all holders of shares with identical terms and conditions must be offered identical consideration per share, both in terms of form and value. The expression “identical terms and conditions” refers primarily to the rights conveyed by shares in financial terms and in terms of influence, according to law and the company's articles of association. Typically, this involves the right to receive dividends and the right to participate with certain voting rights in the adoption of resolutions at general meetings.

The consideration usually consists of shares in the offeror company, cash or a combination of shares and cash. However, other assets may also serve as consideration.

This rule does not prevent the offeror from offering the shareholders the opportunity to choose between different forms of consideration, such as shares and cash, nor from assigning different values to these forms of consideration. It is also permitted to stipulate that one or more forms of consideration will no longer be available after a certain period of time. However, the principles underlying sections II.7 and IV.2 provide that all alternative forms of consideration must be available for not less than three weeks or, in respect of offers covered by Part IV, four weeks.

In cases of combined consideration, such as shares and cash, shareholders may be granted the opportunity to choose to sell a larger proportion of their shares in the offeree company in exchange for e.g. cash or shares, provided that the choice can be matched with the choice of other shareholders, as long as this opportunity is available to all of the shareholders.

In special cases, deviations may be made from the principle that all holders of shares with identical terms and conditions are to be offered identical consideration per share in terms of both form and value. One example is where certain shareholders are unable to receive consideration in the form the offeror intends to offer the other shareholders, for legal or similar reasons. There may also be important practical reasons that justify a deviation from the general principle. For example, in the case of offers for companies with a very large number of shareholders, it may be justified to offer payment in cash for small blocks of shares, despite the fact that another form of consideration is paid in other cases, provided that, at the time the offer is made, this cash payment does not differ from the value of the consideration which is offered to the other shareholders. However, drafting the offer in such a way that all shareholders are offered payment in cash for a certain number of shares is not compatible with the principle of equal treatment.

This rule, in principle, does not prevent consideration being structured such that shareholders with large holdings receive the consideration in foreign currency, e.g. Euro, while the consideration to shareholders with limited holdings is automatically converted into Swedish krona at an exchange rate applicable at the time the consideration is reported. However, in this case, the procedure must be arranged such that, on the day or days on which the offeror places the amount to be paid at the

disposal of the payer bank, shareholders who receive the consideration in Swedish krona receive consideration, expressed as the corresponding value of the other currency, which is equal to the consideration received by the shareholders in that currency.

The principle that all holders of shares with identical terms and conditions must be offered identical consideration per share, in terms of both form and value, also means that the offeror is prevented, within the scope of the offer, from offering a specific shareholder or shareholders the opportunity, for example, to acquire shares in the offeror company or in another company or to acquire another asset. Such arrangements are not permitted within the scope of the offer, irrespective of the value of the consideration.

Another situation may arise whereby one or more shareholders of the offeree company participate in the offer in their capacity as shareholders of the offeror company. For example, this may involve several major shareholders of the offeree company cooperating with a private equity firm to make an offer to acquire the shares in the offeree company through a jointly-owned offeror company created specifically for this purpose. Whether such procedure is compatible with the principle of equal treatment is to be determined on a case-by-case basis through an overall assessment in which the main issue is whether the parties in the offeror company/consortium are *de facto* the offeror or shareholders of the offeree company enjoying special treatment. Circumstances to be taken into account in making such an assessment may include the number of shareholders who were contacted concerning ownership stakes in the offeror company, the type of shareholder involved, on whose initiative and when the discussions regarding cooperation began, the manner in which the relevant shareholder contributed to financing the offeror company, and the terms and conditions applicable to ownership stakes in, and exit from, the offeror company. It may not be considered compatible with the rules for a shareholder to act as an offeror by participating in the offeror company while at the same time retaining all or part of his shareholding in the offeree company, thus being included in the offer as well. However, this does not prevent the members of a bidding consortium from contributing their shares to a joint offeror company only after it is established that the offer will be completed. See also the commentary on the fourth paragraph of section II.13.

Reference is also made in the commentary on section I.1 to certain specific problems which may arise if the offeree company has foreign owners.

Treatment of holders of shares with non-identical terms and conditions

II.11 If the offeree company has different classes of shares, the same form of consideration must be offered for all classes of shares.

If the offer applies to different classes of shares which differ in terms of the economic rights carried by the shares, the difference in terms of the value of the consideration may not be unreasonable.

If the offer applies to different classes of shares which only differ in terms of the voting rights carried by the shares and all classes of shares are not traded on the Marketplace, the value of the consideration must be the same for all shares.

If the offer applies to different classes of shares which only differ in terms of the voting rights carried by the shares and all classes of shares are traded on the Marketplace, the general principle is that the value of the consideration must be the same for all shares. Subject to the Securities Council's consent, the offeror may offer a price for each class of shares which is equal to the trading price of the shares and, in addition, may offer a premium which, for each class of shares, represents an equal percentage of the price of all such classes of shares. The Securities Council may only consent to this type of consideration structure if:

- **the liquidity in the relevant classes of shares is sufficient to provide a fair and true price structure;**
- **the price difference is not merely temporary; and**
- **the price difference is not due solely to demand from only one or a small number of buyers.**

Commentary

If the offeree company has different classes of shares, the *first paragraph* states that the same form of consideration must be offered for all classes of shares. This means, for example, that an offeror may not offer shares in the offeror company to holders of one class of shares and cash to holders of another class of shares.

The principle that the same form of consideration must be offered for all classes of shares does not prevent an offeror from offering shares carrying high voting rights in the offeror company as consideration for shares carrying high voting rights in the offeree company and from offering as consideration shares carrying lower voting rights for shares carrying lower voting rights in the offeree company.

The *second to fourth paragraphs* address the issue of the value of the consideration. If the offer relates to different classes of shares carrying different economic rights in the company (such as ordinary shares and preference shares), the offeror may offer the holders of each class of share consideration which differs in terms of value. A difference in terms of the value of the consideration might arise where, for example, any of the classes of shares involves shares carrying no rights or limited rights to a share in the growth in value of the company. However, the difference in terms of the value of the consideration offered may not be unreasonable.

In cases where the difference between the classes of share only relates to the voting rights carried by the shares (for example, Class A and Class B shares), a distinction is made between, on the one hand (which is the most common in practice), the case where shares of only one class are traded on the Marketplace and, on the other hand, the case where both classes of shares are admitted to trading on the Stock Exchange.

If only one class of shares is traded on the Marketplace, the principle is that consideration of the same value must be offered for all classes of shares. If, for

example, Class B shares are traded but Class A shares are not, consideration of the same value must be offered for both Class A and Class B shares.

If all classes of shares are traded on the Marketplace, the general principle is that the offeror must offer consideration of the same value for all classes of shares. However, if the trading price differs for different classes of shares, the offeror may apply to the Securities Council for permission to offer consideration of a different value for the shares concerned. The *fourth paragraph* states that the Securities Council may only grant such a request if three specified requirements are met. The first requirement relates to the liquidity in the classes of shares concerned. The liquidity in the classes of shares concerned need not be identical, but must be sufficient to provide a fair and true price structure. The second requirement relates to the stability of the price difference. The third and final requirement is that the price difference is not due solely to the acquisition of a certain class of shares by one or a small number of buyers.

According to section I.2, the Securities Council may consent to consideration of different value being offered for the different classes of shares in other cases as well. However, in light of the wording of the rule, this can only take place in very specific circumstances, namely where, following an overall assessment, the Securities Council comes to the conclusion that this type of consideration structure would be in the interests of all of the shareholders and could not diminish public confidence in the rules.

Treatment of holders of equity-related transferable securities other than shares

II.12 If the offer also applies to equity-related transferable securities issued by the offeree company other than shares, the consideration for the securities must be reasonable.

The offeror may only exclude from the offer holders of equity-related transferable securities issued within the scope of an incentive programme of the offeree company, provided the holders are otherwise afforded reasonable treatment.

Other than in circumstances specified in the second paragraph, the offeror may only exclude from the offer holders of a certain class of equity-related transferable security issued by the offeree company where it can be assumed that the price of these securities would not be materially affected by the delisting of the shares or other securities to which the offer relates.

If an offer applies to both shares and call options regarding shares to which the offer relates, the total consideration for the call options and the shares may not exceed the consideration for corresponding shares of the same class which do not constitute the underlying asset for the call options.

Commentary

The *first paragraph* addresses the situation where the offer also applies to equity-related transferable securities issued by the offeree company other than shares, such as convertible securities or warrants (*cf.* also the commentary on section I.1).

The consideration for other equity-related transferable securities to which the offer relates must be reasonable, i.e. neither too low nor too high. The manner in which the consideration should be calculated may differ from case to case. Consideration which corresponds to the see-through value of the security calculated based on the consideration offered for the shares may normally be deemed to constitute reasonable consideration for the security. If, for example, a warrant has an exercise price of SEK 75 and the consideration offered for the shares is SEK 100, SEK 25 is thus normally to be regarded as reasonable consideration for the warrant. However, the conditions governing a particular security, its market value, term to expiration as well as other relevant circumstances may lead to the result that the consideration should be calculated in another manner. If, for example, a calculation of the theoretical value of a warrant based on the circumstances pertaining immediately prior to the offer – i.e. without taking into account the consideration offered for the shares and without taking into account the possibility that, at a later stage, the warrant may become worthless as a consequence of the final date for subscription or conversion being brought forward, e.g. as a consequence of a demand for compulsory redemption – yields a higher value, such value should constitute the basis for the offered consideration. It may be necessary to add to this a premium in order to satisfy the requirement of reasonableness in relation to the shareholders. On the other hand, calculating the theoretical value of the warrants based on the value of the shares being equal to the consideration offered for the shares, normally results in pricing which is higher than can be accepted.

The requirement that, as a starting point, one must take into account the consideration offered for the shares is, first and foremost, a rule to protect the holders of the securities referred to in this provision - the price must not be too low. However, it also functions as a rule protecting shareholders, provided the relevant securities represent a potentially substantial proportion of the shares or voting rights. On the other hand, where the securities have been issued to such a limited extent that the consideration offered for the securities cannot be assumed to affect the pricing of the shares in the offer (which is often the case if the securities have been issued to employees), there is usually no reason to take into account the consideration offered for the shares other than as a circumstance of significance for determining the minimum amount that must be offered for the securities

The general requirement that shareholders of the offeree company must be treated equally provides that, in cases where certain holders of other securities are also shareholders, the offeror may not set the price of the securities in a way which results in part of the price being attributed, in practice, to the shares.

The *second paragraph* prescribes that equity-related transferable securities which are issued within the scope of an incentive programme of the offeree company may be excluded from the offer. In such case, the holders of such securities must instead be afforded reasonable treatment outside the offer, for example in the form of cash consideration or participation in an incentive programme of the offeror (in respect of

certain cases of offers to employees of the offeree company, see the commentary on section II.17). The offeror must announce the main terms and conditions of the compensation to the holders. Securities held by a wholly-owned subsidiary of the offeree company may be excluded from the offer without payment of consideration.

The *third paragraph* states that an offer must otherwise in all cases apply to transferable securities (both listed and unlisted) issued by the offeree company which are related to another class of security, provided the pricing of the former is materially affected by the price of the latter. There is usually an impact on the price if the shares and any other securities to which the offer is primarily intended to relate will be delisted. Consequently, the offer must apply to, for example, securities which may be converted into shares, or which entitle the holder to subscribe for new shares, which may be delisted as a result of the offer. This also applies to securities where the interest rate or repayment of principal is linked to the company's share price or suchlike.

It follows from the purpose of the rule that it is not necessary for the offeror to make an offer to acquire outstanding warrants issued by the offeree company if their value is negligible or virtually negligible and it cannot be assumed on any other grounds to be in breach of generally accepted practices on the stock market to exclude the warrant holders from an offer. However, the offeror must usually make an offer to acquire outstanding convertible securities issued by the offeree company, even if the value of the conversion right is negligible or virtually negligible. The debt instrument per se may in fact have a value. However, the Securities Council may grant an exemption from this obligation, depending on the circumstances of the individual case.

The *fourth paragraph* provides that the total consideration offered by the offeror for a share and an outstanding call option regarding the relevant share may not exceed the consideration paid for other shares of the same class which do not constitute the underlying asset for the call option. Removing obstacles to acceptance of the offer may be considered to be the shareholder's responsibility. An issued call option constitutes such an obstacle, and means that the shareholder must be free from the option commitment if the shareholder is to be in a position to accept the offer for the share without committing a breach of contract. If the offeror eliminates this obstacle on the shareholder's behalf by also addressing the offer to holders of call options, the costs therefor (the amount offered for call options) is borne by the shareholder in the form of a corresponding reduction in the price offered for his shares.

Acquisitions prior to the offer

II.13 If, less than six months prior to publishing the offer, the offeror acquires shares in the offeree company otherwise than through a previous takeover bid (a "prior transaction"), the terms and conditions of the offer may not be less favourable than the terms and conditions of the prior transaction. If the offeree company has different classes of shares, the consideration under the offer will be governed by the provisions of section II.11.

Notwithstanding the first paragraph, when determining the terms and conditions for the offer, the offeror may take into account any fall in the price of the offeree

company's shares that occurs in the period between the prior transaction and the announcement of the offer and which is substantial and not merely temporary. However, if, in the prior transaction, the offeror paid a premium in relation to the offeree company's share price, an equivalent premium in percentage terms must be provided in the offer.

If, during the period referred to in the first paragraph, a party other than the offeror announces an offer to acquire shares in the offeree company on terms which are less favourable for the holder than the terms and conditions of the prior transaction, the offeror is no longer bound by the prior transaction when drawing up the offer.

If, during the period referred to in the first paragraph, the offeror has acquired more than ten per cent of the shares in the offeree company in exchange for cash consideration and otherwise than through a previous takeover bid for all of the shares in the offeree company, the offer must provide for an alternative form of consideration which entitles shareholders to receive payment in cash.

If, during the period referred to in the first paragraph, the offeror has acquired more than ten per cent of the shares in the offeree company in exchange for consideration in the form of shares or other securities and otherwise than through a previous takeover bid for all of the shares in the offeree company, the offer must provide for an equivalent alternative form of consideration.

In applying this section, prior transactions carried out by any party who, on the date of the prior transaction, was closely related to the offeror according to section I.3 are to be equated with prior transactions carried out by the offeror.

Commentary

The principle that shareholders of the offeree company must be afforded equal treatment means that the terms and conditions of an offer must, in certain cases, be adjusted based on the terms and conditions of other acquisitions of shares carried out by the offeror. Consequently, in accordance with the *first paragraph*, an offer which is made public after an acquisition of shares must be at least as favourable for recipients of the offer as the previous acquisition (the prior transaction) if less than six months have elapsed between the prior transaction and the offer.

