



The Helsinki Takeover Code

Securities Market Association



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N.B.

THIS IS AN UNOFFICIAL TRANSLATION.
IN CASE OF ANY DISCREPANCY BETWEEN THE FINNISH VERSION AND THE ENGLISH VERSION
THE FINNISH VERSION SHALL APPLY.

IN CASE OF ANY MISUNDERSTANDING, UNCLARITY OR UNCERTAINTY THE TAKEOVER BOARD
SHOULD BE CONSULTED.

THE TAKEOVER BOARD

Pursuant to Chapter 11, Section 28 of the Securities Markets Act (746/2012, "SMA") that entered into force on 1 January 2013, a listed company must directly or indirectly belong to an independent body, established in Finland, that broadly represents the business sector, which has, in order to promote compliance with good securities markets practice, issued a recommendation, which relates to the actions of the management of the target company regarding a public takeover bid and the contractual structures relating to the maintenance of control, or which shall provide direction for the corporate law procedures to be complied with in mergers and acquisitions. In order to promote compliance with good securities markets practice, the body may also issue other recommendations concerning the scope of application of the Securities Markets Act and relevant corporate law issues. The body may also issue statements on these issues. The Securities Market Association functions as the above-mentioned body under the Securities Markets Act.

The Takeover Board is an independent board, acting at the Securities Market Association, tasked with promotion of good securities markets practice in Finland. The board's duty is to draft and update the recommendations provided for under Chapter 11, Section 28 of the Securities Markets Act. Furthermore, the board is tasked with issuing recommendations for resolutions and statements on issues relating to the Takeover Code and other mergers and acquisitions either on its own initiative or upon application. Further provisions on the board's duties and operations are included in the board's rules of procedure.

The Takeover Board consists of 3 to 12 members, appointed by the association's board of directors for three years at a time. The members of the Takeover Board must have good knowledge of the business sector, corporate law and the securities markets.

The board examines any resolutions concerning the Helsinki Takeover Code in a composition consisting of a chair or a vice chair, two members and a secretary, unless there are grounds for handling the issue in some other composition. The chair of the Takeover Board, or the vice chair should the chair be prevented, determines the composition of the board examining the issue at the secretary's proposal. When appointing members, special attention will be paid to potential disqualification issues and the person's experience and expertise in the issue under consideration. In any composition, the board shall seek unanimous decisions. In case of dispute, the issue will be settled by voting.

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During the 2013–2015 term, the chair of the Takeover Board is Counsellor of Law Juhani Mäkinen and the other members are:

- Tom Berglund, Professor, Svenska Handelshögskolan (Hanken School of Economics)
- Henrik Ehrnrooth, Chief Financial Officer, Kone Corporation
- Kari Hietanen, Executive Vice President, Wärtsilä Corporation
- Seppo Ikäheimo, Professor, Aalto University
- Timo Kaisanlahti, Director, Varma Mutual Pension Insurance Company
- Merja Karhapää, Chief Legal Officer, Sanoma Corporation
- MSc Juha Karttunen, Mirosa Capital Ltd
- Sari Lounasmeri, CEO, Finnish Foundation for Share Promotion
- Juha Salonen, Senior Advisor, Huhtamaki Plc
- Tarja Tyni, Senior Vice President, Mandatum Life

Legal Counsel Antti Turunen acts as the secretary of the Takeover Board.

PREPARATION OF THE HELSINKI TAKEOVER CODE

The Securities Markets Act requires that a body that broadly represents the business sector issues, in order to promote compliance with good securities markets practice, a recommendation relating to the actions of the management of the target company regarding a public takeover bid, and the contractual structures relating to the maintenance of control, or which shall provide direction for the corporate law procedures to be complied with in mergers and acquisitions. The Securities Market Association has given the Takeover Board the assignment to prepare the recommendation referred to in the Act (“the Takeover Code”).

Before its approval, statements on the Takeover Code were requested from a total of 20 stakeholders, including the key ministries, the Financial Supervisory Authority, interest groups within the sector, as well as parties representing law firms, auditing entities, financing institutions and universities.

The Board of Directors of the Securities Market Association has approved this Takeover Code and confirmed the entry into force of this Code from 1 January 2014.

The Takeover Code will replace the corresponding recommendation issued by the Panel on Takeovers and Mergers of the Central Chamber of Commerce of Finland in 2006 (Recommendation Regarding the Procedures to be Complied with in Public Takeover Bids, Helsinki Takeover Code). The Takeover Code has been updated primarily due to the Securities Markets Act that entered into force on 1 January 2013. The structure of the recommendations has been affected by the so-called comply or explain principle, based on the Act. In addition, the Takeover Code has been modified in light of the experiences gained from the application of the recommendation issued in 2006. The procedures and practices to be complied with in public takeover bids evolve constantly. Therefore, domestic and international development shall still be followed and the Takeover Code is updated when necessary.

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Counsellor of Law Juhani Mäkinen has acted as chair of the working group responsible for drafting the recommendation. The members of the group were Juha Karttunen MSc, Senior Vice President and Secretary Jaakko Raulo and Head of Corporate Finance Joakim Åberg. The secretariat of the working group included Attorneys-at-Law Heidi Haanpää, Klaus Ilmonen, Paula Linna and Mia Morkila, and Legal Counsel Antti Turunen.

TAKEOVER CODE

The Securities Market Association has issued the following recommendation referred to in Chapter 11, Section 28 of the Securities Markets Act.

INTRODUCTION

OBJECTIVES OF THE TAKEOVER CODE

The purpose of the Takeover Code is to promote development of good securities markets practice and provide direction for the procedures to be complied with in public takeover bids.

The objective of the Takeover Code is to standardise the procedures to be complied with in public takeover bids in Finland, and in this way promote the legal protection of the parties in a takeover bid.

REGULATIONS REGARDING PUBLIC TAKEOVER BIDS AND THEIR SCOPE OF APPLICATION

This Takeover Code is meant to supplement the legislation applicable to public takeover bids, and therefore the Code shall be applied and interpreted in accordance with the objectives and provisions of the Securities Markets Act. The most essential provisions of the law applicable in public takeover bids, and the rules and regulations pursuant to them, are mentioned briefly below:

Takeover Directive. The Directive 2004/25/EC of the European Parliament and of the Council on takeover bids relates to national rules relating to takeover bids for the securities of companies governed by the laws of the Member States, where all or some of those securities are admitted to trading on a regulated market. In Finland, the Takeover Directive has been mainly implemented through the provisions of the Securities Markets Act.

Securities Markets Act. The provisions concerning public takeover bids are included in Chapter 11 of the Securities Markets Act, which regulates both voluntary and mandatory bids. The provisions apply, as provided for by the Takeover Directive, to a bid that is made for securities that are publicly traded in Finland on a regulated market, or which give title to such securities. In certain respects, the provisions of the Securities Markets Act also concern bids for securities that are publicly traded in another state within the European Economic Area

on a regulated market, where these securities have been issued by a company registered in Finland. The provisions of the Securities Markets Act relating to public takeover bids are partly applied also when making bids on shares that are publicly traded in Finland within the multilateral trading facility upon the issuer's application.

Limited Liability Companies Act. The provisions of the Limited Liability Companies Act (624/2006, "CA") become applicable in the different stages of a public takeover bid process, especially in respect of the actions of the target company and its management. The Limited Liability Companies Act also regulates the right of the minority to have their shares redeemed at a fair price when the majority shareholder holds more than 90 per cent of the shares in the company and the votes carried by them. Pursuant to the Limited Liability Companies Act, in such a situation the majority shareholder also has a corresponding right to redeem the shares of the minority shareholders at a fair price. In practice, squeeze-out of the shares of the minority shareholders often constitutes the last stage of the takeover bid process.

Act on the Financial Supervisory Authority. The Financial Supervisory Authority supervises compliance with the Securities Markets Act. The Act on the Financial Supervisory Authority (878/2008) includes specific provisions regarding the right of the Financial Supervisory Authority to supervise the actions of certain parties taking part in takeover bids. The Financial Supervisory Authority has the right, in relation to its right of supervision, among others, to impose administrative sanctions and to provide information to other authorities or bodies.

Regulations and instructions issued by the Financial Supervisory Authority. The Financial Supervisory Authority has issued Financial Supervisory Authority's regulations and guidelines on Takeover Bid and Obligation to Launch a Bid 9/2013 ("FIN-FSA RAG on Takeover Bids"). Other regulations and guidelines also issued by the Financial Supervisory Authority, such as The Financial Supervisory Authority's regulations and guidelines on the Disclosure Obligation of the Issuer ("FIN-FSA RAG on Disclosure Obligation") may become applicable in connection with a public takeover bid process. The provisions of the regulations and

guidelines are partly based on the duties assigned to the Financial Supervisory Authority in Chapter 11 of the Securities Markets Act and partly on the powers of the Financial Supervisory Authority as the supervisor of the financial markets.

Recommendations and statements issued by the body referred to in Chapter 11, Section 28 of the Securities Markets Act. A listed company must directly or indirectly belong to a body established in Finland, that broadly represents the business sector, which has, in order to promote compliance with good securities markets practice, issued a recommendation which relates to the actions of the management of the target company regarding a public takeover bid, and the contractual structures relating to the maintenance of control, or which shall provide direction for the corporate law procedures to be complied with in mergers and acquisitions. The body may also issue other recommendations concerning the scope of application of the Securities Markets Act and relevant corporate law issues to promote compliance with good securities markets practice. The recommendations may also be included as a part of the Rules of the Stock Exchange. The body may also give statements on issues relating to the recommendations or, upon application, issue recommendations for resolutions regarding individual issues relating to the recommendations. The Securities Market Association acts as the above-mentioned body and this Takeover Code is a recommendation issued pursuant to Chapter 11, Section 28 of the Securities Markets Act. The obligation of listed companies and other parties acting on the securities markets to follow the recommendation is described further under the section Compliance with the Takeover Code.

