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Recent and Future Changes in Swedish Securities Law Due to Expected Membership of the EC

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Introduction

On 1 July 1991 Sweden handed over its application for membership of the European Community to the EC Authorities. As a result Sweden is expected to become a member of the EC during 1995 at the earliest. Further, during the autumn of 1991 the Community on the one hand and the EFTA-countries on the other came to an understanding concerning the so-called the EEA Agreement. Under that agreement a European Economic Area is to be established where goods, services, capital and persons are free to circulate on the same conditions as in the Community. As a consequence the EFTA countries will harmonise their securities legislation in accordance with EC directives. The intention is, or was, that the EEA Agreement should become effective on 1 January 1993 *ie* the same day as the Internal Market was due to be completed. However, a few weeks before Christmas the European Court of Justice declared that rules dealing with the administration of The EEA Agreement and those establishing an

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independent EEA Court of Justice violated fundamental principles of the EC Treaty. The renegotiations were concluded recently and seem to involve rather major changes.

Provisions regulating the Swedish securities market are to be found in several acts and a number of non-binding recommendations issued by private organisations. In 1987 a committee was set up by the Swedish government with the task of completely reappraising those provisions.[1] As part of its work the Committee was required to consider all relevant EC directives. The conclusions of the Committee have been published in a comprehensive report. Some of the proposals of the committee have already resulted in new legislation, some are still under consideration. This article will give a short survey of recent and future changes in the Swedish securities legislation. However, first a few remarks will be devoted to the peculiar Swedish division of shares into restricted and non-restricted.

Restricted and Non-Restricted Shares

For many years there has been a number of provisions in Swedish legislation aimed at controlling foreign investment. Until January 1992 foreign natural persons or legal entities, and such Swedish legal entities where foreigners had or could get a dominant influence were not allowed to acquire, without permission from the competent authority, so many shares in a Swedish company that the aggregate number of shares or votes exceeded 10, 20 40 or 50 per cent. Natural persons and legal entities acquisitions of which were subject to specific permissions, were called control entities. As a result of Sweden's steps towards harmonisation with the EC legislation, such permissions are no longer needed.

To limit foreign "influence" so as to avoid being treated as control entities, many Swedish companies have a provision in their statutes dividing the shares of the company into restricted and non-restricted. Normally the number of restricted shares are limited to a figure representing less than 40 per cent of the share capital and 20 per cent of the votes. Under Chapter 17 of the Swedish Companies Act, foreigners and other control entities are not allowed to acquire non-restricted shares at all, except in certain cases of minor importance. Those provisions of the Companies Act are still valid. However, since the provisions are discriminatory and thus violate Article 7 of the EEC Treaty they are expected to be abolished later this year or at the beginning of 1993.

Nonetheless, after the abolition of the provisions concerning restricted and non-restricted shares it is to be expected that many companies will still have provisions in their statutes stating that foreigners may not acquire non-restricted shares. It is somewhat uncertain what the legal effect of such a provisions will be. Probably it will be invalid, because there is a mandatory provision in section 3:2 of the Companies Act stipulating that shares may be freely transferred and acquired unless there is a pre-emption clause in the company's statutes or unless otherwise provided by law. Further, such provisions in a company's statutes preventing foreigners from acquiring certain shares will probably violate Article 7 EEC.[2]

Insider Dealing

On 1 February 1990 a new Insider Act entered into force. This act fulfills all criteria in the EC directive.[3] The main provision of the Insider Act, Section 4, stipulates that any person who has employment, an assignment or any other position which means that he normally receives knowledge of circumstances which are significant with regard to the price of securities, which may be listed on a stock market, and that person has received information which is not generally known and which is likely to materially influence the price of the securities, such a person may not buy or sell such stock market securities on the securities market on his own behalf or on behalf of any other person or entity until the circumstances have become generally known. Nor may such a person cause any other person or entity to make such a purchase or sale by giving advice or by similar action. It is not necessary that the inside information is specifically related to the company or securities in question. Also a future change in interest rates, exchange rates or legislation can constitute inside information (section 5).

To such very strict provisions a number of exceptions must be added. Such exemptions are found in section 7 of the Insider Act. First, there is no prohibition on persons purchasing other kinds of securities like options or futures where the inside information is likely to depress the price and *vice versa*. Nor is there any reason to prevent the holder of an option from buying or selling the underlying asset upon which there is an option. A corresponding provision also applies to futures. Another exception worth mentioning concerns persons working for securities entities who may implement "buy" or "sell" orders in the normal course of its business.

Certain persons belonging to a company's management are considered to be insiders and must therefore report their holdings of shares and any changes in their holdings to the Securities Register Centre (sections 8 and 9). Persons treated as insiders are the directors and deputy directors, the managing director and deputy managing director, the auditors and deputy auditors and some other holders of senior positions.

A person who intentionally or as a result of gross negligence infringes section 4 of the Insider Act shall be liable to a fine or imprisonment, (section 21). Further, gains from a crime in accordance with section 21 shall be declared forfeited unless this is unreasonable (section 23).

The legislative history of the Insider Act shows that its purpose is to protect the integrity of the securities market in general, not the counter parties of insider dealers.[4] Consequently the Insider Act contains no provisions providing for compensation for loss or damages. As a result the prevailing opinion among Swedish lawyers is that a person who has bought securities

[1] *Värdepappersmarknaden i framtiden* (The Securities Market in the Future, SOU (legislative committee report) 1989:72.