The adjustment requirement means that a comparison must be made between the terms and conditions of the prior transaction and the terms and conditions of the offer. This comparison must relate to the value of the consideration paid and the consideration offered, whereupon the consideration paid in the prior transaction must normally be valued based on the prevailing conditions on the contract date of the prior transaction and the terms and conditions of the offer must normally be valued based on the circumstances prevailing when the offer was issued. This means, *inter alia*, that if the consideration in the prior transaction consists wholly or partly of shares, and the value of the shares has increased, such increase in value of the shares should be disregarded and, instead, the offer must be made involving consideration which corresponds to at least the price of the shares paid as consideration on the contract date of the prior

transaction. In this context, the volume-weighted average transaction price on the last completed trading day before the prior transaction must normally be used. Correspondingly, if the prior transaction was carried out in exchange for cash consideration and the consideration in the offer comprises shares, the comparison must normally be made based on the volume-weighted average transaction price for the consideration shares on the last completed trading day before the offer was issued.

If a prior transaction is carried out as a cash deal but in a currency other than the currency of the consideration under the offer, the value of the prior transaction must be determined on the basis of the exchange rate at the time of the prior transaction. For example, if the offer is made in Swedish krona and a prior transaction was carried out in US dollars, the value of the prior transaction must be determined based on the corresponding value of the prior transaction in Swedish krona, applying the exchange rate applicable on the date of the prior transaction.

In some prior transactions, the seller may have been offered an additional purchase price payable in the event the offeror in turn sells the relevant shares within a certain period of time at a higher price to a third party, such as a competing offeror. Agreements of this nature are not compatible with the principle of equal treatment unless a comparable offer regarding an additional purchase price is made to all of the shareholders, or the Securities Council grants an exemption in an individual case.

In some prior transactions, the offeror may also, prior to an impending offer, promise to pay the seller an equivalent additional purchase price in the event the price under the offer is ultimately higher than the price under the prior transaction. A prior transaction formulated in this manner does not violate the principle of equal treatment.

The equal treatment requirement need not necessarily be maintained in all situations. The *second paragraph* states that the equal treatment requirement may be derogated from if the price of the offeree company's shares at the time the offer is announced is substantially lower than the price which applied on the date of the prior transaction, and this decline in the share price is not merely temporary but has a certain permanence. Clearly, the fall in the share price may be ignored if it is a result of the prior transaction.

If the exception rule is applicable, the circumstances in question may be taken into account when the terms and conditions of the offer are determined, although this does not mean that all connections with the previous acquisition cease to apply. A percentage increment in relation to a trading price in the prior transaction must be followed by an increment of at least the same percentage in relation to the share price at the time the offer is announced.

Another situation in which the main principle of equal treatment need not necessarily be maintained is addressed in the *third paragraph*. In this case, a party other than the offeror announces an offer to acquire shares in the offeree company during the period referred to in the first paragraph, on terms which are less favourable for the holder than the terms and conditions of the prior transaction. In a situation such as this, it is unreasonable for the offeror to be bound by its prior transaction when drawing up the terms and conditions of the offer - otherwise, bidders would not be competing on

equal terms. Accordingly, in a situation such as this, the offeror is free to offer terms and conditions that differ from the terms and conditions of the prior transaction.

The provisions apply irrespective of whether the prior transaction was carried out as a stock market trade or otherwise. An executed acquisition is equated with an agreement for a future acquisition. This is also the case where an option is issued that entitles the offeror to acquire shares in the offeree company.

The provisions do not apply to intra-group transactions or acquisitions through subscription for new shares.

The adjustment requirements address primarily shares with identical terms and conditions. However, the question of adjustment also arises in other cases as a result of the application of the second to fourth paragraphs of section II.11 concerning the value of the consideration in cases where the offeree company has different classes of shares.

When making a comparison between the consideration in the prior transaction and the consideration under the offer, dividends payable must be taken into account. Interest to compensate for the time factor may, but need not, be paid to the other shareholders. The offeror's commission costs or equivalent costs should not be taken into account. If, during the period between the prior transaction and the offer, the offeree company carries out a share split or reverse share split in respect of shares in the offeree company or carries out a rights issue, this must be taken into account.

If an offer provides for alternative forms of consideration, the offeror may, as a basis for the comparison, select the alternative which, at the time the comparison is made, appears to be the most favourable for parties to whom the offer is made.

In keeping with the fundamental principle that the offeree company's shareholders be treated equally, the *fourth paragraph* stipulates that if the offeror has acquired more than ten per cent of the shares in the offeree company less than six months prior to the announcement of an offer, in exchange for cash consideration and otherwise than through a previous takeover bid for all of the shares in the offeree company, the offer must provide for an alternative form of consideration which entitles shareholders to receive payment in cash. The application of this provision is not conditional on the prior transactions having been carried out exclusively in exchange for cash consideration. The provision also applies to transactions involving mixed forms of consideration, provided the cash component of the consideration is sufficiently large that, as a result of this component, the offeror can be considered to have acquired shares representing more than ten per cent of the shares in the offeree company in exchange for cash consideration.

The *fifth paragraph* states that if the offeror has acquired more than ten per cent of the shares in the offeree company in exchange for consideration in the form of shares or other securities, an equivalent alternative form of consideration must be included in the offer. This means, for example, that if, in a prior transaction, the offeror has acquired more than ten per cent of the shares in the offeree company through a non-cash issue, the offer must provide for a share alternative. The provisions of section

II.11 should be taken into account in this context. The application of this provision is not conditional on the prior transactions having been carried out exclusively in exchange for consideration in the form of, for example, shares. The provision also applies to transactions involving mixed forms of consideration, if, for example, the share component of the consideration is sufficiently large that, as a result of this component, the offeror can be considered to have acquired shares representing more than ten per cent of the shares in the offeree company in exchange for consideration in the form of shares.

The rules in this section address transactions which are carried out with shareholders who would have been covered by the offer if the prior transaction had not been carried out. Thus, they do not address the terms and conditions applicable to the participation of one or more shareholders in an offeror company, such as the terms and conditions of the sale of shares by members of a consortium to a jointly-owned offeror company which, in these types of cases, may differ from the terms and conditions of the offer. *Cf.* also the commentary on section II.10.

According to the *sixth paragraph*, prior transactions carried out by any party who is closely related to the offeror according to section I.3 are to be equated with prior transactions carried out by the offeror. The wording of the provision provides that it only applies if the close relationship existed on the date of the relevant transaction. However, it follows from the purpose of the rule that a transaction which has been carried out with a party closely related to the offeror is not normally equated with a transaction carried out by the offeror, provided the offeror and the closely related party have implemented, applied and maintained adequate and effective internal systems and procedures which effectively ensure that no-one at the closely related party has used any information regarding the impending offer and that no one at the offeror has encouraged, recommended, induced or otherwise influenced anyone at the closely related party to carry out the transaction; cf. Article 9.1 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (the Market Abuse Regulation).^{*} The foregoing may apply correspondingly also within the offeror, for example where the offeror is a financial institution which engages in securities trading operations separately from the other operations in the manner stated above and where a transaction is carried out within the scope of the securities trading operations.

^{*}Subject to certain exceptions, the Market Abuse Regulation is applicable commencing 3 July 2016.

Acquisitions during the offer

II.14 If the offeror acquires shares in the offeree company after an offer has been made public (a “side transaction”) on terms which are more favourable for the holder than the terms and conditions of the offer, the offeror must adjust the terms and conditions of the offer to a corresponding extent. If the offeree company has different classes of shares, the consideration under the offer will be governed by the provisions of section II.11.

The first paragraph applies to side transactions which are carried out outside the offer, prior to commencement of payment of the consideration under the offer. Section II.15 applies to subsequent acquisitions.

The offeror must, as soon as possible, publish the price and, where applicable, other terms and conditions on which side transactions referred to in the first paragraph have been carried out and also disclose the new terms and conditions applicable to the offer as a result of the side transactions.

If, during the period referred to in the first and second paragraphs, the offeror acquires shares in exchange for cash consideration and otherwise than through a previous takeover bid for all of the shares in the offeree company which, together with shares acquired in the manner referred to in the fourth paragraph of section II.13, represent more than ten per cent of the shares in the offeree company, the offer must provide for an alternative form of consideration which entitles shareholders to receive payment in cash.

If, during the period referred to in the first and second paragraphs, the offeror acquires shares in exchange for consideration in the form of shares or other securities and otherwise than through a previous takeover bid for all of the shares in the offeree company which, together with shares acquired in the manner referred to in the fifth paragraph of section II.13, represent more than ten per cent of the shares in the offeree company, the offer must provide for an equivalent alternative form of consideration.

In applying this section, side transactions carried out by any party who, on the date of the side transaction, was closely related to the offeror according to section I.3 are to be equated with side transactions carried out by the offeror.

Commentary

An offeror may acquire shares in the offeree company by means of a side transaction, both on and off the Marketplace. This type of acquisition may be carried out using the same form of consideration as that under the offer, but it may also be carried out using a different form of consideration. If the terms and conditions of the side transaction are more favourable for the holder than the terms and conditions of the offer, in accordance with the *first paragraph*, a corresponding amendment to the terms and conditions of the offer must be made. Consequently, a comparison must be made between the terms and conditions of the offer and the terms and conditions of the side transaction. The consideration under the offer and the consideration in the side transaction must usually be valued based on the market conditions on the date of the side transaction. This means, *inter alia*, that if the consideration under the offer consists wholly or partly of shares, or if shares constitute one or more alternative forms of consideration, and the shares have risen in value, side transactions may be carried out at the new share price, without the requirement for compensation to be paid to those who have accepted the offer.

These provisions apply irrespective of whether the side transaction was carried out as a stock market trade or otherwise. An executed acquisition is equated with an

agreement for a future acquisition. This is also the case where an option is issued that entitles the offeror to acquire shares in the offeree company.

The adjustment requirements address primarily shares with identical terms and conditions. However, the question of adjustment also arises in other cases as a result of the application of the second to fourth paragraphs of section II.11 concerning the value of the consideration in cases where the offeree company has different classes of shares.

When making a comparison between the consideration under the offer and the consideration in the side transaction, dividends payable must be taken into account. Interest to compensate for the time factor may, but need not, be paid to the other shareholders. The offeror's commission costs or equivalent costs should not be taken into account.

If an offer provides for alternative forms of consideration, the offeror may, as a basis for the comparison, select the alternative which, at the time the comparison is made, appears to be the most favourable for those who accept the offer.

In cases where side transactions result in an adjustment of the terms and conditions of the offer, in accordance with the *third paragraph*, the offeror must, as soon as possible, publish the price and, where applicable, other terms and conditions of the side transactions and also disclose the new terms and conditions applicable to the offer.

In keeping with the fundamental principle that the offeree company's shareholders be treated equally, the *fourth paragraph* stipulates that if, during the period referred to in the first and second paragraphs, the offeror acquires shares in exchange for cash consideration and otherwise than through a previous takeover bid for all of the shares in the offeree company which, together with shares acquired in the manner referred to in the fourth paragraph of section II.13, represent more than ten per cent of the shares in the offeree company, the offer must provide for an alternative form of consideration which entitles shareholders to receive payment in cash. The application of this provision is not conditional on the transactions having been carried out exclusively in exchange for cash consideration. The provision also applies to transactions involving mixed forms of consideration, provided the cash component of the consideration is sufficiently large that, as a result of this component, the offeror has *de facto* acquired shares representing more than ten per cent of the all of the shares in the offeree company.

The *fifth paragraph* states that if the offeror has acquired more than ten per cent of the shares in the offeree company in exchange for consideration in the form of shares or other securities, an equivalent alternative form of consideration must be included in the offer. This means, for example, that if, in a side transaction, the offeror has acquired more than ten per cent of the shares in the offeree company through a non-cash issue, the offer must provide for a share alternative. In this context, the provisions of the second to fourth paragraphs of section II.11 must be taken into account as regards the value of the consideration in cases where the offeree company has different classes of shares. The application of this provision is not conditional on the

transactions having been carried out exclusively in exchange for consideration in the form of, for example, shares. The provision also applies to transactions involving mixed forms of consideration, provided, for example, that the share component of the consideration is sufficiently large that, as a result of this component, the offeror can be considered to have acquired shares representing more than ten per cent of the shares in the offeree company in exchange for consideration in the form of shares.

According to the *sixth paragraph*, side transactions carried out by any party who is closely related to the offeror according to section I.3 are to be equated with side transactions carried out by the offeror. The wording of the provision provides that this only applies if the close relationship existed at the time of the relevant transaction.

Where appropriate, that which is stated in the commentary on section II.13 applies, *mutatis mutandis* also to this section II.14.

Acquisitions after the offer

II.15 If the offeror acquires shares in the offeree company (a “subsequent transaction”) within a period of six months after the commencement of payment of the consideration in a takeover bid on terms which are more favourable than the terms and conditions of the offer, the offeror must pay compensatory cash consideration to those who have accepted the offer. If the offeree company has different classes of shares, section II.11 applies to the consideration under the offer.

The first paragraph does not apply if a party other than the offeror has announced an offer to acquire shares in the offeree company on terms which are more favourable for the shareholder than the terms and conditions of the offer.

In applying this section, subsequent transactions carried out by any party who, at the time of the subsequent transaction, was closely related to the offeror according to section I.3 are to be equated with subsequent transactions carried out by the offeror.

Commentary

If the offeror acquires shares in the offeree company less than six months after the commencement of payment of the consideration in a takeover bid on terms which are more favourable for the holder than the terms and conditions of the offer, in accordance with the *first paragraph* the offeror must pay compensatory cash consideration to those who have accepted the offer. Consequently, a comparison must be made between the terms and conditions of the offer and the terms and conditions of the subsequent transaction.

The consideration under the offer must normally be valued based on the market conditions at the time it was announced that the offer would be completed, whereas consideration in the acquisition must normally be valued based on market conditions prevailing at the time of the acquisition. Thus, the terms or conditions of a subsequent transaction may not be more favourable for the seller in the subsequent transaction

than the terms and conditions of the offer at the time of the announcement that the offer will be completed.

This provision addresses transactions which are carried out after the offer has been implemented. Thus, it does not prevent the offeror, in connection with one or more extensions of the acceptance period in an offer in which consideration consists wholly or partly of shares, from paying consideration at different times in accordance with the original exchange ratio, notwithstanding any increase in the price of the share constituting consideration.

This provision applies irrespective of whether the subsequent transaction was carried out as a stock market trade or otherwise. An executed acquisition is equated with an agreement for a future acquisition. This is also the case where an option is issued that entitles the offeror to acquire shares in the offeree company.