The recommendations provided by the Takeover Code concern questions and problems arising in public takeover bid situations. The Takeover Code gives recommendations regarding the actions of the offeror and the target company and the management and the shareholders of the target company. The Takeover Code also addresses integration measures and redemption of the shares held by minor-

ity shareholders in compliance with the Limited Liability Companies Act, which often follow the completion of a takeover bid. The Takeover Code has been drafted for the purpose of voluntary takeover bids, but many of the recommendations given by the Code also apply to mandatory takeover bids. As such, the Takeover Code shall not apply to other types of mergers and acquisitions. However, the Takeover Code addresses questions that may arise also in other mergers and acquisitions. Thus, by acting in accordance with the Code, compliance with good securities markets practice can also be ensured in connection with other mergers and acquisitions, where applicable.

PRINCIPLES OF INTERPRETATION OF THE TAKEOVER CODE

Very different kinds of questions may arise in respect of public takeover bids and the takeover bid procedures evolve continuously. The recommendations relating to public takeover bids shall, in different situations, be interpreted in the light of the objectives set for them. It is important in such situations that the procedure chosen in the individual case shall:

- increase the predictability of the takeover bid process;
- contribute to the standardisation of the procedures complied with in takeover bids;
- provide different parties to a takeover bid with increased access to information and enhance the transparency of securities markets; and
- ensure legal protection for the different parties to a takeover bid.

The Takeover Directive contains provisions regarding the following principles, which shall be taken into account when the Directive is being implemented in the Member States:

- All holders of the securities of an target company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;
- The holders of the securities of a target company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board or management body of the target company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business;
- The board or management body of a target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;
- False markets must not be created in the securities of the target company, of the offeror or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;
- The offeror must announce a bid only after ensuring that he or she or it can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration; and
- The target company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

The above principles are binding on the Member States. The principles nevertheless support the completion of an appropriate takeover bid process and they shall, when applicable, be complied with also in the interpretation of the recommendations contained in this Takeover Code.

COMPLIANCE WITH THE TAKEOVER CODE

The obligation to comply with the Takeover Code is based on the provisions of the Securities Markets Act. The 'comply or explain' principle shall be applied with in respect to the recommendation referred to under Chapter 11, Section 28 of the Act, which, in other words, means that a party not committed to complying with the Takeover Code must provide an explanation for this.

The procedures to be complied with in takeover bid situations are also regulated by, for example, the Limited Liability Companies Act and the Securities Markets Act as well as official regulations (FIN-FSA regulations and guidelines on takeover bids in particular). To ensure that the Takeover Code gives a comprehensive picture of the procedures to be complied with in takeover bid situations, in drafting of the Code, account has been taken of the applicability of the Limited Liability Companies Act and the Securities Markets Act to takeover bid situations. Efforts have been taken to draft the recommendations in such a manner that compliance with them would also meet the requirements of the Limited Liability Companies Act and the Securities Markets Act. In the recommendations given in the Takeover Code, account has also been taken of the Financial Supervisory Authority's regulations and guidelines applicable to takeover bid situations.

Insofar as the recommendations include obligations related to legislation or official regulation, deviation from the recommendations is not possible on the basis of the 'comply or explain' principle. Each actor must therefore ensure on a case-by-case basis compliance with the Limited Liability Companies Act, the Securities Markets Act and other mandatory regulations.

a. 'Comply or Explain' Principle

Pursuant to the Securities Markets Act, both the offeror and the target company must announce whether they are committed to complying with the Takeover Code. The disclosure of a takeover bid shall indicate whether the offeror is committed to complying with the recommendation referred to under Chapter 11, Section 28 of the Securities Markets Act and if not, provide an explanation for

not making the commitment (Chapter 11, Section 9(3) of the SMA). The statement on the takeover bid given by the board of the target company must indicate whether the target company is committed to complying with the recommendation and if not, provide an explanation for not making the commitment (Chapter 11, Section 13 of the SMA). As the purpose of the Takeover Code is to promote good market practice and to secure the rights of the different parties of takeover bid, compliance with the takeover code is presumed from both the bidder and the target company.

The statutory 'comply or explain' principle described above concerns commitment to the Takeover Code in general. However, within the framework of the Takeover Code and in the manner described in closer detail below, it is possible to deviate from an individual recommendation without this being considered deviation from the Code. However, explanation must be provided for deviation from any individual recommendation.

b. Deviation from an Individual Recommendation

This Takeover Code includes 14 individual recommendations relating to takeover bid situations. In connection with the recommendations, an introduction and explanatory notes relating to each recommendation are provided. Only the actual recommendation text is part of this Takeover Code. The purpose of the introductory and explanatory parts of the text is to describe good securities markets practice and practices and procedures suited for different situations, and to provide background information and clarify the actual recommendation, and, therefore, they are not part of the actual Takeover Code. The introductory and explanatory parts of the text also present standards applicable to the situations covered by the recommendations that cannot be deviated from on the basis of the 'comply or explain' principle.

Some of the recommendations in the Takeover Code relate to situations where the takeover bid has not yet been made public. Potential deviation from such recommendations shall be made public only in the event the bid is made public.

The procedures and practices to be complied with in public takeover bids evolve constantly. In addition, very different situations may arise in connection with takeover bids. This Takeover Code cannot serve as a pre-emptive or comprehensive guide to procedure that is compliant with good practice in all individual situations. Situations may arise in which there is a well-founded reason to deviate from the procedures defined in the Takeover Code. Nevertheless, the principles of interpretation defined in the previous section shall be applied in such situations. In addition, the procedure applied must always be in compliance with legislation and other binding regulations and good securities markets practice. Individual recommendations can be deviated from in such a manner that, in spite of the deviation, the party in question can be considered to comply with the Takeover Code, provided that (i) the principles of interpretation described in the previous section are complied with; (ii) the procedure is in compliance with legislation and other binding regulations and good securities markets practice; and (iii) the deviations have been reported and explained.

The reasons for the deviations must be given openly and in sufficient detail. A clear and comprehensive explanation strengthens the confidence in the solution relating to the deviation and provides the holders of target company's securities and other actors with the necessary grounds for assessing the deviation. As a rule, explanations for a deviation must be made public no later than in connection with the publication of the bid (the offeror) or release of the statement by the board of directors (target company) insofar as the need to deviate from an individual recommendation could reasonably be predicted at that point. In any case, explanation for deviation from the recommendation must be made public at as early a stage as possible, and usually no later than when the need to deviate from the Takeover Code becomes known.

c. Compliance with Good Securities Markets Practice

Pursuant to Chapter 1, Section 2 of the Securities Markets Act, any activities on the securities markets must be conducted in compliance with good securities markets practice. Good securities markets practice means principles and rules adherence to which is deemed, according to the informed and unbiased opinion among those operating in the securities market, to constitute correct and, for all of the parties, fair and reasonable business practice. The aim has been to bring together in this Takeover Code and the explanatory notes for the recommendations such procedures as may be deemed, in the manner described above and, for all of the parties, fair and reasonable business practice. Unless otherwise provided for due to specific circumstances, compliance with the procedures in accordance with the Takeover Code shall be considered to be good securities market practice as per above.

d. Limited Liability Companies Act

Even though the Limited Liability Companies Act does not include regulations related to public takeover bids in particular, certain provisions thereof apply to the activities of the target company's administrative bodies in takeover bid situations. In drafting the Takeover Code, it has been taken into account that the provisions of the Limited Liability Companies Act apply to the actions of the board of directors and the general meeting of the target company in the different phases of a takeover bid. Compliance with the procedures in accordance with the Takeover Code will in particular promote the fulfilment of the general principles mentioned in Chapter 1 of the Limited Liability Companies Act and the fulfilment of the rights of the shareholders of the target company in takeover situations. Furthermore, such compliance also ensures that the target company does not undertake measures as referred to in Chapter 1, Section 7 of the Limited Liability Companies Act that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder, and that the management of the target company has, in accordance with the requirement of Chapter 1, Section 8 of the same Act, acted with due care and promoted the interests of the

shareholders in a takeover bid situation. The same applies to the offeror when it is a Finnish limited liability company.

e. Public Takeover Bid in a Multilateral Trading Facility

Chapter 11, Section 27 of the Securities Markets Act applies to a public takeover bid in a multilateral trading facility. Pursuant to the Securities Markets Act, in such bids, the offeror shall, for example, afford equivalent treatment to all holders of the securities subject to the bid. Holders of the securities also have to be provided with essential and sufficient information on the basis of which the holders of the securities will be able to make a well-founded assessment of the bid. However, the provisions of the Securities Markets Act relating to, for example, the obligation to state commitment to compliance with the Takeover Code are not directly applicable to public takeover bids in a multilateral trading facility

>> *see Chapter 11, Sections 9(3), 13(3) and 28 of the SMA).*

The purpose of this Takeover Code is basically the promotion of good securities markets practice and standardisation of the procedures complied with in takeover bids in Finland. The Takeover Code also takes into account that the provisions of the Limited Liability Companies Act apply to the actions of the board of directors and the general meeting of the target company in the different phases of a takeover bid. When acting in a multilateral trading facility, compliance with good securities markets practice can be deemed equally essential. The procedures in accordance with the Takeover Code are therefore also applicable to public takeover bids in a multilateral trading facility.

f. Statements by the Takeover Board

One may apply for a statement from the Takeover Board on individual questions related to the application of the Takeover Code. Typically, applying for a statement becomes topical in questions related to the interpretation of how to apply the Takeover Code. A statement can be applied for in order to find out whether the planned procedure is in compliance with the Takeover Code or good securities markets practice. The Financial Supervisory Au-

thority recommends, for example, that the board of directors of the target company apply for a statement from the Takeover Board if it does not plan to transfer a directed share issue or any other issue relating to an activity or arrangement referred to in Chapter 11, Section 14 of the Securities Markets Act to the general meeting for a decision (Section 4.4 (18) of FIN-FSA RAG on Takeover Bids). The Financial Supervisory Authority may also take account of the statement provided by the Takeover Board on the matter when considering the prerequisites for the bid to deviate from the minimum amount of consideration offered (Section 7.3.2 (18) of FIN-FSA RAG on Takeover Bids).