[2] Case 36/74, *Walrave* and *Koch v Association Union Cycliste Internationale* [1974] E.C.R. 1405, where the European Court of Justice stated that the prohibition of any discrimination on grounds of nationality: "... does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services". In my opinion it seems very likely that the Court of Justice would take a similar view so far as provisions preventing foreigners from acquiring certain shares are concerned.

[3] Council Directive 89/592/EEC, OJ [1989] L334/30.

[4] Proposition (Parliament Bill) 1990/91:42, *Insiderhandel* (Insider dealing).

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from, or sold securities to, an insider cannot base any claim for damages on the Insider Act, but only on the Sale of Goods Act. Besides, when an insider has bought or sold the securities on the stock exchange it is normally impossible to claim damages because it is impossible to identify the insider's counter party.

Carrying Out Securities Business etc.

Under Swedish law securities business, *eg* securities brokerage business, may only be carried on after authorisation from the Financial Supervisory Authority. In the Act on Securities Business, which entered into force on 1 August 1991, the preconditions for being granted such an authorisation are laid down. There is an express provision stating that foreign enterprises can be granted authorisation (section 1:5).

Most of the provisions in the Act on Securities Business lay down conduct of business rules. For example there are provisions regulating what kinds of securities and other kinds of property a securities house may acquire and what kinds of business such an enterprise may be engaged in. Furthermore there are limits as to the size of loans granted and capital adequacy rules.

On the same day as the Act on Securities Business became effective a short Act concerned with dealing in financial instruments entered into force. Under this Act, trading in options and futures on a regulated market is only allowed subject to certain preconditions. Furthermore the Act prescribes that securities brokers and certain other enterprises may only dispose of financial instruments belonging to others if a written agreement to that end has been entered into.

Current Swedish legislation does not fully comply with the EC Prospectus Directive requiring a prospectus to be published when transferable securities are offered to the public.[5] Under this Directive, all offers of transferable securities to the public are subject to the publication of prospectus, (Art. 4), unless one of a number of exceptions applies. Current Swedish legislation is more liberal, see sections 4:18, 5:16 and 7:3 of the Companies Act. However, these provisions are supplemented by a private recommendation containing much more far reaching provisions. In practice these provisions are followed. The intention now is to add a new second chapter to the Act on Trading in Financial Instruments, causing Swedish legislation to fall into line with the EC directive.

Nor does Swedish legislation comply with the EC Directive on the information to be published when a major holding in a listed company is acquired or disposed of.[6] As mentioned above, the Insider Act stipulates certain reporting obligations, but the obligations have quite another purpose and only extend to persons who have insider status. There are also rather comprehensive provisions of a self-regulatory nature in respect of disclosure of acquisitions and assignments of shares. However, under agreements between the Stockholm Stock Exchange and the individual companies which have their shares listed on this stock exchange, such companies are required to follow these provisions. The intention is to supplement these self-regulatory provisions with statutory provisions which at least comply with the minimum obligations under the EC Directive.

All enterprises, domestic or foreign, engaged in securities business in Sweden are supervised by the Financial Supervisory Authority. On this point the EEA Agreement is expected to bring about a change. In the future The Financial Supervisory Authority will only supervise enterprises which are domiciled in Sweden. On the other hand the competence of the authority will be extended to all the activities of Swedish enterprises within the EEA area. Correspondingly, foreign enterprises' activities in Sweden will be supervised by their own home State authorities.

Stock Exchange Legislation

The EC has enacted three Directives concerning stock exchange regulations; one dealing with the conditions for admission of securities to stock exchange listing,[7] one dealing with the requirement for a prospectus to be published in connection with stock exchange listing,[8] and one dealing with the information that companies which have their shares listed must publish on a regular basis.[9] Existing Swedish legislation, The Stockholm Stock Exchange Act and The Companies Act do not comply fully with the provisions of these three directives.

There also exist other reasons for a revision of stock exchange legislation. At present the Stockholm Stock Exchange, a private enterprise which also has been entrusted with some quasi-public functions, has a legal monopoly to provide an exchange for trading in shares and bonds. Although the scope of the monopoly is rather limited and has not prevented the establishment of an OTC-market, the prevailing opinion today is that this legal monopoly should be abolished. Another deficiency is that the present legislation is only applicable to financial instruments which may be listed on the stock exchange, mainly shares and bonds.

At present a new Act on stock exchange and clearing activities is under preparation. With the introduction of this new Act the Stockholm stock exchange's monopoly will be abolished and any enterprise, Swedish or not, may be granted authorisation to run a stock exchange subject to certain preconditions. It should also be possible for foreign enterprises to be members of a Swedish stock exchange. The new Act will contain all the provisions necessary for complying with the three EC directives.

[5]Directive 89/298/EEC, OJ [1989] L124/8.
[6]Directive 88/627/EEC, OJ [1988] L348/62.
[7]Directive 79/279/EEC, OJ [1979] L66/21.
[8]Directive 80/390/EEC, OJ [1980] L100/1.
[9]Directive 82/121/EEC, OJ [1982] L48/26.