This provision does not apply to acquisitions which are carried out within the scope of a squeeze-out procedure, where the squeeze-out has been considered by an arbitration tribunal. Nor does the provision apply to a private offer made by an offeror in connection with a squeeze-out procedure, whereby the offeror offers to acquire shares for a price equal to the price claimed in the squeeze-out procedure. However, this does not apply if, in order to circumvent the rules concerning subsequent transactions, the party entitled to exercise squeeze-out rights has submitted the matter to arbitration in order therein to concede the other party's claim and to reach a settlement on terms which, for the parent company, manifestly deviate from generally accepted practices in squeeze-out cases, or otherwise waive its rights.

The adjustment requirements address primarily shares with identical terms and conditions. However, the question of adjustment also arises in other cases as a result of the application of the second to fourth paragraphs of section II.11 concerning the value of the consideration in cases where the offeree company has different classes of shares.

When making a comparison between the consideration under the offer and the consideration in the subsequent transaction, dividends payable must be taken into account. Interest may, but need not, be taken into account. If interest is to be taken into account, it must be calculated no earlier than from the date on which the offeror commenced payment of the consideration (*cf.* section II.23). The offeror's commission costs or equivalent costs should not be taken into account.

If an offer provides for alternative forms of consideration, the offeror may, as a basis for the comparison, select the alternative that, at the time the comparison is made, appears to be the most favourable for those who have accepted the offer.

The *third paragraph* states that the provision also applies to transactions carried out by any party who is closely related to the offeror according to section I.3.

Where appropriate, that which is stated in the commentary on section II.13 applies, *mutatis mutandis* also to this section II.15.

Certain provisions regarding partial offers

- II.16 A takeover bid may relate to fewer than all of the shares in the offeree company (a partial offer) if:**
- a) as a result of the offer, the offeror, either alone or together with a party closely related to the offeror according to section I.3, could not become the owner of shares representing 30 per cent or more of the voting rights for all of the shares in the offeree company; or**
 - b) at the time the offer is made public, the offeror, either alone or together with a party closely related to the offeror according to section I.3, owns shares representing 30 per cent or more of the voting rights for all of the shares in the offeree company, and there is no requirement to make a mandatory offer.**

When a partial offer is announced, the maximum number of shares which the offeror wishes to acquire pursuant to the offer must be stated in the press release referred to in section II.3, as well as whether the offeror reserves the right to acquire additional shares pursuant to the offer.

If the maximum desired number of shares stated in the offer is exceeded and the offeror has not reserved the right to acquire additional shares, the offeror must make a proportional reduction in the blocks of shares covered by acceptances submitted. In assessing whether a certain minimum number of shares have been acquired, shares covered by acceptances submitted pursuant to the offer will be added to shares which the offeror has acquired outside the offer, after the offer was announced.

Commentary

A takeover bid usually applies to all of the shares in the offeree company not already held by the offeror. However, offers are sometimes made for more limited acquisitions of shares. Offers which relate to fewer than all of the shares in the offeree company not already held by the offeror are referred to as partial offers. Unless otherwise stated in the rules, the rules also apply to partial offers. Certain provisions which only apply to partial offers are presented in this section.

The rules relating to mandatory offers restrict the scope for partial offers. Consequently, in accordance with the *first paragraph*, a partial offer may not be made if, as a result of the offer, the offeror, either alone or together with a closely related party in accordance with section I.3, could become the owner of shares representing three-tenths or more of the voting rights for all of the shares in the company. Thus, a partial offer which does not meet the threshold triggering a mandatory offer is permitted. But the offeror, either alone or together with a closely related party, may already hold shares representing three-tenths or more of the voting rights in the offeree company and not be subject to the requirement to make a mandatory offer, such as where the relevant shares were already held when the provisions regarding mandatory offers in these rules originally entered into force (on 1 January 2010). In this case, a partial offer relating to some of the other shares in the company may be made. If the shareholding is based on an exemption from the requirement to make a mandatory

offer granted by the Securities Counsel, the possibility to make a partial offer for some of the other shares depends on the wording of the exemption.

In the case of partial offers, in a press release as referred to in section II.3 the offeror must state the number of shares in the offeree company to which the offer relates. This is stated in the *second paragraph*. There is nothing to prevent the offeror from reserving the right to acquire additional shares pursuant to the offer, as long as the threshold triggering a mandatory offer is not met, if it proves to be the case that interest in selling shares is sufficient to permit this.

This provision does not preclude the offeror from stating a price range within which the offeror makes an offer to acquire shares and each shareholder stating the minimum price at which they are prepared to sell, after which the offeror eliminates surplus acceptances on this basis, provided this is done in a predictable, fair and uniform manner.

Role of the board of the offeree company

II.17 The board of the offeree company must act in the interests of shareholders in matters relating to the offer.

Commentary

A takeover bid is addressed to the offeree company's shareholders, who must decide whether to accept or reject the offer. However, this does not mean that the board of the offeree company is not involved in the offer procedure. The board has a key role in the procedure and must endeavour, throughout the entire procedure, to act in the interests of shareholders. The board may not act in its own interests or allow itself to be directed by the interests of only one or some shareholders. Also, if there is more than one bidder, the board may not promote a particular offeror without objective grounds. Section II.21 contains provisions which prohibit the board from taking measures, without the approval of shareholders, which are intended to impair the conditions for making or implementing the offer. The provisions of section II.21 do not prevent the board from considering or providing information about alternatives other than the offer that has been made, or from entering into discussions with other potential bidders, provided the board is of the opinion that this is in the interests of shareholders. It follows from this provision that the board is not only entitled but also required to consider other alternatives and, where necessary for the purpose, take such measures as the board considers to be in the interests of the shareholders. The board may thereupon cause the company to incur such reasonable expenses as associated with the measures.

The general disclosure obligations of the offeree company as a listed company remain unchanged in a takeover situation. If new information is published by the offeree company in a takeover situation, it may be necessary to make a supplement to the offer document (see the second paragraph of section II.6). If information is available which may affect the assessment of the offer without the offeree being obliged to publish the information immediately, the offeree company should endeavour to publish the information not later than two weeks prior to the expiry of the acceptance

period (cf. the board's obligation under section II.19 to announce its reasoned opinion on the offer not later than two weeks prior to the expiry of the acceptance period).

As a consequence of a takeover bid, the board is often assigned the task of deciding whether one or more potential bidders are entitled to conduct a due diligence investigation and to determine, in this context, *inter alia*, the scope and the forms of the investigation. Section II.20 contains a provision on this. Correspondingly, given its obligation to act in the interests of shareholders, it is the board's responsibility to decide upon, for example, an offeror's request for assistance in the drafting of applications for requisite official authorisations/regulatory clearances.

If, prior to completion of the offer, an offeror wishes to offer employees of the offeree company a bonus arrangement or the equivalent, the prior approval of the board of the offeree company must be obtained. A determination of whether such approval should be given must also be made based on the obligation to act in the interests of shareholders.

Offer-related arrangements

II.17a The offeree company may not commit itself to any offer-related arrangement vis-à-vis the offeror.

“Offer-related arrangement” means any and every arrangement related to the offer which entails an obligation on the offeree company vis-à-vis the offeror, however not confidentiality commitments or undertakings not to solicit the offeror's employees, customers, or suppliers.

Commentary

In some cases, the offeror requests that the offeree company undertakes certain commitments vis-à-vis the offeror. This may, for example, involve undertakings to restrict the right for the offeree company to conduct discussions with, or seek, other potential bidders for a certain period of time. It may also involve undertakings to notify the offeror in the event the target company receives proposals from competing offerors. Another example comprises an agreement whereby, on certain conditions, the offeree company wholly or partly compensates the offeror for costs incurred if the deal fails to materialise.

According to the *first paragraph*, the offeree company may not commit itself to any such offer-related arrangement. The prohibition is primarily intended to limit the scope for arrangements which detrimentally impact on the conditions for the submission or completion of competing offers.

The *second paragraph* states that an offer-related arrangement comprises each and every such arrangement involving an obligation for the offeree company vis-à-vis the offeror. Accordingly, the provision does not apply to arrangements under which the offeree company has no obligations. Nor, according to the second paragraph, does the provision prevent the offeree company from undertaking confidentiality commitments or providing undertakings not to solicit the offeror's employees, customers or

suppliers. Undertakings that contemplate the amalgamated group following completion of an offer do not constitute offer-related arrangements.

Pursuant to section I.2, the Securities Council is entitled to grant exemptions from the provision or to issue an opinion on how it is to be applied. It is not a sufficient reason for an exemption that the offeror has demanded a particular offer-related arrangement and that the offeree company has not opposed this. However, in individual cases the circumstances may be such that an exemption from the rule can be granted. This may, for example, be the case where reciprocal undertakings are involved in amalgamation agreements between parties of equal strength. An exemption might also be granted regarding an arrangement with a competing offeror, where the board of the offeree company does not recommend the first offeror's offer, or with respect to an arrangement with the offeror whose offer is recommended by the board following a sales process initiated by the offeree company. Reasons for exemption might also conceivably exist in other cases where a particular arrangement improves, rather than reduces, the prospects of a competitive bidding situation. When considering the granting of an exemption, the entire circumstances must be considered, whereupon certain arrangements may be deemed acceptable, while others are not accepted

Conflicts of interest

II.18 A director of the offeree company may not participate in discussions on a matter related to the offer if, as a result of a shared interest with the offeror or for any other reason, the director may have an interest in the matter that conflicts with the interests of shareholders. This also applies to the managing director of the offeree company.

Commentary

In some cases, a director or the managing director of an offeree company may have a shared interest with the offeror or a third party, such as a potential competing offeror, which means that his objectivity in relation to the offer can be called into question. A clear case of such a shared interest is where the director is also an owner of the offeror company; but there may also be a shared interest where, for example, the director or managing director is employed or otherwise engaged to provide services to the offeror company. If the shared interest indicates that the director may have an interest which is in conflict with the interests of the offeree company's shareholders, the director must declare this to the board and refrain from participating in discussions on any matters addressed by the board which, in a broad sense, are related to the offer. This may, for example, involve matters relating to contacts and negotiations with the offeror or other potential bidders, other alternative forms of conduct, the retention of advisers, the board's opinion of the offer, and any defence measures. The words "may have" denote that the provision even applies in a situation where directors typically have a conflict of interest.

It is not possible to provide an exhaustive list of circumstances constituting such a conflict of interest as referred to in the provision. This must be determined in each individual case taking into account, for example, the nature and scope of the director's connection to the offeror, undertakings relating to board duties, etc. The rules must

also be applied in light of their purpose, namely to maintain public confidence in the market.

The fact that a director of the offeree company is also a shareholder of the company does not normally give rise to a conflict of interest. However, if, in connection with the offer, the director has entered into an agreement to sell his shares to the offeror or provided an undertaking to accept the offer, he may be considered to have a conflict of interest. This must be disclosed in the press release regarding the offer and in the offer document. If the sale is governed by special terms and conditions, such as being made conditional on the completion of the offer, a description of these terms and conditions must also be provided.

The above also applies to any director who is a proxy for or otherwise represents a shareholder of the offeree company.

The obligation for the board of the offeree company to state its views regarding the offer

II.19 The board of the offeree company must announce its opinion of the offer, and the reasons for this opinion, not later than two weeks prior to the expiry of the acceptance period.

Based on the press release or offer document issued by the offeror, the board must present its opinion regarding the impact that the implementation of the offer will have on the company, particularly in terms of employment, and its opinion regarding the offeror's strategic plans for the offeree company and the effects it is anticipated that such plans will have on employment and on the communities in which the company conducts its business. If, within a reasonable period of time, the board receives a separate statement of opinion from employee representatives expressing different views on the impact of the offer on employment, this statement must be attached to the board's opinion.

The board's opinion must also state whether a director has not participated in discussions on the matter due to a conflict of interest or whether a director has expressed reservations regarding the board's decision. If a relevant board meeting is not quorate, the other directors are entitled, but not obliged, to announce their opinion of the offer. In such case, a valuation opinion pursuant to section IV.3 must be obtained and published, irrespective of whether or not the other directors choose to express their views on the offer.

If the offeror amends the terms and conditions of an offer which has been made, the offeree company's board must announce its opinion of the revised offer, and the reasons for this opinion, as soon as possible and, in any event, not later than one week prior to the expiry of the acceptance period.

Commentary

The opinion held by the board of the offeree company about the offer is very often of considerable interest to shareholders when faced with a decision. The board's views on the offer are of value to shareholders since the board usually has useful insights

into the matters concerned. Consequently, in accordance with the *first paragraph*, the board must announce its opinion of the offer and state the reasons for this opinion. This rule must be understood in the sense that the board must state its views not only on the total amount that the offeror is offering to pay for the company but, above all, on the consideration and other terms and conditions that the offeror is offering for each share and, where applicable, each class of shares.

If the offer is of the nature of a merger, whereby the consideration consists of shares in the offeror company, it is usually appropriate for the board to expand upon its views on the industrial logic, synergies, etc.

The amount of detail required in the reasons for the board's opinion on an offer may otherwise be determined based on the circumstances of the particular case. If the board's position is straightforward, detailed reasons are not usually required, whilst more detailed reasons are required in borderline cases which are difficult to assess, where there may be circumstances worthy of consideration both for and against the offer.

The board needs a certain amount of time to evaluate the offer and provide its opinion. As a result, the board cannot always be required to provide a statement of its opinion immediately when the offer is announced. However, it is an advantage if the opinion is provided in sufficient time for it to be included in the offer document. The opinion must be provided not later than two weeks prior to the expiry of the acceptance period. This usually allows for sufficient time remaining in the acceptance period for shareholders who elected to await the opinion to be considered to have a reasonable amount of time to evaluate the board's opinion.

According to the *second paragraph*, based on the press release or offer document issued by the offeror, the board must present its opinion regarding the impact that the implementation of the offer will have on the company, particularly in terms of employment, and its opinion regarding the offeror's strategic plans for the offeree company and the effects it is anticipated that such plans will have on employment and on the communities in which the company conducts its business. If, within a reasonable period of time, the board receives a separate statement of opinion from employee representatives expressing different views on the impact of the offer on employment, this statement must be attached to the board's opinion. This provision is based on the provisions of the Takeover Directive.

If the board of the offeree company has provided its opinion of the offer in sufficient time for it to be reproduced in the offer document, the entire opinion must be reproduced in the offer document, in accordance with Part 4 of the Appendix. If the opinion is not available in time to be reproduced in the offer document, it must be disclosed in the offer document when it is expected to be available.