Pursuant to Chapter 11, Section 26(1) of the Securities Markets Act, the Financial Supervisory Authority can, upon application for a specific reason, grant permission to deviate from the obligation to launch a bid, provided that the deviation does not violate the general provisions of Chapter 1, Sections 2–4 of the Securities Markets Act or the general principles of Chapter 11, Sections 7 and 8 of the Securities Markets Act or Article 3 of the Takeover Directive. When applying for an exemption, it may often be of significance that the arrangement complies with the general principles of the Limited Liability Companies Act and that the rights of minority shareholders are fulfilled in connection with the corporate transaction in question. The Takeover Board may, upon application, give a statement on, for example, whether, in the Board's view, the planned merger or acquisition is considered to comply with the general principles of the Limited Liability Companies Act or whether the planned corporate law procedures are in compliance with good securities markets practice.

I PREPARATION OF A BID

RECOMMENDATION 1 - ENSURING PREREQUISITES TO COMPLETE A BID

Introduction

A public takeover bid and its disclosure may have a material effect on the price of the shares in the target company. Information on a public takeover bid may also affect the business operations of the target company.

For functioning markets it is essential that relevant information regarding a public takeover bid and its terms and conditions is provided in connection with making the takeover bid public. It is important for the shareholders of the target company that the takeover bid and the prerequisites for completing the bid in accordance with its terms can be evaluated on the basis of the available information.

Prior to making a takeover bid public, the offeror shall ensure that it can fulfil in full any cash consideration, if such is offered, and take reasonable measures that may be required for the implementation of any other type of consideration (Chapter 11, Section 9(4) of the SMA).

According to the Financial Supervisory Authority, ensuring financing means that the offeror has sufficient cash funds at its disposal or it has agreed on financing arrangements for completing the bid with sufficient certainty. However, the cash amount agreed on in the financing arrangement does not need to be in the offeror's possession at the time the bid is made public. The financing arrangement of the cash consideration may also be conditional. According to the Financial Supervisory Authority, ensuring payment of a share consideration requires that, if necessary, the offeror convenes a general meeting to resolve on a directed issue of shares, or commits to doing so at the time of the disclosure of a bid.

>> See also Section 5.2.2 (21-22) of FIN-FSA RAG on Takeover Bids.

Any terms and conditions and elements of uncertainty relating to the financing arrangements which are essential to the evaluation of a bid shall be made public at the time the bid is disclosed.

>> See also Recommendation 11 - "Disclosure of a Bid" and Sections 5.2.2 (20) and (21) of FIN-FSA RAG on Takeover Bids.

The offeror often sets the acquisition of a certain proportion of ownership in the target company as a condition for the completion of a public takeover bid. If the target company has a certain major shareholder or a few fairly large shareholders, a negative attitude to the bid on the part of these shareholders may prevent the completion of the bid. Therefore, when preparing the bid, it may be justified for the offeror to seek to explore the feasibility of its bid through direct discussions with the major shareholders of the target company. If the board of directors of the target company receives information about the takeover bid before it is made public, it may be advisable for the board to evaluate whether the board may and indeed should acquire information on the opinion of such shareholders in relation to the bid, already before making the bid public.

The rules pertaining to the use of insider information must be taken into account in potential shareholder discussions. Pursuant to Chapter 14, Section 2 of the Securities Markets Act, insider information may not be disclosed to another party unless the disclosure takes place as part of the ordinary performance of the work, profession or tasks of the person disclosing the information. According to Section 5.5 (40) of the FIN-FSA RAG on Disclosure Obligation the normal performance of the work, profession or tasks may, in certain situations, be considered to include disclosing insider information to the major shareholders of the company.

>> See Explanatory notes 1 (c) "Discussions with Major Shareholders of the Target company".

Recommendation 1

Prior to making a takeover bid public, the offeror shall ensure that, in addition to the financing as required by the Securities Markets Act, it also has the other necessary prerequisites to complete the bid. Furthermore, the offeror shall determine whether there are any specific elements of uncertainty relating to the bid due to authority approvals or other reasons.

Explanatory notes**a. Ensuring the Financing**

Pursuant to a mandatory provision of the Securities Markets Act, prior to making a takeover bid public, the offeror shall ensure availability of necessary financing (Chapter 11, Section 9(4) of the SMA), and this requirement cannot, therefore, be deviated from on the basis of the 'comply or explain' principle. These explanatory notes will describe what practical steps can be taken to ensure financing in accordance with good securities markets practice.

If external loan financing is required to finance the bid, insofar as ensuring financing is concerned, as a rule, it can be considered sufficient that a decision regarding the availability of the financing has been made (such as approval for granting financing of the relevant body of the finance provider) and the amount of financing and the main terms and conditions have been agreed between the credit institution, the finance provider or the party arranging funding, and the offeror. A unilateral letter of interest or a letter of strong interest on behalf of an individual finance provider alone does not constitute sufficient proof of the availability of the financing having been ensured, nor does ensuring always require that all parties involved have signed the final financing agreement by the time the bid is made public. The availability of the financing may be agreed on a conditional basis, for example, upon that no material adverse change takes place on the financing markets or in the target company, or upon the takeover bid being completed in accordance with its terms.

>> *For closer details on conditional financing, see Section 5.2.2 (21) of FIN-FSA RAG on Takeover Bids.*

If the offeror intends to acquire financing for its bid in connection with the bid from the capital markets (by means of, for example, a share issue or by issuing non-equity securities, such as bonds), prior to making the bid public, the offeror should take the necessary steps to prepare the issue in question and to ensure in collaboration with the arranger of such issue of securities the prerequisites for the completion of such an issue. The prerequisites for the completion of the issue can be ensured, for example, by acquiring subscription and/or underwriting commitments for such an amount of securities that can be reasonably estimated to ensure completion of the issue required for financing the takeover bid. The planned issue of securities shall be described in connection of making the bid public and in the offer document.

If the offeror is a limited company, issuance of shares or some other consideration in equity securities usually requires a resolution by a general meeting. A situation in which the board of directors has been granted authorisation suited for such issuance in advance may constitute an exception. According to the Financial Supervisory Authority, ensuring payment of a share consideration requires that, if necessary, a general meeting is convened to approve a directed issue of shares. In any other situation as well, where approval of the offeror's general meeting or some other similar body is required for the payment of the consideration offered or the completion of the bid, ensuring fulfilment of the prerequisites to complete the bid usually requires that the offeror convene or commit to convene said body to a meeting to take a decision on the matter, at the latest, when the takeover bid is made public. The offeror is not, however, usually required to examine in advance the stance of the offeror's shareholders on the decisions needed, unless the offeror has reason to assume that the decision needed will not be supported by a sufficient number of shareholders. In such situations, prior to making the bid public, it is often justified to investigate – within the limits of insider regulations – the stance of such offeror's shareholders whose practical contribution is needed to reach the decisions in question.

>> *See also Recommendation 10 - "Preparing for Information Leaks" and Recommendation 11 - "Disclosure of a Bid" and, as regards share consideration, Section 5.2.2 (22) of FIN-FSA RAG on Takeover Bids.*

If any other securities than equity securities (for example, bonds) are offered as consideration the offeror must, in connection with the bid, provide sufficient information on such securities for the assessment of the consideration.

>> *See also Chapter 1, Section 4, and Chapter 11, Section 11 of the SMA and the Ministry of Finance's Decree on the content and disclosure of offer documents, as well as the exemptions granted on the content, and on the reciprocal recognition of offer documents approved within the European Economic Area, 20 December 2012/1022.*

b. Authority Approvals and Regulations

Good securities markets practice requires that the offeror shall, by the means at its disposal, strive to find out what authority approvals it needs for the completion and execution of the bid. The approvals may include those granted by the competition authorities and the approvals required in different business areas, such as those required in the insurance and banking business. The offeror shall also, by the means at its disposal, strive to ensure that it fulfils or is able to fulfil all the requirements or any other operating conditions imposed by the authorities within the sector in question.

Applying for authority approvals may be a lengthy process and may impact the schedule for completing the bid. The duration of the process may affect the position of the target company and its shareholders, and information relating to these matters is important for the shareholders. The offeror shall, when making the bid public, indicate its opinion regarding the authority approvals required and, to the extent possible, its estimate of the duration of the process.

>> *See Recommendation 11 - "Disclosure of a Bid".*

If the offeror is unable to make an assessment of the necessary authority approvals and the requirements for getting them, this shall be mentioned when making a bid public.

In this connection, it should also be noted that the mandatory provision of Chapter 11, Section 8(1) of the Securities Markets Act prohibits the offeror from taking measures that would prevent or materially hamper the completion of the public takeover bid or the conditions set for the completion of the bid. It is not possible to deviate from the provisions in question on the basis of the 'comply or explain' principle.

>> *See also Section 5.4 (45) of FIN-FSA RAG on Takeover Bids.*

c. Discussions with Major Shareholders of the Target Company

In certain situations, it is justified for the offeror to approach certain shareholders of the target company before making the bid public. If the completion of the bid is, for example, conditional upon the offeror acquiring a certain ownership level, and if the target company has one or a few major shareholders, who could alone or together prevent the completion of the bid, it may be justified for the offeror to strive to find out the stance of such shareholders on the bid.

In certain situations, it may also be justified for the target company's board of directors to strive to find out the stance of such individual shareholders before the board decides to take a stance on the bid. The target company's board does not, however, have an obligation to discuss the bid beforehand with the shareholders. Generally speaking, from the point of view of the target company's board, examining the prerequisites to complete the bid can be considered to be in the interests of both the company and all of its shareholders. If it becomes apparent in such discussions that the prerequisites to complete the bid do not exist because major shareholders oppose the bid and will not accept it, the board of directors shall consider whether it is justified to use the resources of the company in seeking to contribute to the bid.

The restrictions pertaining to disclosure of insider information must be taken into account in connection with potential shareholder discussions. However, disclosure of insider information to the major shareholders of the company may, in certain situations, be considered acceptable performance of the work, profession or tasks. Such a situation may arise, for exam-

ple, when the management of the company is considering a measure which would, at a later stage, require the specific approval of the shareholders or the planning of which is, in practice, otherwise not feasible without the prior consent of, or support given by, the major shareholders.

>> *See Section 5.5 (40) of FIN-FSA RAG on Disclosure Obligation.*

For example, the decision of the target company to contribute to the planned public takeover bid or the offeror's plan to make a bid where the offeror's shares are offered as consideration may typically constitute such a situation.

As a rule, the prohibition to disclose insider information does not therefore limit the possibility of the board of directors of the offeror or target company to discuss the proposed bid with the major shareholders of the company, provided that such discussions are justified and that the board ensures that the administration of insider information and confidentiality issues are handled appropriately. Shareholders who have been informed of the proposed bid in connection with potential discussions will normally become insiders, for which reason the timing of the shareholder discussions must be considered carefully. The information regarding the preparations of a bid may constitute insider information also in respect of the securities of the target company and, if the offeror is a listed company, also in respect of its securities. Even though the first contacts would not generally be considered to constitute insider information, there is reason to exercise caution when communicating information relating to such contacts and in trading in the securities of the target company and, if the offeror is a listed company, also in its securities. For example, information regarding the willingness of the largest target shareholders to sell may have an impact on the evaluation of the nature of the information regarding the first contact.

Insofar as the obligations concerning the administration of insider information and confidentiality aspects are based on mandatory legislation, binding official regulations or stock exchange rules, they cannot be deviated from on the basis of the 'comply or explain' principle.

>> *On the maintenance of a project-specific insider register see Recommendation 2 - "Duty of the Board of Directors to Take Measures Due to a Proposal Relating to a Bid" (section d) Insider Issues), Chapter 13, Sections 6–8 of the Securities Markets Act, the Financial Supervisory Authority Standard 5.3 (Declarations of Insider Holdings and Insider Registers) and NASDAQ OMX Helsinki Guideline for Insiders.*

It is advisable that, in addition to the target company, the offeror also maintains a project-specific insider register in connection with the preparation of the bid, regardless of whether the offeror is a listed company or not.

II POSITION AND DUTIES OF THE BOARD OF DIRECTORS

RECOMMENDATION 2 - DUTY OF THE BOARD OF DIRECTORS TO TAKE MEASURES DUE TO A PROPOSAL RELATING TO A BID

Introduction

An offeror often approaches the board of directors or the managing director of a target company prior to making a bid public. At the latest the decision of the offeror to make a public takeover bid as referred to in the Securities Markets Act shall be made public and communicated to the target company (Chapter 11, Section 9(1) of the SMA). The Securities Markets Act also imposes the board of directors of the target company certain obligations relating to a public takeover bid (Chapter 11, Sections 10–11, 13–15 and 17 of the SMA).

The Limited Liability Companies Act does not contain provisions specifically relating to the position and duties of the board of directors of the target company in a takeover bid situation (see, however, the reference provision in Chapter 6, Section 7(3) of the CA). The role of the board shall be evaluated in the light of the general principles of company law, setting the interests of the company and its shareholders as the basis for the evaluation.

The board of directors has general competence to act for the company (Chapter 6, Section 2 of the CA). The board of directors shall act with due care and promote the interests of the company and its shareholders (duty of care and loyalty, Chapter 1, Section 8 of the CA). Acting in the interests of the company includes the duty to act in accordance with the purpose of the company. The purpose of a company is to generate profits for its shareholders, unless otherwise provided in the articles of association (Chapter 1, Section 5 of the CA). The board of directors of the target company has a duty to treat all shareholders equally, and the target company cannot undertake measures that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder (Chapter 1, Section 7 of the CA).

When the board of directors of the target company has received information about an intention relating to a public takeover bid that is of a serious nature, its task is to seek the best possible outcome

for the shareholders. According to the preparatory works for the Limited Liability Companies Act, in a takeover bid situation, seeking the best possible outcome for the shareholders means that the board shall undertake the measures needed to achieve as good a bid as possible (Government Proposal 109/2005, p. 41). However, the proposed bid may not necessarily be the best solution for the shareholders. The company may also have other alternatives. Examining and evaluating these alternatives forms a part of the evaluation of the bid.

A public takeover bid made without the support of the board of directors or management of the target company may be considered to be hostile and the board or the management of the target company may attempt to frustrate such a bid. Measures aimed at frustrating a bid may require convening the general meeting. Chapter 11, Section 14 of the Securities Markets Act imposes on the board of directors the duty to convene the general meeting in certain situations where the board, after having received knowledge of a public takeover bid made public, intends to use its authority to issue shares or decide on other measures and arrangements falling within the scope of its general competence in such a manner that these prevent or may prevent or materially hamper the completion of the bid or the fulfilment of its material conditions. The Financial Supervisory Authority recommends that the board of directors of the target company apply for a statement from the body referred to in Chapter 11, Section 28 of the Securities Markets Act if it intends not to transfer a share issue or any other issue relating to an activity or arrangement referred to in Chapter 11, Section 14 of the Securities Markets Act to the general meeting for a decision.

>> On issues to be transferred to the general meeting for a decision, see Section 4.4 (18)–(19) of FIN-FSA RAG on Takeover Bids.

The board of directors may consider it to be justified to convene the general meeting also in other situations than those referred to under Chapter 11, Section 14 of the Securities Markets Act. The Financial Supervisory Authority may also, upon application by the target company, order that the offer period under the takeover bid and of the limitation for making the completion trades of the bid be extended so that the target company may convene a

general meeting to consider the bid (Chapter 11, Section 12(3) of the SMA). The offeror shall have the right, due to such extension, to waive the bid. According to the Financial Supervisory Authority, extension of the offer period under the takeover bid can come into question, for example, if convening the general meeting is justified due to issues arising during the offer period, such as a competing bid or a bid concerning an individual business function of the target company.

>> See Section 5.3.3 (34)–(35) of FIN-FSA RAG on Takeover Bids.

Insider issues must also be taken into account in connection with takeover bids, since – depending on the stage of preparations of the takeover bid – information on the fact that the target company has been contacted in relation to a takeover bid may constitute insider information.

>> See Explanatory notes (d) “Insider Issues”.

Recommendation 2

If the board of directors of the target company is contacted with the purpose of proposing a takeover bid and the board considers such contact to be of a serious nature, the board shall evaluate what measures may be required to secure the interests of the shareholders. The board must take active steps to ensure that the best possible outcome is achieved for the shareholders.

Explanatory notes

a. Duty of the Board of Directors to Consider a Proposal Relating to a Bid

A public takeover bid is made to the shareholders of the company, not to the company itself. In a takeover bid situation, the interests of the company usually correspond with the interests of the shareholder collective, in which circumstances the duty of care and loyalty of the board of directors may be

seen as focusing directly on the value of the securities held by the shareholders. This recommendation cannot be deviated from on the basis of the ‘comply or explain’ principle insofar as the board of director’s duties result from the principles of the Limited Liability Companies Act and other mandatory provisions.

If the board of directors of the target company is approached with a proposal relating to a takeover bid, the chairman of the board of the target company often receives the first contact. If an individual person (a member of the board of directors or the managing director) is the focus of the contact, that person shall immediately present the matter to the board of the company for consideration, unless there are justified grounds to presume that the contact is not of a serious nature or that the matter does not need to be considered by the board due to the nature of the contact or for other reason. Even where the person with whom contact is made takes the view that the matter does not need to be considered by the board, it is usually justified to inform the whole board that such contact has been made. The board of directors of the target company is considered to have received information on a contact when such information has been obtained by one of the board members or the managing director.

When the board of directors of the target company considers whether the contact relating to a public takeover bid received by it is of a serious nature, the following factors shall, among others, affect the consideration:

- the concreteness and credibility of the contact (for example the form and means of the contact, who has made the contact, whether the contact and a bid have been prepared);
- the amount and form of the consideration offered;
- the prerequisites to complete the bid (for example financing of the bid and the conditions set for completion of the bid); and
- other factors relating to each individual situation.

If the board of directors considers the contact to be of a serious nature, it shall examine the matter, evaluate the proposed bid and acquire sufficient and appropriate information to support its evaluation. The board shall seek the best outcome for the shareholders. To the extent possible, this requires careful evaluation of, besides the bid itself, the other alternatives available to the company. If the board of directors decides to take measures in the matter, it shall treat all shareholders equally and is not allowed to favour an individual shareholder or group of shareholders at the expense of the company or another shareholder. The board shall also ensure that any possible conflicts of interest of its individual members or other undue influence do not affect the functioning of the board.

>> *On disqualification, see Chapter 6, Section 4 of the Companies Act, and Recommendation 4 “Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid”.*

b. Evaluation of the Alternatives of the Company

In a takeover bid situation, the interests of the shareholders require that the board of directors evaluate the bid itself and its consequences and also compare it with the company's other alternatives, which might, for example, include continuing the company's operations as an independent company in accordance with a predetermined strategy, or implementing some kind of structural re-organisation. The board of the target company may also seek competing bids. There is, however, no obligation to seek a competing bid. If a potential alternative purchaser is known to the board, it would be justified for the board to consider whether it would be in the interests of the shareholders to approach such other party.

The board of directors of the target company may, during the takeover bid process, be contacted by a competing offeror without having requested this. The questions relating to competing bids have been separately discussed in Recommendation 8 - “Measures of the Target Company in the Event of a Competing Bid”.