If a director has not participated in discussions on the matter due to a conflict of interest or for any other reason, according to the *third paragraph* this must be stated in the board's opinion. Similarly, if a director has expressed reservations regarding the board's decision, this must be stated together with the reasons for the reservations, if stated. If a sufficient number of board directors are prevented from participating in the

formulation of the board's opinion for the relevant board meeting to be declared inoperative, the other directors are entitled, but not obliged, to announce their opinion of the offer (this is usually what happens in these cases). In a situation such as this, a valuation opinion in accordance with section IV.3 must be obtained and published, even if a squeeze-out situation as referred to in Part IV is not involved. The obligation to obtain a valuation opinion applies irrespective of whether or not the other directors choose to express their views on the offer. The board may also have reason to obtain a valuation opinion in other cases. If so, the valuation opinion must be published.

Pursuant to section II.9, an offeror may amend the terms and conditions of an offer which has been made. The board of the offeree company must also announce its opinion of the revised offer. The *fourth paragraph* states that this must take place as soon as possible and not later than one week before the expiry of the acceptance period.

The participation of the offeree company in a due diligence investigation

II.20 If the offeror requests that it be permitted to conduct a due diligence investigation on the offeree company, the board of the offeree company must decide whether the company can, and should, participate in such an investigation and, if so, on what terms and conditions and to what extent. The board must limit the investigation to factors relevant to making and implementing the offer.

If, in the investigation, the offeree company provides the offeror with non-public price-sensitive information, the offeree company must ensure that the information is made public as soon as possible.

Commentary

In connection with a takeover bid, the offeror may sometimes ask the offeree company for permission to conduct a due diligence investigation in order to obtain more information about the company. According to the *first paragraph*, the board of the offeree company is responsible for determining the extent to which such a request can, and should, be complied with based on the circumstances of the individual case, and taking into account, first and foremost, the scope permitted for such participation under the relevant legislation, in particular the Companies Act, and the Marketplace's rules. The board must also comply with the rules on insider trading. The board may consent to participation by the offeree company in a due diligence investigation only if the board considers that the potential offer will be of interest for consideration by shareholders and if the offeror has presented a written request for permission to conduct the investigation concerned as a condition to making the offer.

In arriving at its decision, the board must weigh up the risks of harm to the company, such as through the disclosure of trade secrets. In light of, *inter alia*, these risks, the board should ensure that the investigation is no more extensive than is necessary for the offer. The board should also ensure that a confidentiality agreement is prepared which, *inter alia*, places limitations on the offeror's right to use and disseminate the information, and that the company documents the information provided, the persons who have received it, and when this occurred. The board should also endeavour to

ensure that the investigation is conducted as quickly as possible in order to avoid unnecessary disruptions to the offeree company's business.

If, in the course of the due diligence investigation, the offeree company provides the offeror with non-public price-sensitive information, according to the *second paragraph* the offeree company must ensure that this imbalance in the provision of information is rectified as soon as possible. This may take the form of information – in any event summarised in relevant parts - being published and included in the offer document.

The obligation to publish the information provided in accordance with these rules does not apply before the offer has been made. If no takeover bid is made after the due diligence investigation, this obligation no longer applies.

Where, within the framework of a due diligence investigation or otherwise the offeror receives insider information concerning the offeree company, a prohibition on trading and other restrictions are triggered as prescribed in the market abuse rules. Cf. *inter alia*, Articles 14 and 9.4 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (the Market Abuse Regulation).*

If more than one bidder plans to make an offer for the shares in the offeree company, it is of the utmost importance that the offeree company applies the rules uniformly vis-à-vis all bidders. Consequently, if information has been provided to one bidder and another bidder requests equivalent information, the offeree company must comply with this request, provided the circumstances are similar in other respects. Clearly, the board must also consider the risks to the company which may result from the provision of information as regards the other bidder. Circumstances may differ from one bidder to another, depending on the level of competition, for example.

The above comments apply to due diligence investigations which are begun before the offer is announced. The question of whether such an investigation may also be conducted after the offer has been announced is quite a different matter. This should only occur if required to determine whether or not the conditions to completion stipulated in the offer have been satisfied.

*Subject to certain exceptions, the Market Abuse Regulation is applicable commencing 3 July 2016.

Defence measures

II.21 Where, based on information originating from a person who intends to make a takeover bid for the shares in the offeree company, the board of directors or managing director of a Swedish limited company whose shares are taken on a Marketplace, has a well-founded reason to believe that such a takeover bid is imminent, or if such a takeover bid has been made, the offeree company may only take measures which are intended to impair the conditions for making or implementing the takeover bid following the adoption of a resolution by the shareholders at a general meeting.

Notwithstanding the first paragraph, the offeree company may seek alternative bids.

Commentary

The rule corresponds in substance with the provisions of Chapter 5, section 1 of the TBA and, in like manner, its application is limited to offeree companies that are Swedish limited companies.

According to the *first paragraph*, the board of directors of an offeree company may not take measures which are intended to impair the conditions for making or implementing the takeover bid. The obligation to refrain from taking such so-called defensive measures applies not earlier than the time at which the board of directors or managing director of the offeree company has a well-founded reason to believe that a takeover bid is imminent, based on information originating from the person who intends to make a takeover bid for the shares in the offeree company. The section also applies when the information has not been provided directly to the board of directors or the managing director, but has first passed through one or more stages, for example through shareholders. As regards the board of directors, it is sufficient for one director to have gained such knowledge. Where a takeover bid is made without any information being provided by the offeror, or without the board having become aware of the takeover bid in any other manner, the crucial time is the date on which the takeover bid is published.

The requirement that, in order to limit the possibilities for the offeree company to take action, the information regarding the takeover bid must provide “a well-founded reason to believe that a takeover bid is imminent” means, *inter alia*, that the information must be fairly specific and that the offeror can be assumed to have the requisite financial resources to implement the takeover bid. The mere fact that the board is of the opinion that the takeover bid will not be attractive enough for the shareholders does not in itself constitute a circumstance which entitles the board to take measures on its own initiative to thwart the takeover bid.

It is not possible to provide an exhaustive list of the various types of measures which the offeree company is not permitted to take in cases where the rule applies. Examples of such measures include a private placement of shares, a transfer or acquisition of assets, or an offer to the shareholders of the offeror company or another company to acquire their shares. Measures may also include encouraging a subsidiary to take such measures. However, whether these measures or other measures fall within the ambit of the rule depends on whether the measure is intended to impair the conditions for making or implementing the takeover bid.

Accordingly, measures which are intended to impair the conditions for making or implementing the takeover bid may only be taken following the adoption of a resolution at a general meeting. This also means that the measure cannot be taken pursuant to previously granted authorisation. It also means that a measure which is decided upon by the board, conditional on the subsequent ratification by the shareholders at a general meeting, may not be taken until the shareholders have granted their approval.

The *second paragraph* states that the offeree company may seek alternative bids notwithstanding the provisions of the first paragraph.

The offeror's obligation to announce the outcome of the offer

II.22 As soon as possible after the expiry of the acceptance period, the offeror must make an announcement stating:

- the number of shares in the offeree company for which acceptances of the offer have been received and the proportion of the offeree company's share capital and total voting rights represented by these shares;
- the number of shares in the offeree company acquired by the offeror outside the offer and the proportion of the offeree company's share capital and total voting rights represented by these shares;
- whether the stipulated conditions to completion have been satisfied and, where applicable, whether the offeror has decided to complete the offer notwithstanding that all of the conditions have not been satisfied;
- the number of shares in the offeree company held or otherwise controlled by the offeror, and the proportion of the offeree company's share capital and total voting rights represented by these shares;
- any holdings of financial instruments which give the offeror financial exposure equivalent to a shareholding in the offeree company; and
- the date on which payment of the consideration is expected to commence.

Where applicable, disclosure must also be made of any decision to:

- extend the acceptance period;
- reduce the blocks of shares for which acceptances have been received;
- initiate a squeeze-out procedure in respect of the remaining shares; or
- acquire additional shares on the market.

Commentary

According to the *first paragraph*, after the expiry of the acceptance period pursuant to the offer, the offeror must provide information about the outcome of the offer as soon as possible after the counting of acceptances has been completed. Given the importance of shareholders receiving information promptly about the outcome of the offer, the counting of acceptances must take place as quickly as possible without jeopardising the reliability of the counting procedure.

The application of this provision is conditional on the acceptance period having expired. If the offeror extends the acceptance period for the offer prior to the end of the acceptance period, the offeror is not under an obligation to provide information about the outcome of the offer until the end of the extension period. The information must be provided by means of an announcement in the manner stated in section I.4.

In the first instance, the offeror must state the number of shares in the offeree company for which acceptances have been received and the proportion of the offeree company's share capital and total voting rights represented by these shares. This indicates how successful the offer has been. In addition, the offeror must state the

number of shares in the offeree company acquired by the offeror outside the offer and the proportion of the offeree company's share capital and total voting rights represented by these shares.

If the offeror has stipulated conditions to completion of the offer, such as the achievement of a specific level of acceptances, the offeror must state whether these conditions have been satisfied or, where applicable, that the offer will be completed notwithstanding that all of the conditions have not been satisfied.

The offeror must also state the number of shares in the offeree company held or otherwise controlled by the offeror, and the proportion of the offeree company's share capital and total voting rights represented by these shares. If the offeror holds warrants or convertible securities issued by the offeree company, details of these must be provided within the scope of the reporting of the number of shares controlled by the offeror. The offeror must also provide details of any holdings of financial instruments which give the offeror financial exposure equivalent to a shareholding in the offeree company. Finally, the date on which payment of the consideration is expected to commence must be stated.

In the *second paragraph*, a requirement is imposed for the offeror to provide information regarding, for example, an extension of the acceptance period for the offer. An offeror may decide to extend the acceptance period at the end of the acceptance period. The offeror may, for example, fail to achieve the level of acceptances stated in the conditions to completion (normally more than 90 per cent), and therefore may wish to extend the acceptance period in order to achieve a higher level of acceptances. There is nothing to prevent the offeror from renouncing such a condition during the extended acceptance period. Also, the offeror may achieve a level of acceptances of more than 90 per cent at the end of the acceptance period, but may extend the acceptance period for the offer nonetheless.

If the offeror has made a partial offer, and the interest in selling shares to the offeror is so substantial that a *pro rata* reduction is required, information to this effect must be provided in the press release.

Finally, where applicable, it must be stated that the offeror has decided to initiate a squeeze-out procedure in respect of minority shares or has decided to purchase shares in the offeree company on the market.

The offeror's obligation to pay the consideration

II.23 The offeror must pay the consideration under the offer as soon as possible.

Commentary

When the offeror has given notice that the offer has been completed, the offeror must pay the consideration to shareholders who accepted the offer as soon as possible. It is natural that the payment of consideration may require a longer period of time if the consideration consists wholly or partly of shares in the offeror company or other securities, than if the consideration consists exclusively of cash. If, at the same time as

giving notice of completion of the offer, the offeror extends the acceptance period for the offer, the consideration must be paid during the prescribed period to shareholders who accepted the offer during the original acceptance period.

Limitations placed on the offeror's right to make a new offer

II.24 If an offer that has been made is not completed, the offeror or a party closely related to the offeror according to section I.3 may not, earlier than 12 months thereafter, make an offer to acquire shares in the offeree company or acquire shares in the offeree company which thereby triggers a requirement to make a mandatory offer. This also applies to a party closely related to the offeror when the offer was made according to section I.3. The first and second sentences do not apply if the offeror makes a new offer which is recommended by the board of the offeree company.

Commentary

In line with the principle stated in the introduction to the rules that a takeover bid may not prevent the offeree company from conducting its business for a period that is longer than reasonable, this section stipulates certain limitations on the right for an offeror to make a new offer after an unsuccessful offer has been made. The provision entails that an offeror who announces at the end of the acceptance period that the offer is not completed may not, earlier than 12 months thereafter, make an offer to acquire shares in the offeree company, or acquire shares in the offeree company which thereby triggers a requirement to make a mandatory offer. This applies correspondingly if the offeror withdraws its offer.

In order to prevent the circumvention of the rule, the rule also applies to offers and acquisitions which are made or carried out by a party closely related to the offeror according to section I.3.

The first and second sentences of the provision do not apply if the offeror makes a new offer which is recommended by the board of the offeree company. If this is the case, the recommendation must be obtained in advance. The Securities Council may grant an exemption from the rule. A reason for such exemption may be, for example, that a third party has made an offer to acquire shares in the company.

The application of this provision is conditional on an offer having been made; it does not apply where a potential bidder has made a pre-announcement of a potential offer. Section II.3 states that in this type of situation the Securities Council may set a deadline by which the offer must be made and set the earliest date on which the offeror may subsequently make an offer to acquire the shares in the company if it does not make an offer within the stipulated period.

III. Mandatory offers

The conditions giving rise to a requirement to make a mandatory offer

III.1 A person who holds no shares, or holds shares representing less than three-tenths of the voting rights for all of the shares, in a Swedish limited company whose shares are traded on a Marketplace and who, through an acquisition of shares in the company, either alone or together with a closely related party according to section I.3(a) – (d) or (f), attains a shareholding representing not less than three-tenths of the voting rights for all of the shares in the company, must:

- 1. immediately make public the extent of his or her shareholding in the company; and**
- 2. within four weeks thereafter make a takeover bid for the remaining shares in the company (a mandatory offer).**

According to section III.4, the Securities Council may order that the requirement to make a mandatory offer be satisfied by another person.

Commentary

This rule corresponds in substance to the provisions of Chapter 3, section 1 of the TBA and, in like manner, its application is limited to shareholdings in Swedish limited companies.

According to the *first paragraph*, a requirement to make a mandatory offer is triggered where a person who holds no shares, or holds shares representing less than three-tenths of the voting rights for all of the shares, in a Swedish limited company whose shares are traded on a Marketplace, through an acquisition of shares, either alone or together with a closely related party according to section 1.3(a)-(d) or (f), attains a shareholding representing not less than three-tenths of the voting rights for all of the shares in the company. It is irrelevant what form the acquisition takes. For example, the acquisition may consist of a purchase but also a subscription for shares, a conversion into shares, or an acquisition by virtue of family law. It is irrelevant how many shares are acquired. The crucial thing is whether the total shareholding after the acquisition meets the specified threshold.

In line with the purpose of the rules governing mandatory offers, the requirement that the relevant share of voting rights must have been achieved through an acquisition means that the acquisition must be final and definitive. If the acquisition has been made through a purchase which is subject to certain conditions, such as regulatory clearance by a competition authority, in order for the requirement to make a mandatory offer to be triggered, these conditions must be satisfied and the acquirer must be able to exercise voting rights for the relevant shares. Correspondingly, the term “acquisition” in this context means that an acquisition which takes place through a subscription for shares will not trigger a requirement to make a mandatory offer until the relevant share issue has been registered.