The board of directors shall acquire sufficient and appropriate information as a basis for its evaluation. This usually means information regarding the tar-

get company's value on the basis of various evaluation methods and factors affecting the target company's value. This might also require asking for additional information from and entering into discussions with the offeror. Finding the best alternative for the shareholders may, in addition, require that the board enters simultaneously into discussions with parties other than the offeror.

The shareholder and the offeror may come to a mutual agreement on a prior transaction or commitment, by which the shareholder commits him or herself to selling his or her shares in the forthcoming bid. If the board of directors of the target company becomes aware of such arrangements, the board shall, however, endeavour to assess the matter and take the arrangements into account when evaluating the takeover bid and other alternatives available to the company. Prior transactions or an undertaking given by major shareholders in the company to accept a forthcoming bid may promote the prerequisites to complete the bid and thereby influence the board's evaluation of the bid.

In evaluating the bid and other alternatives of the company, the board of directors shall consider whether the board should use external experts to assist in the evaluation.

If the board of directors concludes in its evaluation that the bid is the most beneficial alternative for the shareholders, the board shall undertake the measures needed in order to achieve as good a bid as possible. As a rule, the task of the board is to seek the best possible value for the securities of the company, and, by means available to it, it shall examine whether the offeror has the necessary prerequisites to complete the bid. In practice, this might mean initiating negotiations with the offeror.

If the board of directors decides to initiate negotiations with the offeror, the board usually also decides who will represent the company in the negotiations. In the decision-making process, the potential disqualification issues of the members of the board must be taken into account.

>> *See Recommendation 4 “Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid”.*

The board of directors has no obligation to enter into negotiations with the offeror in respect of the bid if the board deems that the bid is not in the interests of the shareholders. Pursuant to Chapter 11, Section 9(5) of the Securities Markets Act, in certain situations, the board of directors of the target company can request the Financial Supervisory Authority to set a deadline for the party planning the bid by which date it must either make the takeover bid public or announce that it will not launch a bid.

c. Possible Measures for Frustrating a Bid and the Need to Convene the General Meeting

The board may, in its evaluation of the company's alternatives, reach a conclusion that the launched or planned bid is not a beneficial alternative to the shareholders. The board may seek to produce a competing bid or other alternative transaction, which the board considers to be more beneficial to the company and its shareholders. The board may also consider that it is most beneficial to the shareholders of the company that the company continues its business operations in accordance with its earlier strategy.

As a rule, the board of directors is not obliged to cooperate with the offeror in respect of the bid if the board deems that the bid is not of a serious nature and in the interests of the shareholders. After having received information of a possible forthcoming takeover bid, the board of directors should not usually take action that might endanger the launching of a bid that is beneficial to the shareholders or the completion thereof without the general meeting's approval.

Measures that prevent or may prevent or materially hamper the completion of the bid or the fulfilment of its material conditions can include a directed share issue, distribution of assets, modification of the class of shares, or the selling of significant business operations. Amendments to the articles of association may also be proposed in order to frustrate a takeover bid. Except for the selling of business operations, decision-making on the measures mentioned above falls within the scope of authority of the general meeting. The board of directors may, however, have been granted, for example, the authority to resolve on a share issue or the distribution

of assets and, as a rule, decisions concerning the selling of business operations fall within the general competence of the board of directors.

If the board of directors intends to, after having received information of a takeover bid made public, use an authorisation to issue shares or take decisions on measures and arrangements within its general competence in such a manner that they prevent or may prevent or materially hamper completion of the bid or fulfilment of its material conditions, the law requires that the matter be transferred to the general meeting for a decision (Chapter 11, Section 14 of the SMA). After the bid has been made public, the board of directors may refrain from transferring the measures referred to under Chapter 11, Section 14 of the Securities Markets Act to the general meeting for approval only on the condition that the practice is in compliance with both the general principles of Chapter 1 of the Limited Liability Companies Act and Article 3 of the Takeover Directive. The general principles of the Limited Liability Companies Act of special significance in this context probably include the purpose of company operations (Chapter 1, Section 5 of the CA), the principle of equal treatment (Chapter 1, Section 7 of the CA), and the duty of the management to act with due care and loyalty (Chapter 1, Section 8 of the CA). When considering the general principles of the Takeover Directive, the principle according to which the board or management body of a target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid should be taken into particular account (Article 3(1)(c) of the Takeover Directive). The board of directors must also make public the reason why it refrains from transferring the issue to the general meeting and this should be done without delay after such a decision concerning refusal to transfer has been made.

>> On issues to be transferred to the general meeting for consideration, see Chapter 4.4 (18)–(19) of FIN-FSA RAG on Takeover Bids.

Potential reasons for not transferring a matter to the general meeting could include, for example, the board of director's evaluation that the bid is obviously insufficient or otherwise not in keeping with the interests of shareholders, or that consideration at the general meeting would not be feasible for some other reason related to the bid or the nature of the measure or arrangement planned by the board. Even in such a case, the procedure as a whole must be compliant with the general principles of Chapter 1 of the Limited Liability Companies Act and Article 3 of the Takeover Directive. In accordance with the preparatory works for the Securities Markets Act, making a takeover bid public does not, in itself, prevent the board of directors of the target company from conducting, for example, a merger or acquisition or other corresponding transactions, or continuing the planning and fulfilment of transactions which are already pending, if this is deemed to be in the interest of the company and all of its shareholders (Government Proposal 32/2012, p. 145). In other words, situations may arise where the board of directors, after having examined the situation in its entirety in the light of the general principles of the Limited Liability Companies Act and the Takeover Directive, considers that convening the general meeting is not necessary for the shareholders. The situations must always be considered on a case-by-case basis.

>> On transfer of a matter to general meeting for consideration in a situation where a takeover bid has been made public, see also the preparatory works of the Security Markets Act (Government Proposal 32/2012, p. 143–146).

In certain circumstances, the conditions of the bid may require a resolution by a general meeting. The offeror may, for example, require an amendment of the articles of association before completing the bid (for example, by removing a voting restriction or a redemption clause). According to the preparatory works for the Limited Liability Companies Act, the obligation of the board of the company to seek the best possible outcome for the shareholders deriving from the duty of care and loyalty under the Limited Liability Companies Act implies in a takeover bid situation that it is necessary to undertake such measures that are needed to achieve as good a bid as possible. This obligation may also extend to convening a general meeting.

d. Insider Issues

Depending on the stage of preparations of the takeover bid, information on the fact that the target company has been contacted in relation to a takeover bid may constitute insider information.

Insider information means information of a precise nature relating to a security subject to public trading on a regulated market or on a multi-lateral trading facility in Finland which has not been made public or which otherwise has not been available in the markets and which is likely to have material impact on the value of the said security or other financing instruments related to it (Chapter 12, Section 2(1) of the SMA). It is important for the uninterrupted operation of the markets that information regarding a prospective bid and the preparations relating thereto remain confidential until the bid has been made public. The abuse of insider information is a criminal offence under the Penal Code (Chapter 51, Sections 1 and 2 of the Penal Code). The Securities Markets Act also imposes a general prohibition on the use of insider information in the trading and conveyance of securities and the disclosure of insider information to another party without a justified reason (Chapter 14, Section 2 of the SMA). The Securities Markets Act imposes several obligations regarding administration of insider information on the target company.

>> See also NASDAQ OMX Helsinki Guidelines for Insiders.

The board of directors, its individual members or the managing director may constantly receive various contacts and proposals for purchasing the share capital of the company or other structural transactions. Such contacts or proposals, which are of a preliminary nature, should not generally be considered to constitute insider information, rather only contacts that are of a serious nature may generally constitute insider information. For example, information regarding the willingness of the major shareholders to sell may have an impact on the evaluation of the nature of the information regarding the first contact. The negotiations regarding a bid progress in stages and the evaluation of the stage in which information regarding the preparation of the prospective bid develops into insider information shall be made separately in each individual case.

If the target company is approached with a proposal relating to a takeover bid, the target company shall evaluate whether the situation constitutes (at that stage of the matter) an insider project. Criteria that may be used to assist the evaluation of whether a certain arrangement should be categorised as an insider project have been listed in the NASDAQ OMX Helsinki Guidelines for Insiders.

>> *See Section 7.3.1 of NASDAQ OMX Helsinki Guidelines for Insiders.*

In a takeover bid situation, preparations regarding a bid shall usually be defined as an insider project if the target company has received a contact, which the board of directors considers to be of a serious nature. In the assessment of the nature of the contact in terms of insider information, the evaluation criteria may often be considered to include the same criteria as when assessing the duty of the board to act in the matter, especially with regard to the concreteness and credibility of the contact, the amount of the offered consideration and the likelihood of the bid being completed. Information on the contact regarding a bid may constitute insider information to the persons aware of it, even before the target company has had the time to make a decision to establish a project-specific insider register.

A matter shall usually be defined by the board of directors as constituting an insider project at least in the following situations:

- the board considers the contact regarding the bid to be of such of a serious nature that it deems it necessary to take measures in the matter;
- the board of the target company has agreed to commence negotiations regarding the bid with the offeror;
- the board of the target company has otherwise decided to take concrete preparation measures in the matter; or
- the board of the target company has – regardless of the prospective contact regarding the bid – independently decided to take concrete measures aimed at achieving a public takeover bid to be made for the securities of the company.

Pursuant to Chapter 13, Section 6(2) of the Securities Markets Act, the issuer or parties acting on its behalf or on its account must maintain a project-specific insider register of the persons to whom the issuer has given specified insider information of the project. In takeover bid situations, it can often be agreed that the party receiving insider information, on its own part, maintains a list of persons to whom relevant information is further disclosed (for example, within the offeror's own organisation, or to advisors). Especially in extensive or cross-border mergers and acquisitions, it may be appropriate to agree on the maintenance of lists as described above. The board shall also ensure that the project-specific insider register is terminated without delay after the project regarding the bid has ended (through disclosure of the bid or expiration of the project). The termination date of the project shall be evaluated separately in each individual case.