When calculating the total share of voting rights in the company, shares held in treasury will be taken into account. Thus, where the company holds share in treasury (which normally does not occur due to restrictions in the Swedish Companies Act), such treasury shares have no impact on the number of shares which a third party may acquire without triggering a requirement to make a mandatory offer.

When calculating whether a certain holding triggers a requirement to make a mandatory offer, only holdings of shares, and not, for example, warrants or convertible securities issued by the company, will be taken into account. Holdings of call options and put options will also not be taken into account. Furthermore, the exercise of a warrant or a convertible security may result in the holder's share of voting rights reaching three-tenths or more of the voting rights, thereby triggering a requirement to make a mandatory offer.

The requirement to make a mandatory offer entails an obligation to make a takeover bid for the remaining shares in the company. If a person attains or exceeds three-tenths of the voting rights in the company, it is important that the stock market is made aware of this as soon as possible. Therefore, the rule imposes an obligation on the shareholder to publicise the fact that he or she has met the threshold for a mandatory offer requirement. A takeover bid must be made within four weeks of such publication.

Section III.4 provides that the Securities Council may, in a specific case, order that the requirement to make a mandatory offer be satisfied by a party other than the person subject to the requirement to make a mandatory offer according to this rule. The *second paragraph* draws attention to this.

It follows from the wording of the mandatory offer rules that any person who, at the time these rules originally entered into force (on 1 January 2010), either alone or together with a closely related party, already held shares representing not less than three-tenths of the voting rights for all of the shares in a company referred to in the rule, is not subject to a requirement to make a mandatory offer. Furthermore, the rules governing mandatory offers do not prevent such a shareholder from acquiring additional shares in the company at a later date without an accompanying requirement to make a mandatory offer.

Pursuant to section I.2, the Securities Council may grant an exemption from the obligation to make an offer. The possibility of exemption is aimed at a party who intends to make a mandatory offer acquisition. In the individual case, the issue of exemption may be considered based on the purpose of the mandatory offer rules i.e. to afford other shareholders the possibility, in a certain way, to leave the company when any party has taken over control of the company by virtue of its shareholding. In certain cases, the circumstances may be such that no *de facto* change in controlling ownership has taken place, despite the fact that the company has obtained a new owner holding three-tenths or more of the voting rights.

Reasons for exemptions probably normally exist when the holding has arisen through an acquisition to which the shareholder in question has not actively contributed, e.g. through inheritance or gift. Another reason which might justify an exemption from the obligation to make an offer is that the holding has arisen as a consequence of a shareholder having exercised pre-emption rights to subscribe for shares in a new offer. A further reason is that the holding has arisen as a consequence of an issue of shares which either constituted payment in conjunction with the purchase of a company or other property, or which constitutes a necessary step in the reorganisation of a

company with significant financial difficulties. The Securities Council is required to consider whether, based on all the circumstances, an exemption is in the interest of the shareholders as a whole and that such interest outweighs the possibility for shareholders to leave the company, which the mandatory offer entails. In conjunction with such an assessment, account might be taken of, for example, the extent to which the issue is supported or requires the support of the shareholders at a general meeting.

An additional reason for granting an exemption may be that the articles of association contain a provision restricting the number of votes that each shareholder is entitled to cast at a general meeting. If such a provision entails that a shareholder – irrespective of the size of his shareholding – is unable to exercise voting rights in respect of shares representing three-tenths of the voting rights for all shares in the company, this may justify an exemption from the obligation to make an offer.

An exemption from the obligation to make an offer does not mean that the shareholder in question is subsequently able, through additional purchases of shares, to increase his share of the vote in the company without a mandatory offer being triggered. However, where special reasons exist the exemption decision may prescribe that the exemption shall apply also to additional purchases. For example, it may be prescribed that the exemption will cover additional purchases of minor importance in terms of influence. Such an exemption may be justified if an exemption is granted to a larger group of owners, e.g. a family or extended family, the individual members of which should have the possibility to make minor adjustments to their share portfolios without triggering a mandatory offer.

Reasons for an exemption from the obligation to make an offer may exist when the threshold of three-tenths is reached or exceeded as a consequence of acquisitions of such shares as are subject to restrictions on transfer. A further situation which may arise is that the shareholding reaches or exceeds such threshold but other shareholders' shares are covered by post-transfer purchase right obligations or other restrictions on transfer. An exemption from the obligation to make an offer may be granted completely or with respect to the obligation to make an offer regarding the shares covered by the restrictions on transfer.

III.2 The provisions of section III.1 in respect of mandatory offers also apply where:

- 1. a person who holds no shares or who holds shares representing less than three-tenths of the voting rights for all of the shares in such a company as referred to in section III.1, through measures by the company or another shareholder, alone or together with another closely related party according to section I.3(a)-(d) or (f), attains a shareholding representing not less than three-tenths of the voting rights for all of the shares and thereafter, other than through a takeover bid to acquire the remaining shares in the company, increases his share of voting rights through an acquisition of one or more shares in the company; or**
- 2. a close relationship according to section I.3(a) or (d) is established and the parties thereby together attain a shareholding representing not less than three-tenths of the voting rights for all of the shares in such a company as referred to in section III.1.**

Where the requirement to make a mandatory offer arises pursuant to the first paragraph, subsection 2, the following applies. Under circumstances referred to in section I.3(a), the requirement to make a mandatory offer must be satisfied by the parent company or an equivalent legal entity and, under circumstances referred to in section I.3(d), by the person whose shareholding represents the largest share of voting rights for all of the shares in the company. Where several closely related parties under the latter circumstances hold equal shares of voting rights, each of them shall be jointly and severally liable to ensure that the requirement to make a mandatory offer is satisfied.

Section III.4 states that the Securities Council may order that the requirement to make a mandatory offer be satisfied by a person other than the person pursuant to this rule.

Commentary

This rule, which in substance corresponds to the provisions of Chapter 3, section 2 of the TBA, applies to certain specific cases where a requirement to make a mandatory offer arises. According to the *first paragraph*, the requirement to make a mandatory offer according to section III.1 is extended to apply in the following two situations as well.

Subsection 1: A requirement to make a mandatory offer is not triggered by measures taken by the company, such as redemption of shares, which result in an increase in the share of voting rights held by a shareholder to three-tenths or more of the total voting rights. In that case, the share of voting rights held by the shareholder has increased without the shareholder having acquired any additional shares. However, the requirement to make a mandatory offer is triggered if the relevant shareholder subsequently acquires one or more shares in the company and, as a result, once again increases the share of his or her voting rights. The equivalent applies in relation to certain measures taken by other shareholders. This may include the conversion of shares held by one or more other shareholders to shares with inferior voting rights, thereby resulting in other shareholders obtaining higher shares of voting rights in the company. If measures of this nature result in a shareholder attaining or exceeding the threshold of three-tenths of the voting rights, a requirement to make a mandatory offer will be triggered only if the shareholder in question subsequently acquires a further one or more shares in the company, thereby further increasing his or her share of voting rights. When calculating whether the threshold for a mandatory offer requirement has been exceeded, the shareholding of closely related parties will be taken into account.

Subsection 2: The requirement to make a mandatory offer is also triggered if a close relationship according to sections I.3(a) or (d) is established and, as a result, the parties together attain shares comprising not less than three-tenths of the voting rights for all of the shares in the company. The intention is to a group relationship or an agreement regarding coordinated exercise of the voting rights. If a person acquires such shares or interests in a company that a group relationship arises, and the subsidiary, in turn, holds shares in a company, the requirement to make a mandatory offer will be triggered if the acquirer and the subsidiary together, the subsidiary alone, or the

subsidiary together with other subsidiaries, holds shares representing not less than three-tenths of the voting rights for all of the shares in the company. Correspondingly, the requirement to make a mandatory offer is triggered if a person who holds two-tenths of the voting rights for all of the shares enters into an agreement regarding coordinated exercise of the voting rights with a party who holds not less than one-tenth of the voting rights.

The *second paragraph* governs the issue of who is required to satisfy the requirement to make a mandatory offer in cases where the requirement is triggered according to the first paragraph, subsection 2, i.e. through the establishment of a close relationship. The rule distinguishes between two different cases. If a group relationship has been established, the requirement to make a mandatory offer must be satisfied by the parent company or an equivalent legal entity, such as a foreign “parent company”. If such an agreement as referred to in section I.3(d) has been entered into, the requirement to make a mandatory offer must be satisfied by a party whose shareholding represents the largest share of the voting rights for all of the shares in the company. Where several closely related parties hold equal shares of voting rights, each of them is jointly and severally liable to ensure that the requirement to make a mandatory offer is satisfied.

The *third paragraph* draws attention to the fact that, according to section III.4, the Securities Council may order that the requirement to make a mandatory offer be satisfied by a person other than the person pursuant to this rule.

III.3 Sections III.1 and III.2 do not apply where a party attains a shareholding representing not less than three-tenths of the voting rights for all of the shares through a takeover bid for all of the shares in the company.

Commentary

This rule, which in substance corresponds to the provisions of Chapter 3, section 3 of the TBA, states that a takeover bid for all of the shares in the offeree company which, upon completion, results in the threshold of three-tenths of the voting rights being met or exceeded, does not trigger a requirement to make a mandatory offer. In this case, all of the shareholders have, through the offer, already been given the opportunity to sell their shares to the controlling shareholder.

If an offeror first makes a voluntary takeover bid and subsequently, during the acceptance period, through purchases on the market or in another manner, acquires a shareholding of such magnitude as to meet the threshold for a mandatory offer requirement, he or she must adapt the offer to comply with the rules governing mandatory offers.

Section III.5 states that the requirement to make a mandatory offer lapses if, within four weeks of the date on which the threshold for a mandatory offer requirement is met, the controlling shareholder disposes of shares such that the holding no longer represents three-tenths of the voting rights or initiates a squeeze-out procedure pursuant to the Swedish Companies Act in respect of the remaining shares.

III.4 Where special cause exists, the Securities Council may order that the requirement to make a mandatory offer be satisfied by a party closely related to the person who is required to make a mandatory offer according to section III.1 or III.2.

Commentary

This rule, which in substance corresponds to the provisions of Chapter 3, section 4 of the TBA, regulates the power for the Securities Council to decide who is required to satisfy the requirement to make a mandatory offer in certain cases.

A requirement to make a mandatory offer arises, *inter alia*, where a person acquires shares to the extent that his or her shareholding, together with the shareholding of a closely related party, attains the threshold for a mandatory offer requirement. In such a case, it may be the case that the person who acquires the shares holds only a small percentage of the shares in the company even after the acquisition. In such case, the Securities Council may order that the requirement to make a mandatory offer be satisfied by a party closely related to the acquirer. This may be relevant, for example, where a subsidiary acquires a small shareholding in a company in which the parent company has already held a substantial shareholding for some time, and the subsidiary's acquisition results in the aggregate shareholding attaining the threshold for a mandatory offer requirement. In such case, the Securities Council can order that the requirement to make a mandatory offer be satisfied by the parent company despite the fact that section III.1 appears to indicate that it must be satisfied by the subsidiary.

A somewhat similar situation arises where the aggregate shareholding of two closely related parties will exceed the threshold for a mandatory offer requirement as a result of measures taken by the company or another shareholder. If one of them subsequently acquires additional shares, according to section III.2, first paragraph the person who carried out the most recent acquisition will be subject to a requirement to make a mandatory offer. According to this rule, the Securities Council can order that the requirement to make a mandatory offer be satisfied instead by a closely related party of this person.

Correspondingly, in the circumstances referred to in section III.2, first paragraph, subsection 2, i.e. when the threshold for a mandatory offer requirement is exceeded through the establishment of a close relationship, the Securities Council can order that the requirement to make a mandatory offer be satisfied by a closely related party other than the party referred to in section III.2, second paragraph. This may be the case where, for example, two or more parties who together hold shares representing not less than three-tenths of the voting rights for the shares in the company enter into such an agreement as referred to in section I.3(d). An example of a reason which could justify deviating from the main principle is where the parties have agreed that one of them must satisfy the requirement to make the mandatory offer and this does not appear to jeopardise satisfaction of the requirement. Another example is where the underlying agreement between the parties governs the issue of how the voting rights for the shares are to be exercised in a manner which does not reflect the parties' shares of voting rights in the company.

Where the parties hold equal shares of voting rights, each of them will be subject to the requirement to make a mandatory offer. According to this section, in such cases, the Securities Council can order that only one of them be required to satisfy the requirement to make a mandatory offer.

The conditions for lapse of the requirement to make a mandatory offer

III.5 Where a requirement to make a mandatory offer has arisen and, within four weeks of the date on which the requirement to make a mandatory offer arose, the person subject to the requirement or, where applicable, a party closely related to such person according to section I.3(a)-(d) or (f), disposes of shares such that the shareholding does not represent three-tenths of the voting rights for all of the shares in the company, the requirement to make a mandatory offer shall no longer apply. This is also the case where, within the same period, the person subject to the requirement to make a mandatory offer, another party, or the company takes any other measure as a consequence of which the shareholding does not represent at least three-tenths of the voting rights for all of the shares in the company.

Where a requirement to make a mandatory offer has arisen and the person subject to the requirement initiates a squeeze-out procedure in respect of the remaining shares pursuant to Chapter 22 of the Companies Act (SFS 2005:551) within four weeks of the date on which the requirement to make a mandatory offer arose, the requirement to make a mandatory offer shall no longer apply. However, where such a request for a squeeze-out procedure is withdrawn, or dismissed on procedural grounds or on the merits of the case, the requirement to make a mandatory offer applies.

Where the requirement to make a mandatory offer no longer applies as a result of the first or second paragraphs, the acquiring party must immediately make such fact public.

Commentary

This rule corresponds in substance to the provisions of Chapter 3, section 6 of the TBA.

According to the *first paragraph*, where a shareholder who is subject to a requirement to make a mandatory offer, within four weeks of the date on which a requirement to make a mandatory offer arose, disposes of shares such that the shareholding no longer represents three-tenths of the voting rights for all of the shares, the requirement to make a mandatory offer no longer applies. This is also the case if, where applicable, a party closely related to the shareholder according to section I.3(a)-(d) and (f) disposes of shares such that the shareholding no longer meets the threshold for a mandatory offer requirement. This rule also covers the situation where a close relationship is dissolved, such as where a parent company sells its shares in the subsidiary, resulting in there no longer being a group relationship.

According to the *second paragraph*, the mandatory offer requirement also no longer applies where the relevant shareholder initiates a squeeze-out procedure in respect of the remaining shares. However, in order, *inter alia*, to prevent the rules being circumvented, the requirement to make a mandatory offer is reinstated if such a request to initiate a squeeze-out procedure is withdrawn. In order to protect shareholders, this also applies if the request is dismissed on procedural grounds or on the merits of the case.

The *third paragraph* provides that there is duty to provide information in cases where the mandatory offer requirement no longer applies due to any of the grounds stated in the first and second paragraphs.

Procedures, wording of conditions, etc. in mandatory offers

III.6 Unless otherwise stated, the rules relating to voluntary offers also apply to mandatory offers. However, the following provisions also apply to mandatory offers:

- **the offer must apply to all of the shares in the offeree company;**
- **the offer must provide for an alternative form of consideration whereby all shareholders are entitled to receive payment in cash;**
- **the offeror is entitled to make the offer conditional only upon requisite official authorisations/regulatory clearances being obtained; and**
- **an extension of the acceptance period for the cash offer is conditional upon there being no delay in payment of consideration to those who have already accepted the offer.**

As stated in sections II.13-15, the terms and conditions of a mandatory cash offer must be adjusted based on the terms and conditions of other acquisitions of shares by the offeror or a party closely related to the offeror according to section I.3 prior to, during or after the offer. However, if the offeror acquires shares via convertible securities, warrants, call options or other securities, thereby achieving a holding of 30 per cent or more of the voting rights for all of the shares in the offeree company, the price under the cash offer may not be less than the volume-weighted average price paid for the share concerned during the 20 trading days preceding the date of announcement of the holding.

Commentary

In most respects, the rules governing voluntary offers also apply to offers arising due to a requirement to make a mandatory offer. However, certain exceptions must be made in view of the aim of the mandatory offer rules. These exceptions are described in this section.

The aim of the mandatory offer rules is to give shareholders of a company which has a new controlling owner an opportunity to dispose of their entire shareholding in the company in a specific manner. Therefore, it is reasonable that a party who is required to make a mandatory offer must always give shareholders an opportunity to receive payment in cash for their shares. Consideration in this form gives shareholders

maximum freedom of action. In addition, the offeror has the possibility to offer alternative forms of consideration, and at a different value.

A mandatory offer means that an offer must be made to all shareholders for all of the shares. As in the case of section II.12 regarding voluntary offers, mandatory offers also apply to holders of securities the pricing of which might be materially affected by the delisting of the shares to which the offer relates.

The acceptance period for mandatory offers must also be determined in the manner referred to in section II.7. As in the case of voluntary offers, the acceptance period may be extended. However, the extension may not delay payment of consideration to those who have already accepted the cash offer, and the total acceptance period may not exceed three months, or nine months if the offer is conditional on official authorisations/regulatory clearances being obtained.

In the case of mandatory offers, the offeror may not stipulate conditions to completion other than the requisite official authorisations/regulatory clearances being obtained. This means, *inter alia*, that the offeror may not make the offer conditional on the offeree company refraining from taking countermeasures or a more favourable, competing offer not being submitted.

According to the *first paragraph*, subject to the exceptions stated above, the rules governing voluntary offers also apply *mutatis mutandis* to mandatory offers. However, since the determination of the amount of the consideration may be of particular importance in the case of mandatory offers, this matter calls for special comment.

The connection to the rules governing voluntary offers means, *inter alia*, that, according to section II.13, the terms and conditions of the cash offer may not be less favourable than the terms and conditions of a prior transaction carried out less than six months prior to the offer. This usually means that the acquirer must offer the highest price which the acquirer, or, where applicable, a party closely related to the acquirer according to section I.3, paid for the relevant shares less than six months prior to the announcement of the offer. Sections II.14 and II.15 concerning side transactions and subsequent transactions also apply *mutatis mutandis* to mandatory offers. If an acquisition which triggers a mandatory offer requirement is subject to assessment by a competition authority and clearance for the acquisition is granted more than six months after the contract date, the value of the consideration in the prior transaction on the contract date continues to be the determining factor for the price under the offer.

The percentage threshold for a mandatory offer may be attained or exceeded, *inter alia*, if warrants are exercised to subscribe for shares, or convertible securities are converted into shares. Consequently, the *second paragraph* states that, in such cases, the consideration under the offer may not be less than the volume-weighted average price paid for the share concerned during the 20 trading days preceding the date of announcement that the percentage threshold for a mandatory offer has been attained or exceeded. However, if the acquirer has acquired shares at an even higher price during the six-month period prior to the announcement of the offer, that price is the determining factor, and the terms and conditions must then be adjusted based on the terms and conditions of the prior transaction.

The provision stating that the price paid during the preceding 20 days constitutes the minimum threshold for the amount of the consideration also applies in other cases to a mandatory offer requirement which arises without a prior transaction as referred to in II.13 having been carried out during the specified six-month period, for example as a result of an indirect change in ownership control.

If the company has more than one class of shares, the price level and the form of consideration in a mandatory offer are primarily determined pursuant to sections II.10 and II.11.

In light of the far-reaching assault on the freedom of contract which a mandatory offer entails, the legislature has stipulated that a requirement to make a mandatory offer is triggered only in cases where a shareholder (where applicable, together with a closely related party) holds shares representing 30 per cent or more of the voting rights for all of the shares in the company. Accordingly, a requirement to make a mandatory offer will not arise, for example, in cases where a shareholder holds shares representing less than 30 per cent of the voting rights, but also holds an option to acquire additional shares which would increase the holding to 30 per cent or more.

However, the wording of the rules in this respect does not prevent the possibility that the use of various contractual arrangements to achieve what is in practice a change in ownership control without triggering the mandatory offer rules, may be in breach of generally accepted practices on the stock market. It is for the Securities Council to determine in each individual case whether such arrangements are in breach of generally accepted practices.

IV. Rules applicable if a director or senior executive of the offeree company makes or participates in a takeover bid or if a parent company makes or participates in a takeover bid for shares in a subsidiary

Participation in an offer by a director or senior executive

IV.1 The provisions of this Part (IV) apply if a director or alternate director of the offeree company or a subsidiary of the offeree company makes or participates in a takeover bid. The rules also apply if a senior executive of the offeree company or a person equated with a senior executive makes or participates in a takeover bid.

In this context, a “senior executive” means:

- a) the managing director or deputy managing director of the offeree company or a subsidiary of the offeree company; and**
- b) the holder of another senior position in the offeree company or a subsidiary of the offeree company.**

The provisions of this Part also apply to:

- a) the spouse or cohabitee of a person as referred to in the first and second paragraphs;**

- b) a child of a person as referred to in the first and second paragraphs who is in the custody of such person;**
- c) a person who has recently held a position referred to in the first and second paragraphs; and**
- d) a legal entity over which a person as referred to in this paragraph has a decisive influence, either alone or together with another person as referred to in this paragraph.**

Commentary

If a takeover bid is made, directly or indirectly, by one or more directors or senior executives of the offeree company, a number of problems arise which do not normally occur in the case of takeover bids. One problem is that, in such cases, the offeror may often be assumed to have a material informational advantage in comparison with shareholders as regards the offeree company and, as a result, the offeror is able to make a more reliable assessment of the value of the shares in the company.

In order to mitigate the effects of this informational imbalance, provisions have been included in this Part which provide that a valuation opinion regarding the shares in the offeree company must be obtained if a director or senior executive of the offeree company, or a person equated with a senior executive, makes or participates in a takeover bid.

The rule also applies to individuals who recently held a senior position or who recently resigned as a director. The rule does not contain a definition of the term “recently”. An interpretation must be made in each specific case in light of the aim of the rules, namely to establish a level informational playing field.

The provisions apply if a director or senior executive of the offeree company makes or participates in a takeover bid. The expression “makes” refers to a situation in which a director or senior executive, either alone or together with other parties, is the main bidder. The expression “participates” is primarily aimed at situations in which a director or senior executive holds a position with or in relation to the offeror – without being the principal actor - which enables him or her to influence the terms and conditions of the offer. Such an opportunity to exert influence may be based on a shareholding or some other financial involvement in the offeror company, but it may also be, for example, because the individual concerned is also a director of the offeror company or holds some other prominent position with the offeror company. The possibility to exert influence may also derive from the fact that he or she is an adviser to the offeror in connection with the offer.

However, not all shareholdings or other forms of financial involvement in the offeror company call for the application of these provisions. A shareholding which takes the form of a capital investment in a listed offeror company hardly implies that the senior executive concerned is to be regarded as “participating” in the offer. The decisive criterion is whether the senior executive concerned is able to influence the terms and conditions of the offer due to his or her holding or his or her position.

Acceptance period

IV.2 The acceptance period for the offer must be not less than four weeks. Otherwise, the provisions of section II.7 apply with respect to the acceptance period.

Commentary

If a director or senior executive of the offeree company, or a person equated with a senior executive, makes or participates in a takeover bid, according to section IV.3 the board is obliged to obtain at least one valuation opinion as the basis for its own opinion and the shareholders' decision in relation to the offer. In light of this rule, and given the complications which may arise for the board work if one or more directors or another senior executive of the company participates in the offer, this section provides that the acceptance period must be a minimum of four weeks. Otherwise, the provisions of section II.7 apply with respect to the acceptance period.

Valuation opinion

IV.3 The offeree company must obtain, and not later than two weeks prior to the expiry of the acceptance period publish, a valuation opinion from an independent expert regarding the shares in the offeree company. If the consideration offered is in a form other than cash, the opinion must also include a valuation of the consideration offered.

If a third party also makes a takeover bid for the shares in the offeree company, and no director or senior executive of the offeree company participates in this offer, there is no obligation to obtain a valuation opinion according to the first paragraph.

Commentary

If a director or senior executive of the offeree company, or a person equated with a senior executive, makes or participates in a takeover bid, there is a considerable risk of an informational imbalance in comparison with shareholders. Consequently, the *first paragraph* stipulates that a valuation opinion must be obtained regarding the shares in the offeree company. The board of the offeree company is primarily responsible for ensuring that the valuation opinion is obtained.

There is no stipulation requiring more than one valuation opinion, although it may be appropriate in certain situations to obtain more than one valuation opinion.

Irrespective of whether one or more opinions are obtained, it is important that the expert engaged for this purpose adopts a balanced and independent stance in relation to the offeror. The fee for the valuation opinion may not be dependent on the amount of the consideration, the extent to which acceptances of the offer are received, or whether the offer is completed. The requirement for independence does not prevent the valuation opinion being prepared by a person who is also an adviser to the offeree company on matters concerning the offer, but the fee for those services may not be dependent on one of the factors just referred to.

Both the directors and the senior executives of the offeree company, including those who are participating in the takeover bid on the offeror's side, are responsible for ensuring that the person who performs the valuation has access to all relevant information about the company.

The valuation opinion must be published not later than two weeks prior to the expiry of the acceptance period. However, it is an advantage if the opinion is available in sufficient time for the opinion to be reproduced in the offer document.

The *second paragraph* provides for an exemption from the requirement to obtain a valuation opinion. Where there are competing offerors, it is not been considered reasonable to require that either of them obtain a valuation opinion.

A fairness opinion (i.e. an opinion regarding the reasonableness of an offer for shareholders of the offeree company, from a financial viewpoint) is also to be regarded as a valuation opinion.

Offer by a parent company for shares in a subsidiary

IV.4 Sections IV.2 and IV.3 apply if a parent company makes or participates in a takeover bid for shares in a subsidiary.

Commentary

If a parent company makes or participates in a takeover bid for shares in a subsidiary, a senior executive of the subsidiary usually holds such a position in the parent company that he or she may be considered to be "participating" in the offer. However, this is not necessarily the case. Nonetheless, a parent company has an informational advantage in comparison with other shareholders. This informational imbalance justifies the application of the requirements under sections IV.2 and IV.3 concerning the extension of the acceptance period and a valuation opinion in those cases where a parent company makes or participates in a takeover bid for the shares in a subsidiary.

Supplementary information in press releases

IV.5 Where applicable, it must be stated in a press release which an offeror is required to publish when a decision is made to make an offer in accordance with section II.3 that the offer is subject to the rules contained in the foregoing Part. Information must also thereupon be provided about the directors or senior executives of the offeree company who are making or participating in the offer and the manner in which this is taking place. Where a parent company makes or participates in an offer for shares in a subsidiary, the group relationship must be stated in the press release. It must also be stated in these cases that the offeree company is obliged to obtain and publish a valuation opinion.

Commentary

When an offeror has made a decision to make a takeover bid, according to section II.3, the offeror must announce the offer by way of a press release as soon as possible.

If the offer is subject to the rules contained in Part IV, the offeror must disclose this in the press release. In this context, it must be stated which executives are involved, the manner in which they are participating in the offer, and that the offeree is obliged to obtain and publish a valuation opinion in accordance with section IV.3. The foregoing applies correspondingly if a parent company makes or participates in an offer for shares in a subsidiary.

V Rules concerning the structure of an offer document, etc.

Responsibility for the offer document

V.1 The offer document must be prepared by the offeror. If the offeror is a Swedish limited company, this task is normally the responsibility of the board of the offeror company.

Where possible, the offer document must be prepared in consultation with the board of the offeree company. If the offeree company has not cooperated in this, this fact must be disclosed in the offer document, as well as the manner in which information about the offeree company has been obtained.

Commentary

Pursuant to section II.6, the offeror must prepare an offer document. If the offeror is a Swedish limited company, the board is normally responsible for this process, and for ensuring that the contents of the offer document comply with statutes, other ordinances and other rules. However, exceptional cases are conceivable in which the offer relates to such a marginal acquisition that responsibility for the offer document may be imposed on the managing director.

The offer document must include, *inter alia*, information about the offeree company and, accordingly, where possible, must be prepared in consultation with the board of the offeree company. If such cooperation from the offeree company cannot be obtained, this must be disclosed in the offer document. In such case, the manner in which information about the offeree company has been obtained must also be disclosed. In this context, the offeror may have had recourse to documents in the public domain published by the offeree company.

If the offeror adds its own comments on the description of the offeree company in order to comply with the requirements stipulated for offer documents, this fact must be stated.

Lack of cooperation on the part of the offeree company may not result in the postponement or withdrawal of the offer.

Auditor's examination of the offer document

- V.2 If the offeror offers consideration which consists wholly or partly of shares or equity-related securities issued by the offeror, the offeror's auditors must examine the relevant sections of the offer document. An examination report must be issued.**

Commentary

If the offeror offers consideration consisting wholly or partly of shares or equity-related securities issued by the offeror, the offeror's auditors must examine the offer document and issue a report relating to the offeror's historical financial information and, where applicable, the financial statements for the potential merged operations (the pro forma financial statements).

The Appendix states that the auditor's examination report must be reproduced in the offer document.