Generally, the project may be considered to have expired if:

- the parties have jointly decided to end the discussions regarding the matter;
- a competent representative of the offeror (usually the chairman of the board or the managing director or another assigned party, such as an advisor) has communicated that the offeror no longer has the intention of continuing the preparations regarding the bid; or
- the board of directors of the target company decides to end the discussions regarding the bid and notifies the offeror of this.

Before the board of directors decides on the expiration of the project, it shall evaluate whether it is still justified to assume, on the basis of the information available to the board, that the offeror will return to the matter in the near future or that the offeror will otherwise continue the preparation of the matter.

RECOMMENDATION 3 - CONTRACTUAL ARRANGEMENTS WITH THE OFFEROR

Introduction

The offeror and the target company often enter into different agreements on the issues and procedures relating to the takeover bid process.

The offeror may request or demand that the board of directors of the target company commit to a 'negotiation prohibition', meaning that the board is not allowed to simultaneously discuss a competing bid for the shares in the company or other transaction which may prevent the completion of the bid with other parties. Negotiation prohibitions can usually be divided into two different types:

- 'exclusivity arrangements', where the board is requested to agree not to, under any circumstances, discuss potential competing transactions with other parties; and
- 'non-solicitation commitments', in which the negotiation prohibition is limited to the board refraining from actively seeking competing bids or other alternative transactions.

The board of directors of the target company must in such a case assess whether it is able to accept possible negotiation prohibitions and to what extent.

The target company may also consider limiting trading by the offeror through contractual means by signing an agreement with the offeror in which the offeror undertakes not to trade in the shares in the target company during a certain period of time ('standstill agreement'). Such an undertaking may also be connected to a non-disclosure agreement.

In Finnish takeover practice, the offeror and the target company often sign a 'combination or transaction agreement' prior to making the bid public. A combination or transaction agreement is not necessarily feasible in all situations, nor is there any obligation to enter into such an agreement.

The combination or transaction agreement is usually a type of process document where the offeror and the target company agree, for example, on the

terms and conditions of the bid to be made to the shareholders and on the procedures to be followed in connection with the bid. The combination agreement does not obligate the shareholders of the target company who are not parties to the agreement.

The combination or transaction agreement may serve, on one hand, the interests of the offeror and, on the other hand, the interests of the target company and its shareholders. The board of directors of the target company shall assess on a case-by-case basis whether it is feasible to enter into a combination or transaction agreement and what is the appropriate content of the agreement in the particular case at hand.

Recommendation 3

In a takeover bid situation, the board of directors of the target company must not agree to any contractual arrangements that limit the company's and the board of directors' possibilities to act. Such arrangements usually include, for example, different kinds of exclusivity arrangements.

Explanatory notes

a. Committing to a Negotiation Prohibition

In a takeover bid situation, the board of directors of the target company shall carefully seek the best possible outcome for the shareholders. The interest of the shareholders usually requires that the board explores, to the extent possible, the other alternatives available to the company as well and is, as a rule, free to act if the board is contacted by a competing offeror. The board shall also be able, under all circumstances, to fulfil its statutory duty of care and loyalty and to comply with the principle of equal treatment of the shareholders, both of which are duties that cannot be deviated from on the basis of the 'comply or explain' principle. Exclusivity arrangements are therefore problematic from the perspective of the duties of the board.

Sometimes it may, however, be justified for the board of directors to commit to a limited negotiation prohibition or 'non-solicitation commitment'. The commit-

ment shall be of a limited duration only and in the interests of the shareholders. Commitment to a limited negotiation prohibition may be in the interest of the shareholders, for example, in a situation where the offeror sets a negotiation prohibition as a precondition for making and announcing a bid beneficial to the shareholders. The negotiation prohibition shall not, however, prevent the board from examining a potential competing bid and thereby from acting in accordance with its duty of care and loyalty in situations in which the board has received a competing contact, provided that the board did not itself initiate such contact, or if the circumstances otherwise change substantially.

>> *For more details on competing bids, see Recommendation 8 “Measures of the Target company in the Event of a Competing Bid”.*

Usually, commitment to a limited negotiation prohibition is justifiable only after the board of directors has explored the alternatives available to the company and has ascertained that the proposed bid is, in the opinion of the board, a good alternative for the shareholders.

In practice, the negotiation prohibition may be agreed upon, for example, before starting a due diligence review or in a combination//transaction agreement between the offeror and the target company, in connection with the signing of which the board usually also decides to recommend the bid, but, depending on the situation, the negotiation prohibition can be agreed upon in some other connection as well.

b. Entering into a Combination or Transaction Agreement with the Offeror

Assessment of the feasibility of a combination or transaction agreement is usually closely associated with the interests of the company and its shareholders. By negotiating a combination or transaction agreement, the board may possibly influence the price to be offered to the shareholders for the securities of the company and the other terms and conditions of the bid in a manner favourable to the shareholders. The combination or transaction agreement may also secure better prospects of the bid being completed. It may also be in the interests of the company and its shareholders to agree be-

forehand on the procedures to be followed in connection with the bid.

The board of directors shall ensure that the combination or transaction agreement shall not prevent the board from acting in the interests of the shareholders, for example, in the event of a competing bid or when the circumstances otherwise change substantially. The board may, among other things, commit to issuing its possible recommendation regarding the bid with the qualification that the board retains the opportunity to examine any potential competing bid and, if necessary, to amend or withdraw its recommendation. It is also advisable that the board of directors ensure that the combination or transaction agreement shall not unreasonably limit the conducting of the business of the target company during the validity of the agreement.

The board of directors of the target company should be careful in agreeing to pay a ‘break-up fee’. The break-up fee is defined as an arrangement where the target company and/or the offeror promises to pay the offeror and/or the target company a certain pre-agreed compensation in case the bid is not completed because of certain pre-defined reasons. The break-up fee may be agreed upon in the combination or transaction agreement between the parties or otherwise.

Without a justified reason, the board of directors of the target company shall not make, on behalf of the company, such commitments that would limit the ability of the shareholders to consider freely whether they want to accept the bid or decide on possible measures for frustrating the bid in a general meeting convened for this purpose.

>> *See Section (c) “Possible Measures for Frustrating a Bid and the Need to Convene the General Meeting” of Recommendation 2 - “Duty of the Board of Directors to Take Measures due to a Proposal Relating to a Bid”.*

If the offeror establishes as a precondition for launching a bid potentially beneficial for the shareholders that the target company undertakes to pay a break-up fee in certain situations, the arrangement may be justifiable in some situations, provided that

- the acceptance of the arrangement and receiving the bid is, in the opinion of the board of directors, in the interests of the shareholders; and
- the amount of the break-up fee is reasonable, taking into consideration, among other things, the costs incurred by the offeror in preparing the bid.

It is not justifiable for the target company to pay the break-up fee in a situation in which the bid will not be completed due to a reason arising from the offeror.

The target company shall, in accordance with the Securities Markets Act, make the information on the signing of the combination or transaction agreement and on its material terms and conditions public through its own stock exchange release immediately after the signing of the agreement. Terms and conditions of the agreement that may generally be deemed material are, among others, the terms concerning the consideration offered, time schedule, possible break-up fee and negotiation prohibition, the terms concerning the procedures to be followed in the event of a potential competing bid, as well as all the terms relevant for the evaluation of the bid itself.

RECOMMENDATION 4 - DISQUALIFICATION ISSUES AND OTHER CONNECTIONS OF THE MEMBERS OF THE BOARD OF DIRECTORS TO A BID

Introduction

From the point of view of the shareholders, it is important that, in a takeover bid situation, the board of directors and its individual members can, unconstrained by undue influences, further the interests of the shareholder collective.

It is important that the members of the board of directors always assess their ability to participate in the consideration of the bid on the basis of the disqualification rules of the Limited Liability Companies Act (Chapter 6, Section 4 of the CA). A member of the board of directors shall comply with the disqualification rules of the Limited Liability Companies Act, and, according to said Act, a disqualified member of the board shall not participate in the decision-making regarding the public takeover bid. The duty of care and loyalty of the board of directors (Chapter 1, Section 8 of the CA) requires that in the decision-making process the members act unconstrained by undue influences. A member of the board, who is not officially considered disqualified according to the Limited Liability Companies Act, may have to consider whether he or she should refrain in any case from participating in the decision-making due to potential undue influences.

Recommendation 4

Before consideration of a takeover bid, the board of directors of the target company shall urge members of the board of directors to disclose to the board their connections relating to the offeror and the completion of the bid that are of significance when a member of the board evaluates his or her possibilities to participate in the handling of the bid unconstrained by undue influences.

If the board or its members have material connections to the offeror or shared interests connected to the bid with the offeror, or if a member of the board is, directly or indirectly, personally involved in the making of the bid, the board shall specifically ascertain that it is in all respects able to act independently and impartially in the interests of the company and all of its shareholders.

The board shall, in connection with its statement regarding the takeover bid, disclose all disqualifications of the members of the board and of their material connections to the offeror or to the completion of the bid they have knowledge of, as well as how these have been taken into account when the board has evaluated the bid, which members of the board have participated in the consideration of the bid and drafting of the statement, and whether only those members without said disqualifications have prepared the board's measures concerning the bid.

Explanatory notes**a. Disqualification and Material Connections**

The board or its members may also have such connections to the offeror or to the major shareholders of the company or to the bid which do not, as such, render the member of the board disqualified according to the Limited Liability Companies Act but which may affect the evaluation of the bid by the respective board member and the fulfilment of the duty of loyalty in accordance with the Limited Liability Companies Act. In these situations, it is important that the member of the board in question assesses whether he or she is able to participate, unconstrained by undue influences, in the decision-making relating to the bid. On the other hand, a member of the board must not refrain from the consideration of a matter without a justified reason. The disqualification rules of the Limited Liability Companies Act cannot be deviated from on the basis of the 'comply or explain' principle.