The auditor is not required to examine information regarding the offeree company

Contents of the offer document

- V.3 The offer document must contain the information required to enable shareholders of the offeree company to reach a soundly-based decision about the offer.**

In addition to the requirements stated in the first paragraph, the offer document must contain the information stated in the Appendix.

The offer document shall be drafted in Swedish unless the Securities Council decides in an individual case that the offer document may be drafted in another language

Commentary

The offer document must contain the information necessary to enable the shareholders of the offeree company to make a well-founded decision about the offer. In addition, the offer document must contain the information stated in the Appendix.

Chapter 2 of the FITA and in Commission Regulation (EC) No. 809/2004 (the Prospectus Regulation) contain provisions governing the prospectus which must be prepared in the event the consideration consists of transferable securities. In such cases, the provisions of these rules regarding the offer document apply to the prospectus instead. Furthermore, in cases where the language provisions of Chapter 2 of the FITA allow the prospectus to be drafted in a language other than Swedish, an exemption by the Securities Council on the language issue is not required.

Information brochures

- V.4 The following provisions apply if the offeror prepares an information brochure to supplement the offer document:**

- **The information brochure should not give the impression that it is replacing the offer document.**
- **The front cover of the information brochure must clearly state that an offer document is available, and the manner in which it may be obtained.**
- **The information brochure must contain basic information presented in the offer document about the offeror, the offeree company and the offer.**
- **The information brochure must be objective and balanced.**
- **The information brochure may not contain information that is not included in the offer document.**

Commentary

An offer document must always include the basic information about a takeover bid. The offeror may also prepare a somewhat shorter information brochure as a supplement to the offer document to facilitate the dissemination of information and make the contents of the offer more easily accessible.

The information brochure does not replace the offer document, and should not give the impression that this is the case. Thus, for example, the brochure may not be described as a “mini offer document”, etc. The front cover of the information brochure must also clearly state the manner in which the offer document may be obtained. Obtaining the offer document must be simple and free of charge. It is sufficient for the offeror to state that the offer document is available on the company's website or to offer to transmit the offer document in digital format.

The brochure must contain basic information presented in the offer document about the offeror, the offeree company and the offer, and must be drafted in an objective and balanced manner. This means, *inter alia*, that if the consideration offered consists of shares or other securities, and the securities are associated with special risks, these risks must be stated in the brochure.

The brochure may not contain information that is not included in the offer document. However, this does not prevent the inclusion of graphics, etc. that make it easier to understand technical aspects of the offer.

VI Mergers and quasi-mergers

Applicability of the rules to mergers and quasi-mergers

VI.1 The provisions of this Part (VI) apply where a company as referred to in section I.1 (the offeree/transferor company) is to be taken over by, or absorbed into, the transferee company or another company in the same group as the transferee company, through a merger or quasi-merger. In this context, merger is equated with another corresponding type of corporate group. In such cases as referred to herein, the rules shall be applied in a manner equivalent to what would have applied had the transferee company been an offeror that has made a takeover bid

for the shares in the offeree company. Section VI.2 excludes certain provisions from such application.

Commentary

From a minority shareholder protection perspective, similar interests worthy of protection are relevant irrespective of whether the takeover of an offeree/transferor company is carried out in the form a takeover procedure or e.g. through a merger or quasi-merger. Therefore, Part VI provides that, subject to only a few exceptions which are specified in section VI.2, the takeover rules apply *mutatis mutandis* to mergers and quasi-mergers.

The provisions of Part VI apply to the same group of transferor companies as the takeover rules in general, including foreign companies with shares traded on the Marketplace.

Part VI applies where the transferor company is to be taken over by, or absorbed into, the transferee company or another company in the same group as the transferee company, pursuant to a merger or quasi-merger. *Merger* means a procedure pursuant to Chapter 23 of the Swedish Companies Act or an equivalent procedure under the laws of another country. *Quasi-merger* means a procedure which is functionally similar to a merger or which otherwise brings to the fore interests worthy of protection similarly to a takeover bid or a merger. It may, for example, involve a scheme of arrangement or an amalgamation.

In such cases as are referred to herein, the takeover rules apply *mutatis mutandis*. These provisions must be interpreted in light of the aim of causing the rules also to apply to mergers and quasi-mergers, namely that similar interests worthy of protection as regards holders of securities are relevant irrespective of whether the takeover of the transferor company takes place pursuant to a takeover bid or a merger procedure. Clearly, certain provisions of the takeover rules are not relevant at all in the case of a merger procedure. Such provisions are excluded pursuant to section VI.2. Other provisions must often be adapted to ensure that they apply appropriately to a merger procedure and that they are given a common sense meaning which satisfies the relevant interests worthy of protection in such a situation. By virtue of section I.2, the Securities Council can also grant exemptions from the rules or issue rulings on the manner in which the rules are to be applied.

Provisions which are not applicable

VI.2 The following provisions shall not apply in such a situation as referred to in section VI.1:

- **Section I.1, first paragraph (Scope of the rules)**
- **Section II.7 (Acceptance period)**
- **Section II.8 (The shareholders' obligation to honour their acceptances of the offer)**
- **Section II.16 (Certain provisions regarding partial offers)**
- **Section II.21 (Defence measures)**

- **Section II.22 (The offeror's obligation to announce the outcome of the offer)**
- **Part III (Mandatory offers)**
- **Section IV.2 (Acceptance period)**

Commentary

Certain provisions of the takeover rules do not apply at all in the case of a merger procedure. These provisions are listed in this section VI.2. It therefore follows, contrariwise, that the following provisions are applicable *mutatis mutandis* in the case of a merger procedure:

- Introduction
- Section I.1, second and third paragraphs (Scope of the rules)
- Section I.2 (The right for the Securities Council to interpret and grant exemptions from the rules)
- Section I.3 (Measures taken by parties closely related to the offeror)
- Section I.4 (Announcements)
- Section II.1 (Pre-conditions to making an offer)
- Section II.2 (The binding force of statements)
- Section II.3 (The offeror's obligation to make an offer public)
- Section II.4 (Possibilities for the offeror to stipulate conditions to completion of the offer)
- Section II.5 (The offeror's obligation to honour its offer)
- Section II.6 (The offeror's obligation to prepare and publish an offer document)
- Section II.9 (Revision of an offer that has been made)
- Section II.10 (The offeror's obligation to treat equally all holders of shares with identical terms and conditions)
- Section II.11 (Treatment of holders of shares with non-identical terms and conditions)
- Section II.12 (Treatment of holders of equity-related transferable securities other than shares)
- Section II.13 (Acquisitions prior to the offer)
- Section II.14 (Acquisitions during the offer)
- Section II.15 (Acquisitions after the offer)
- Section II.17 (Role of the board of the offeree company)
- Section II.17a (Offer-related arrangements)
- Section II.18 (Conflicts of interest)
- Section II.19 (The obligation for the board of the offeree company to state its views regarding the offer)
- Section II.20 (The participation of the offeree company in a due diligence investigation)
- Section II.23 (The offeror's obligation to pay the consideration)
- Section II.24 (Limitations placed on the offeror's right to make a new offer)
- Section IV.1 (Participation in an offer by a director or senior executive)
- Section IV.3 (Valuation opinion)
- Section IV.4 (Offer by a parent company for shares in a subsidiary)
- Section IV.5 (Supplementary information in press releases)
- Part V (Rules concerning the structure of an offer document, etc.)
- Part VI (Sanctions)

- Appendix

With respect to these other provisions, an adjustment is often required to ensure that the provisions apply appropriately to a merger procedure and that they are given a common sense meaning which satisfies the relevant interests worthy of protection in such a situation.

For example, when applying section II.3, it is not relevant to provide details of the extent to which commitments have been received from shareholders of the transferor company accepting the merger, whereas on the other hand it is of interest to provide details of commitments received to vote in favour of the merger at a general meeting of the transferor company.

Certain adjustments may also need to be made, for example, to the provisions governing conditions to completion in sections II.4 and II.5. However, the following basic ideas underlying the provisions also apply in the case of a merger: that a condition must be drafted in such a manner as to allow for objective determination of whether or not the condition has been satisfied; that the condition may not be drafted in such a manner that the party that imposed the condition has a decisive influence over its satisfaction; and that non-fulfilment of a condition may not constitute grounds for non-completion of a transaction unless the non-fulfilment of the condition is of material importance. It is common in takeover bids for the offeror to make the offer conditional on the offeror achieving a given level of acceptances of the offer. Such conditions are not relevant in a merger procedure.

The provisions governing offer documents in section II.6, Part V and the Appendix are not excluded in this section VI.2. In the case of a merger, in practice it is a question of preparing such a document as referred to in Chapter 2(b) of the FITA or an equivalent document under applicable foreign law, and ensuring that holders of securities are thereupon provided with such information as is relevant in a merger situation, whereupon guidance as to the contents of an offer document can be obtained from the provisions. If the document which is prepared is not governed by the Swedish legislative provisions, it is of course also not necessary to submit the document to the Swedish Financial Supervisory Authority for approval.

Decision making procedure

VI.3 A resolution adopted at the general meeting of the transferor company approving a merger or a quasi-merger is valid only where supported by shareholders with at least two-thirds of both the votes cast and the shares represented at the general meeting.

Where there are several classes of shares in the transferor company, the provisions of the first paragraph shall apply also within each class of shares represented at the general meeting.

In conjunction with adoption of an approval resolution in the transferor company, shares held by the transferee company or another company in the

same group as the transferee company shall not be taken into account. In this context, “group” is equated with another corresponding type of corporate group.

Commentary

The provision goes back to the statutory rules governing such merger procedures as governed by the Swedish Companies Act (cf. Chapter 23, section 17, first, second and fourth paragraph of the Swedish Companies Act). In those aspects addressed by the provision, a corresponding procedure shall be applied also in other cases. The provision entails that a general meeting resolution of the transferor company regarding approval of a merger or quasi-merger must be adopted by a qualified majority and that the shares which the transferee company holds in the transferor company must not be taken into account.

If the transferor company is foreign, the provision will be applicable in addition to whatever company law rules are applicable in that country. Pursuant to section I.2, the Securities Council may issue an exemption from the provision or a ruling on how it is to be applied.

ENTRY INTO FORCE AND TRANSITIONAL PROVISIONS

These rules shall enter into force on 1 February 2015. The rules as worded herein shall apply to offers, mergers and quasi-mergers announced on that date or subsequently.

APPENDIX

Contents of the offer document

The offer document must contain the information stated in this Appendix. If, as a result of the offer, the offeror is required to prepare a prospectus pursuant to Chapter 2 of the FITA and the EU Prospectus Regulation, these provisions shall apply to the prospectus instead. The prospectus must, in such case, contain the information stated in the Prospectus Regulation and in this Appendix.

The Appendix states which information must be included in the offer document. The main sections may be presented in a different order than that presented below.

In principle, the offer document should be structured as a single document, although in certain situations it may be appropriate to include one or more separate annual reports as part of the offer document. If the offer document comprises a number of documents, this must be clearly stated, as well as which documents form part of the offer document.

1 The offer

The introduction to the offer document must contain a description as specified below. The description should give the shareholders an overview of the offer.

a) The offeror

Details of the identity of the offeror must be provided.

If the offer is subject to Part IV of the rules, information as referred to in section IV.5 must be provided.

b) When the offer is being made

Details must be provided of the date on which the offer is being made.

c) Shares and other securities to which the offer relates

Details must be provided of the shares and, where applicable, other securities to which the offer applies.

If the offer also applies to convertible securities, warrants or other securities which are related to the offeree company's shares, details must be provided of the key terms and conditions applicable to these securities or warrants.

If, by virtue of the second or third paragraph of section II.12 or an exemption granted by the Securities Council, the offeror has issued a certain class of security outside the offer, this must be stated and, where applicable, details must also be provided as to the manner in which these securities are intended to be addressed.

In the case of partial offers, the number of shares, of each class where applicable, which the offeror wishes to purchase must be stated as well as, where applicable, the fact that the offeror reserves the right to purchase more shares pursuant to the offer.

d) The consideration

Details must be provided of the consideration which is being offered for the securities covered by the offer.

If the offer applies to shares which are subject to different financial terms and conditions, and the consideration differs for each class of shares, the offer document must contain information which enables shareholders to assess the reasonableness of the offer (*cf.* the second paragraph of section II.11).

If the offer also applies to convertible securities, warrants or other securities which are related to the offeree company shares, details must be provided of the consideration for these securities, as well as the manner in which the consideration has been calculated in order to be considered reasonable (compare section II.12).

If, pursuant to the commentary on section II.10, the offeror offers different forms of consideration to different shareholders, this must be stated and reasons given.

The total value of the offer must be stated.

e) Premiums under the offer

Details must be provided of any premium which the offered consideration entails as compared with the trading price. The premium must be stated relative to the share price immediately prior to the announcement of the offer and relative to the average share price during an appropriate period of time immediately prior to announcement. The basis for calculating the premium must be stated. The average share price must be calculated as the volume-weighted average price paid, unless there is special cause for not doing so.

f) Conflicts of interest

If a situation arises as referred to in section II.18, the nature of the conflict of interest must be disclosed for each individual concerned.

g) Mandatory offers

If the offer is made based on the mandatory offer rules, such fact must be stated and a summary must be provided of the share acquisitions or other measures which triggered the mandatory offer.

h) The offeror's shareholding, agreements with the offeree company, etc.

Details must be provided of the number of shares in the offeree company held or otherwise controlled by the offeror, for example through an option or forward/futures

contract, and the proportion of the total number of shares and voting rights in the offeree company that these shares represent. Details must also be provided of any binding or conditional commitments, declarations of intent or favourable opinions provided or expressed by shareholders of the offeree company with respect to acceptance of the offer. If these contracts, commitments, declarations of intent or favourable opinions contain terms and conditions, such must be reported so that, for example, it is stated under which circumstances the offeror's rights under an option agreement shall not apply, and under which circumstances a shareholder is not bound by an acceptance commitment. If the offeror holds warrants or convertible securities issued by the offeree company, details of these must be provided within the scope of the reporting of the number of shares controlled by the offeror. The offeror must also provide details any holdings of financial instruments which give the offeror financial exposure equivalent to a shareholding in the offeree company, such as cash-settled equity swaps.

In connection with the disclosures above, specific disclosure must be made of the number of shares acquired or otherwise controlled by the offeror (for example through an option or forward/futures contract) during a six-month period immediately preceding the announcement of the offer up to and including the date on which the offer document was issued. In this respect, the highest price, either in cash or in another form of consideration, which has been agreed for the shares, where applicable together with consideration paid for any option or forward/futures contracts, must be stated. Details must be provided of each class of security acquired. If special terms and conditions have been attached to the acquisition or the equivalent, these terms and conditions must be described.

Where the offeree company has, vis-à-vis the offeror, committed itself to any offer-related arrangement (see section II.17a), this must be stated so that the essential purport of the arrangement is evident. In addition, pursuant to part 10 below, agreements between the offeror and the offeree company as a consequence of the offer must be reproduced in their entirety in the offer document.

i) Bonus arrangements and the equivalent

If the offeror has offered employees of the offeree company a bonus arrangement or the equivalent, details of the arrangement must be provided.

j) Statements by the Securities Council

If the Securities Council has made a statement which is of significance to the offer and the Council has ordered the offeror to include the statement in the offer document, this must be done.

k) Financing

A short description must be provided of how the offer is to be financed. Consequently, as early as in the introduction, disclosure must be made of the extent to which the offer is being financed from the offeror's own resources or from borrowed funds. See further section 7.

l) Due diligence

It must be stated whether the offeror has conducted a due diligence investigation on the offeree company, and a summary of the scope of the investigation must be provided.

m) The rules governing the offer

The offeror must state that the offer is subject to these rules. The offeror must also state which national legislation will govern, as a result of the offer, the agreements entered into between the offeror and the shareholders of the offeree company.

2 Terms and conditions and instructions relating to the offer

A detailed description must be provided of the consideration which is being offered.

If the offeror stipulates conditions to completion of the offer, these conditions must be stated.

Furthermore, the acceptance period and the manner in which the shareholders of the offeree company are to proceed if they accept the offer must be stated. Details must also be provided, where applicable, about the right to withdraw acceptances and the manner in which a shareholder is to proceed in order to exercise this right.

Details must be provided of when and how the consideration for acquired shares will be paid out. If the offeror has reserved the right to postpone payment of the consideration, this must be stated.

In the case of partial offers, the number of shares, of each class where applicable, that the offeror wishes to acquire must be stated and, where applicable, the fact that the offeror reserves the right to acquire more shares pursuant to the offer. Furthermore, the principles on which acceptances received will be reduced must be stated and, if a fixed price is not stipulated in the offer, the manner in which the price is to be determined.

Consideration other than cash must be described in such a way that it can be valued. If the consideration consists wholly or partly of shares in the offeror company, details must be provided of the financial year from which the offered shares carry a right to receive dividends. Details must be provided, where applicable, of the marketplace or marketplaces on which the shares are admitted to trading, or are intended to be admitted to trading, and the estimated date for commencement of trading in the shares. If the offeror company has more than one class of shares, it must be stated which class of shares is admitted to trading or intended to be admitted to trading.

If the consideration consists wholly or partly of convertible securities, other debt instruments, warrants, etc., their full terms and conditions must be stated.

If the offeror stipulates conditions to completion of the offer (conditions to completion), these conditions must be stated. The fifth paragraph of section II.4 provides that, if conditions to completion are stipulated, the offeror must state that the offer may only be withdrawn based on a condition to completion if non-fulfilment of the condition is of material importance to the acquisition of the offeree company by the offeror. However, this does not apply to conditions regarding achievement by the offeror of a certain level of acceptances of the offer. It follows from sections II.4 and II.8 that the offeror may reserve the right to control, i.e. waive in whole or in part, one or more of the stipulated conditions to completion. If a reservation of this nature has been made, this must be stated.

Information must be provided about the acceptance period and the manner in which the shareholders are to proceed if they accept the offer. It must also be disclosed, where applicable, that the offeror has reserved the right to extend the acceptance period.

Details must be provided, where applicable, of the right for a shareholder to withdraw his acceptance. The requisite practical instructions regarding such withdrawal possibility must be provided, as well as details of the person to whom a request for a withdrawal should be submitted, the manner in which this is to be accomplished, and the deadline (date and exact time) for receipt of a request for withdrawal. Details must also be provided of the steps to be taken by any shareholder who wishes to withdraw his acceptance in respect of nominee-registered shares.

3 Background and reasons, etc.

The considerations and reasons underlying the offer must be stated. Disclosure must also be made of the anticipated financial and other consequences of the offer for the offeror and the offeree company.

Details must be provided of the offeror's intentions with respect to the future operations of the offeree company, as well as the future operations of the offeror, to the extent they are affected. Details must also be provided of the offeror's intentions with respect to the employees and senior management of both companies, including each and every material change to the terms and conditions of employment. Finally, details must be provided of the offeror's strategic plans for both companies and their possible impact on employment and on the communities in which the offeree company conducts its business.

If the consideration offered consists of shares in the offeror, the board of the offeror company must provide an assurance that it has taken all reasonable precautionary measures to ensure that, as far as the board is aware, the information in the offer document relating to the company and the new group is in accordance with the facts, and that nothing has been omitted which might affect the purport of the offer document. As regards the brief presentation of the offeree company (section 6), the offeree company's board must provide an assurance that the description of the company has been prepared, or examined, by the board of the offeree company and that, in the opinion of the board, the

brief presentation of the offeree company provides a fair and accurate, albeit incomplete, impression of the company.

If the consideration offered consists of cash, an assurance must be provided by the board of the offeror to the effect that, as far as the board is aware, the information contained in the offer document relating to the offeror is in accordance with the facts. In addition, the board of the offeree company must provide an assurance as regards the brief presentation of the offeree company, in accordance with the above, if the board has participated in this context.

If the board of the offeree company has not participated in the preparation of the offer document, the person who prepared the description of the offeree company must be specified, as well as the material on which the description is based.

Details must be provided of the background to the offer and the consequences of the offer for the offeror and the offeree company, both from a financial perspective and in other respects.

The disclosure requirement in the second paragraph corresponds to the provisions of Chapter 2(a), section 2, sub-sections 10-12 of the FITA.

The board of the offeree company must provide an assurance as regards the information in the offer document. The prescribed wording of the assurance differs depending on whether the consideration consists of shares in the offeror or cash. If the consideration consists of debt instruments, shares in a company other than the offeror company or suchlike, the wording of the assurance may need to be adapted accordingly. The board of the offeree company must also provide an assurance if it has participated in the preparation of the offer document (i.e. has prepared or reviewed the description of the offeree company).

4 Statement of opinion by the board of the offeree company; valuation opinion

If the board of the offeree company has announced its opinion of the offer in accordance with section II.19 in sufficient time for the opinion to be reproduced in the offer document, the opinion must be reproduced in its entirety in the offer document. This also applies to any statement of opinion from employee representatives expressing different views on the impact of the offer on employment. If such a statement is not available in sufficient time to be included in the offer document, the date on which it is anticipated that the statement will be available must be indicated.

If the offeree company has obtained a valuation opinion which is available in sufficient time to be reproduced in the offer document, the valuation opinion must be reproduced in its entirety in the offer document.

5 The new group

Where consideration is offered in the form of shares in the offeror company, a description must be provided of the new group to which the offer relates.

Pro forma income statements and pro forma balance sheets, based on historical accounting material relating to the new group, must be reported. Planned changes in operations, the new group's market position, and planned coordination measures and their financial impact must also be presented, as far as possible. This also applies to changes to the board and senior management.

In the case of cash offers, a description of the new group is not required.

Where consideration is offered in the form of shares in the offeror company, a description of the new group must be provided. If the offeree company is much smaller than the offeror, the description can be shortened.

Pro forma income statements and pro forma balance sheets relating to the new group must be reported for the most recent completed financial year and, where applicable, for an interim period during the current financial year. In other respects, the rules contained in the Prospectus Regulation regarding pro forma accounts shall apply.

The financial benefits and costs of a merger should be discussed, and quantified where feasible, possibly in the form of a range of values. The date on which such benefits and costs are expected to be realised or incurred must also be indicated.

According to legislation and the EU Prospectus Regulation, the risk factors regarding an offeror who offers consideration in the form of shares in the offeror company must be stated, together with any risks that may be involved in the establishment and continued operation of the new group.

The share capital structure and major shareholders of the offeror company in the event of full acceptance of the offer must be reported, in terms of equity and voting rights percentages, based on the most recently known ownership data for the offeror company and the offeree company, respectively.

Plans regarding the composition of the board, senior executives and auditors must be reported, to the extent possible.

6 Brief presentation of the offeree company

Irrespective of the form of consideration offered, the offer document must contain a brief presentation of the offeree company's financial position, business operations, board of directors, senior management, and ownership structure. The most recent published interim report or statement of results must be reproduced in the offer document.

Shareholders of the offeree company must receive a brief presentation of the company whose shares they have been invited to sell. The presentation must include:

- A summary of financial developments (i.e. summarised consolidated income statements and balance sheets), and key ratios and data on a per-share basis. This information should at least cover the previous three financial years for which an

auditor's report has been submitted and any interim report that may have been published subsequently. Where applicable, per-share data is to be stated both before and after dilution as a result of the conversion of convertible securities or the exercise of warrants.

This information can normally be extracted directly from the offeree company's published reports. If information is reproduced from the income statement in an interim report, the corresponding information for the same period in the previous year must also be reported.

- A summarised description of operations, broken down by the main business areas.
- Shareholding and ownership structure, indicating the following:
 - The number of shares, broken down by class of share; shares that may vest upon conversion of convertible securities or the exercise of warrants; and shares held in treasury. Where applicable, share data must reflect circumstances both before and after dilution as a result of the conversion of convertible securities or the exercise of warrants.
 - The most recently known major shareholders: their percentage holdings in terms of equity and votes, and the number of shareholders.
 - The dividend policy announced.
 - Material clauses in the articles of association applicable to shares in the company.
 - In the case of convertible securities and warrants, the conversion or subscription price and the date when conversion or exercise may take place must be stated.
 - Authorisation for the board to issue, buy and sell shares, convertible securities or warrants.
 - Material agreements of which the board is aware between major shareholders or between major shareholders and the offeror or the offeree company.
 - The marketplace on which shares and, where applicable, convertible securities and warrants, are admitted to trading.
 - Information equivalent to the information certain other companies are required to disclose in accordance with Chapter 6, section 2(a) of the Annual Reports Act (SFS 1995:1554), to the extent the company has provided such information in its most recent annual report and that information is not stated above.
- Any information which has come to light as a result of a due diligence investigation referred to in the second paragraph of section II.20, in any event in summarised form.
- The company's directors and any alternate directors, senior executives, and auditors and any alternate auditors. In the case of directors, alternate directors and senior executives, disclosure must be made of their duties in the offeree company and other significant appointments, as well as their own holding of shares and other securities in the offeree company, and the holdings of closely related natural or legal persons.

7 Presentation of the offeror

If the offeror offers consideration in the form of shares in the offeror company, the offeror company must be described in a manner that enables shareholders of the offeree company to make a soundly-based decision about the offer.

In the case of a cash offer by a listed company, it is sufficient to state the name and registered office of the offeror company. In other cases involving a cash offer, the identity, legal form, registered office and head office address of the offeror must be stated. Equivalent information which, according to the above, must be provided about the offeror must, where applicable, also be provided about persons who are acting in concert with the offeror. Information must thereupon be provided about their relationship to the offeror. The offeror's business must be presented in a manner which is relevant to shareholders of the offeree company and the stock market. Financial key ratios must be provided which are relevant to an assessment of the payment ability of the offeror. An outline of the ownership structure of the offeror must also be presented.

If the offeror offers consideration which consists wholly or partly of cash, it must be disclosed how the offeror is financing the offer.

Disclosure must be made of resolutions which must be passed at any general meeting of the offeror company in respect of the offer.

If, as a result of the offer, the offeror is required to prepare a prospectus according to Chapter 2 of the FITA and the Prospectus Regulation, the provisions of these rules shall apply to the prospectus instead. In such case, the offeror company must be presented in accordance with the provisions of the EU Prospectus Regulation and in accordance with this section.

If the offeror offers consideration which consists wholly or partly of cash, information must be provided as to how the offeror is financing the offer. This means, *inter alia*, that it must be stated to what extent the offer is being financed from the offeror's own resources or from borrowed funds. If the offeror's implementation of the offer is dependent on contributions or other financing by shareholders or third parties, the relevant information must be provided. Disclosure of the financing arrangements is particularly important if the offer is made by a company established specifically for this purpose.

If the offeror's implementation of the offer is dependent on external financing and the lender imposes conditions for disbursement of the loan or the equivalent, a description of the disbursement terms and conditions must be provided, irrespective of whether or not the offeror makes the offer conditional on the loan being disbursed by the lender. It is not necessary to provide details of all of the terms and conditions; a summary is sufficient. The important thing is that the market receives information about all of the terms and conditions which may be of relevance for assessing the offeror's ability to make payment under the offer. If the disbursement terms and conditions make reference to other agreements entered into between the offeror and the lender, the relevant terms and conditions of those agreements must also be described.

If the offeror is dependent on the adoption of a specific resolution regarding the offer at a general meeting of the offeror company, for example a resolution to issue new shares which are to constitute consideration under the offer, disclosure must be made of the extent to which the offeror has received information that the company's shareholders intend to vote in favour of such resolution at the general meeting. Correspondingly, the offeror must disclose details of subscription or underwriting commitments received in respect of a cash issue which is necessary to implement the offer.

8 Tax issues

An outline must be provided of the Swedish tax rules that apply to any shareholders who accept the offer.

A brief description must also be provided of the tax rules applicable to the holding and divestment of the securities that constitute consideration under the offer.

In addition, information must be provided concerning any request for a ruling submitted, or due to be submitted, to the Swedish Tax Agency, the manner in which such ruling will be published, and, where possible, the expected dates of such ruling.

Mention must be made of proposed changes to tax rules which have been tabled and are relevant in the context.

9 Auditor's examination report

The auditor's examination report relating to the offer document must be included in the offer document.

10 Other information

Agreements relating to the offer entered into between the offeror and the offeree company must be included in the offer document.

Where relevant, the report issued by the board of the offeror in accordance with Chapter 13, section 7 of the Swedish Companies Act (SFS 2005:551), as well as the auditor's statement thereon, must also be presented.

Such agreements as are referred to in the rule must be included in their entirety in the offer document. However, the rule does not apply to agreements which are no longer in force and are manifestly irrelevant to the assessment of the offer. For example, this may be the case as regards a confidentiality agreement concerning a due diligence investigation which has been completed. The rule only applies to agreements entered into between the offeror and the offeree company.

Section II.17a provides that, as a starting point, there must not be certain agreements whereby the offeree company assumes undertakings vis-à-vis the offeror as a

consequence of the offer. Insofar as agreements are nevertheless entered into between the offeror and the offeree company as a consequence of the offer, such agreements must be included in their entirety in the offer document. However, the rule does not apply to agreements covered by the exemption in section II.17a, second paragraph, or which are no longer in force and are manifestly irrelevant to the assessment of the offer. The rule only applies to agreements entered into between the offeror and the offeree company.