It is important that a member of the board of directors discloses to the board all his or her connections relating to the offeror and the completion of the bid that are material when a member of the board evaluates his or her possibilities to participate in the consideration of the bid unconstrained by undue influences. The shareholders of the target company and other investors shall receive information on such connections or relations when evaluating the bid, which is why it is important that these are disclosed. Such disclosure can be made in connection with the disclosure of the statement by the board of the target company regarding the takeover bid.

Special attention shall be given to the position of the board of directors of the target company in relation to the shareholders of the company in a situation where persons who are members of the board or of the management of the company, either alone or together with others, make a public takeover bid for the target company, or where a member of the target board is a major shareholder in the offeror. A member of the board of the target company, or a person who is a member of its management, can be considered to participate in the making of the bid at least if he or she has had the opportunity to

influence the terms and conditions of the bid or the amount of the consideration offered. A person being a member of the board of the offeror or belonging to its management can usually be considered to have the opportunity to influence the terms and conditions of the bid and the amount of the consideration offered. On the other hand, merely the fact that the person in question owns securities issued by the offeror does not imply that he or she would participate in the making of the bid.

In situations where a member of the board, or a person who is a member of the management of the company, participates in the making of the bid, the use of an external advisor in connection with the consideration of the bid may increase the ability of the board to ascertain that the procedures followed and the consideration of the bid are conducted in an appropriate manner.

b. Preparation of the Measures and Decision-making of the Board of Directors of the Target Company

The board of directors has, on the basis of the Limited Liability Companies Act, the right and duty to deal with matters belonging to the board. A member of the board shall not refrain from the consideration of a matter without a justified reason. In all circumstances, the measures taken by the board shall meet the requirements imposed by the duty of care and loyalty in the Limited Liability Companies Act. In a takeover bid situation, it may, in addition, be in the interests of the shareholders that this can also be clearly ascertained.

If any of the members of the board of directors of the target company have connections referred to in this recommendation, the board of directors of the target company may, if necessary, nominate those of its members who do not have such connections to prepare the measures to be taken by the board relating to the bid, in which case the members of the board who do have such connections shall not participate in the evaluation of the bid. External advisors may be engaged to provide assistance to such members, for example in order to evaluate the merits of the consideration offered. The nominated members of the board may together negotiate with

the offeror in order to obtain as good a bid as possible for the holders of securities. In a takeover bid situation, if all the members of the board have the connections referred to above, the board may consider appointing a third party, who is not a member of the board and is free from connections, to prepare measures relating to the bid. Appointing such a third party does not, however, reduce the liabilities and obligations of the board.

In addition, in a takeover bid situation, the board may consider whether only such members of the board that are free from connections and that have participated in the preparation of the bid in the manner described above shall take part in the actual decision-making concerning the bid. Should the board of directors in such a situation lack quorum as referred to in the Limited Liability Companies Act, the board could consider a procedure in which those members of the board who are free from connections would prepare the measures of the board, but, to constitute quorum, the members of the board who are not disqualified on the basis of the Limited Liability Companies Act could participate in the actual decision-making by the board.

c. Sample Situations

Various examples of different situations in which the connections of the members of the board of directors to the offeror or to the bid may require evaluation are presented below.

Ownership of shares. The members of the board of directors, their employers or other associated entities may own shares or other securities giving title to shares in the target company. Ownership of shares or other securities of the target company does not, in itself, prevent a member of the board from evaluating the bid unconstrained by undue influences. In some cases, the option or other incentive programmes include terms and conditions relating to the completion of a public takeover bid, including, for example, terms and conditions regarding the use of subscription rights or special rewards. Such arrangements may generally be con-

sidered comparable to the ownership of shares, and therefore they do not, by themselves, affect the position of the board. However, it is important that the shareholders are aware of such arrangements.

Connections to the offeror. A member of the board of directors of the target company may have a special connection to the offeror, for example, as an employee, a member of the board, a person related to the offeror or a major shareholder. Such connections may create an assumption that the member of the board in question is not unconstrained by undue influences to participate in the consideration of the bid in the target company. For example, an employee position may create a relationship of dependency with the offeror. To avoid conflict of interest, under no circumstances shall a member of the board participate in the decision-making regarding the bid, both on the board of the offeror and the target company. Because the aim of a public takeover bid is to transfer control to the offeror, a person with a connection to the offeror should at least not participate in the consideration of the bid on the board of the target company. As a member of the board of directors of the target company, such a person is in any case still bound by the duty of loyalty under the Limited Liability Companies Act and is, for instance, not permitted to disclose confidential information about the target company to the offeror.

Rewards relating to the completion of the bid. If a member of the board of directors may receive a reward or other comparable benefit relating to the completion of the bid, this must be made public. In addition, it must be considered whether the member of the board is disqualified from considering the bid or whether the reward can otherwise be considered as a factor on the basis of which the member of the board could not be considered to be unconstrained by undue influences when considering the bid.

Acceptance of the bid. Offerors often aim to obtain a prior commitment from the key shareholders to accept the bid. If a member of the board of directors or his or her employer or other associated entity that owns securities in the target company has given such a commitment, this shall, as a rule, impact the ability of the member of the board to evaluate the bid unconstrained by undue influences, for example, in the event of a competing bid or after other corresponding changes in circumstances.

Detriment resulting from the bid. A member of the board of directors may have a material connection to a party for whom the completion of the bid will cause special detriment (for example, a competitor of the offeror). Such a connection may influence the ability of the member of the board to act unconstrained by undue influences. A member of the board may hold a position which will be affected by the completion of the bid. For example, the managing director of the target company may be dependent on the target company in such a manner that he or she is not able to participate in the consideration of the bid on the board of the target company unconstrained by undue influences. Merely the fact that the members of the board are likely to lose their positions on the board when the bid is completed does not, as a rule, affect the position of the members of the board when considering the bid.

Potential connection of a member of the board to the offeror or the bid and the measures concerning it must always be evaluated on a case-by-case basis.

RECOMMENDATION 5 - STATEMENT OF THE BOARD OF DIRECTORS OF THE TARGET COMPANY REGARDING A BID

Introduction

Pursuant to the Securities Market Act, the board of directors of the target company shall draft and make public a statement regarding a public takeover bid (Chapter 11, Section 13 of the SMA). The statement of the board is often of great significance for the completion of the bid. It is important for the shareholders of the target company to know the view of the board on the merits of the bid. The board is often also in the best position to give a statement on the bid in relation to the business operations of the company.

Pursuant to the Securities Markets Act, the statement shall provide a well-founded assessment on the takeover bid for the decision-making of the holders of the securities subject to the bid and evaluation of the strategic plans presented by the offeror in the offer document and their likely effects on the operations and employment of the target company. The statement must also indicate whether the target company is committed to complying with the recommendation on the procedures to be complied with in public takeover bid situations provided by Chapter 11, Section 28 of the Securities Markets Act and if not, provide an explanation for not making the commitment.

Recommendation 5

The board of directors of the target company shall, pursuant to the Securities Markets Act, draft a well-founded assessment on the public takeover bid and the offeror's plans on the basis of careful preparation. In its statement, the board shall recommend either acceptance or refusal of the bid.

If the opinion of the board on the statement is not unanimous, this shall be mentioned in the statement.

Explanatory notes

a. Preparation of the Statement

Giving a statement on the bid is part of the board of directors' duties and, in preparation of the statement, the starting point can be considered to be careful operation in accordance with the principles of the Limited Liability Companies Act. To comply with the requirement of due care, the board shall, to a sufficient extent, examine the bid and its effect on the target company from the perspective of both the company and the holders of the securities subject to the bid. Therefore, the board should aim not only to adopt a stance regarding the merits of the bid in relation to the current market value of the company, but also in relation to other possible alternatives available to the holders of the securities subject to the bid. In this respect, it may be essential that the board evaluates the bid in its statement also in relation to any potential alternative arrangements. These may consist of potential competing bids, other strategic arrangements or continuing the business operations of the company in accordance with its own strategy as an independent company.

The duty to draft a statement and make it public derives from the Securities Markets Act and therefore this duty cannot be deviated from on the basis of the 'comply or explain' principle. Pursuant to the Securities Markets Act, the board of directors of the target company shall set out a well-founded assessment on the bid from the perspective of the target company and the holders of the securities subject to the bid. The statement of the board shall not constitute investment advice to the shareholders, nor can the board be required to specifically evaluate the general price development or the risks relating to investments in general. Acceptance or refusal of the bid is always a matter to be decided by the shareholders themselves, in which the starting point should be the information presented by the offeror in the offer document.

If the consideration offered consists of securities, the board of directors must strive to set out a well-founded assessment on the value of the securities offered as consideration in order to be able to assess the bid.

>> *See Recommendation 7 - "Due Diligence Review Regarding the Offeror".*

Pursuant to the Securities Markets Act, the board of directors shall also provide an assessment regarding the strategic plans of the offeror presented in the offer document and on their likely effects on the operations and employment of the target company. When the evaluation is based on the statements provided by the offeror, it may be difficult for the board to comment on their consequences in detail. However, in this respect, the Act or its preparatory works do not impose on the board of directors any duty to examine the offeror's plans to a larger extent than what has been described in the offer document. However, the board shall aim to evaluate the plans published by the offeror, especially in relation to the company's own strategy.

When the regulations concerning the board of directors' statement were included in the Securities Markets Act, it was considered in the preparatory works of the Act (Government Proposal 6/2006, p. 40) that it is not sufficient that the board describes the bid in a neutral manner, rather it shall adopt a stance regarding the bid. This cannot, however, mean that, under the Act, the board of directors shall always recommend the acceptance or the refusal of the bid, even though under the recommendation of the Takeover Code the board of directors should give a clear recommendation on this. The evaluation of the merits of the bid is not unambiguous in all cases. It is possible that the terms and conditions of the bid or the offered consideration are such that the board is not able to recommend acceptance or refusal of the bid. For example, it may be difficult to evaluate the merits of partial bids. The nature of the consideration offered may also be such that defining its value may not be unambiguous. In such a situation, the board of directors may have a justified reason to deviate from the recommendation. If the board is not able to recommend acceptance or refusal of the bid, it shall provide a justified reason for its opinion in its statement.

Since the Securities Markets Act explicitly obliges the board of directors to provide a statement on the bid, according to the preparatory works of the Act, in the event of rule violation, the members of the board also have a liability to compensate in accordance with the Securities Markets Act. On the other hand, according to the preparatory works, the Securities Markets Act does not rule out other liability to pay damages, such as the liability based on the Limited Liability Companies Act. The liability can, however, come into question only if the damage has been caused either deliberately or through negligence.

>> See *Government Proposal 32/2012, p. 160–173*.

When assessing whether due care has been practiced in the board of directors' operations, it is natural to use the duty of care rules in accordance with the Limited Liability Companies Act as a starting point. It is standard practice in assessing whether due care in accordance with the Limited Liability Companies Act has been practiced to apply the 'business judgment' rule, according to which the duty of care would have been considered fulfilled if, in the preparation of the measure, the board of directors has obtained sufficient background information and, on the basis of this, rationally evaluated various alternatives for action and their effects and, on the basis of careful consideration, without any conflicts of interests, conducted the action believing that to be in the interests of the company and its shareholders. It is advisable that the board of directors pay special attention to meeting the requirements of careful operation in the preparation process, and to documenting the preparation process to ensure that careful operation may be verified afterwards.

If the opinion of the board on the statement is not unanimous, this shall be mentioned in the statement. This may be essential information for the shareholders of the target company when evaluating the bid. The board of directors may assess on a case-by-case basis whether it should make the dissenting opinion of the members of the board in disagreement on the statement public with their justifications. In connection with making the statement of the board of directors public, the board shall also indicate whether the board in its entirety has participated in providing the statement or whether

some of the members of the board, either for reasons of disqualification or because of other connections, have not participated in the consideration of the matter.

>> See *Recommendation 4 - "Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid" relating to disqualification and the effect of other connections of the board on the consideration of the bid*.

The statement must also indicate whether the target company has committed itself to complying with the recommendation on the procedures to be complied with in takeover bid situations referred to in Chapter 11, Section 28 of the Securities Markets Act and if not, provide an explanation for not making the commitment. Since the purpose of the recommendations concerning the operations of the target company and its board of directors included in this Takeover Code is to promote the development of good securities markets practice and promote legal protection of the shareholders of the target company, as a rule, the target company should commit to comply with the Takeover Code.

b. Expert Opinion

The board of directors of the target company may use advisors when evaluating the public takeover bid or when preparing the statement to be provided regarding the bid. Neither legislation nor this recommendation requires the board to use an expert in providing the statement, but it may reinforce the fulfilment of the duty of care and loyalty of the board. The use of an external advisor should especially be considered if the members of the board or other persons who are members of the management of the target company participate in the making of the bid or have committed to accept it on their part.

>> See also *Recommendation 4 - "Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid"*.

External advisors may, for example, be used for the evaluation of the merits of the consideration offered ('fairness opinion'). In such a situation, the financial advisor seeks to evaluate the value of the company on business grounds and provides an

opinion to the board of the target company regarding the sufficiency or fairness of the consideration offered from the point of view of the shareholders of the target company. It should be noted that the purpose of the opinion is only to support the evaluation of the board of directors on the merits of the bid, and therefore the board of directors should not base its statement on the fairness opinion alone.

c. Statement Possibly Provided by the Representatives of the Personnel

The representatives of the personnel of the target company have a possibility to provide a separate statement about the effects of the bid on the employment at the company. If the target company receives a statement from the representatives of the personnel before disclosure of the statement provided by the board of directors, the statement of the representatives of the personnel shall be attached to the statement of the board (Chapter 11, Section 13(5) of the SMA).

Even though the legislation does not impose a duty on the board of directors to request a statement from the personnel or to inform the personnel of the possibility of providing a statement, it is desirable that the board advises the personnel, in a manner it considers suitable, of this possibility after the information regarding the bid has been made public. This may, for example, be done when the bid is communicated to the personnel in a manner required by Chapter 11, Section 10(2) of the Securities Markets Act.

d. Contribution of the Target Company to the Drafting of an Offer Document

The offeror shall in the offer document present its strategic plans regarding the target company and its assessment on their likely effects on the operations and employment of the target company. In addition to this, certain information regarding the target company shall be provided in the offer document. However, the board of directors of the target company is under no obligation to contribute to the drafting of the offer document by, for exam-

ple, providing the offeror with information needed for the offer document. According to the preparatory works of the Securities Markets Act, the target company has no obligation to co-operate with the offeror in promoting the bid (Government Proposal 32/2012, p. 140). The information regarding the target company in the offer document may therefore be completely based on publicly available information. The offeror is not responsible for information concerning the target company that has been made public by the target company. However, the offeror is responsible for ensuring that the information made public by the target company is repeated correctly in the offer document. The offeror shall state in the offer document the sources on which the information regarding the target company presented in the offer document is based.

The above-mentioned does not limit the possibilities of the board of directors of the target company to act. The board may decide to provide the offeror with information needed for drafting the offer document if this is in the interests of the shareholders. The board may also make public its own opinion on the offer document and the information provided in it, for example, in connection with the statement of the board regarding the bid. If the board considers that an offer document that has already been made public does not provide sufficient and correct information to the holders of the securities, fulfilling of the duty of care and loyalty of the board may even require that the board makes its opinion on the matter public in connection with its statement regarding the bid. The duty of disclosure in accordance with the Securities Markets Act or the rules of the stock exchange may also require making this information public.

>> For closer details on the offer document, its content and disclosure see the provisions of the Securities Markets Act (Chapter 11, Section 11 of the SMA), the Decree of the Ministry of Finance on the content and disclosure of an offer document and the exemptions from its content and the reciprocal recognition of an offer document accepted in the European Economic Area (1022/2012) and FIN-FSA RAG on Takeover Bids.

III DUE DILIGENCE REVIEW

RECOMMENDATION 6 - DUE DILIGENCE REVIEW IN THE TARGET COMPANY

Introduction

In connection with the preparation of a public takeover bid, the offeror often requests the possibility to conduct a 'due diligence review' in the target company in order to acquire more information about the company. A due diligence review may include a review of, among others, legal, financial, commercial, technical or environmental matters. There is no regulation in the law about due diligence review or its permissibility, rather the issue shall be examined in the light of the general principles of company law.

In due diligence reviews, in certain cases, insider information concerning the target company may also be handed over to the offeror. According to Sections 5.5 (39) and (40) of FIN-FSA RAG on Disclosure Obligation the prohibition to disclose insider information under the Securities Markets Act shall not generally prevent the disclosure of insider information to the opposite party and their advisors during negotiations (for example in mergers and acquisitions).

Use of insider information in the acquisition of securities, for the purpose of providing advice, or otherwise is prohibited in the Securities Markets Act and the abuse of insider information is also a criminal offence under the Penal Code (39/1889) (Chapter 14, Section 2 of the SMA, and Chapter 51, Sections 1 and 2 of the Penal Code). If the offeror receives insider information in connection with the due diligence review, the offeror is not allowed to make public a bid concerning the securities of the target company before the insider information received in the due diligence review has been made public (and therefore no longer constitutes insider information).

Recommendation 6

If the board of directors of the target company has received a proposal on a takeover bid of a serious nature that the board deems to be in the interests of the shareholders, the board of the target company shall allow the offeror, upon request, to conduct a due diligence review concerning the target company to the extent required in each individual case.

Explanatory notes

a. Allowing Due Diligence Review

As a rule, there must be a special reason to give information regarding the company to a party outside the company. A due diligence review may usually be allowed in a situation where the review is considered to be in the interests of the shareholders.

In a takeover bid situation, the board of directors of the target company shall seek the best possible outcome for the shareholders. If conducting a due diligence review is a precondition for making a public takeover bid to the shareholders, and if the bid is beneficial, considered as a whole from the point of view of the shareholders, allowing the review may usually be considered to be in the interests of the shareholders. The scope and the schedule of the review shall, however, always be considered separately by taking into account the circumstances of each individual situation, possible aspects of competition law and the possibility that the bid will never be completed.

The board of directors of the target company shall not allow a due diligence review if the board deems the proposed bid not to be of a serious nature or not to be in the interests of the shareholders.

If the board allows the review, it shall ensure that confidentiality and insider issues are appropriately attended to.

b. Equality of the Shareholders

In a takeover bid situation, the purpose of allowing a due diligence review is to create prerequisites for a bid to be made to all shareholders, regardless of whether or not the offeror already owns shares in the target company. If the bid is beneficial from the point of view of the shareholders, provision of information shall not usually be considered to confer such undue benefit to the offeror at the expense of the other shareholders (or the company) that is meant in the Limited Liability Companies Act, even where the offeror is already a shareholder of the company. The equality provisions of the Limited Liability Companies Act do not, therefore, generally limit the possibility of the board of directors of the target company to allow a due diligence review or oblige the board to provide the information given in a due diligence review to other shareholders of the company.

c. Confidentiality Issues

If the board of directors decides to allow a due diligence review, the offeror and the target company shall sign a non-disclosure agreement before starting the review, unless such an agreement has already been signed in an earlier phase of the process. The non-disclosure agreement shall, among other things, limit the right of the offeror (and its advisors and other possible parties who receive information provided in the due diligence review) to use the information given during the review for purposes other than the evaluation of the bid itself, as well as limit the right to disclose such information to third parties. The possibility that the prospective bid may never be completed shall be taken into account in the non-disclosure agreement.

d. Nature and Scope of Information to be Provided

With the exception of the limitations regarding insider information and the general principles of the Limited Liability Companies Act, the Limited Liability Companies Act and the Securities Markets Act do not impose limitations on the nature and amount of the information to be provided. However, the board of directors must strive to protect the

interests of the company when making a decision regarding information to be provided to a certain offeror. If the offeror and the company are competitors, the provisions of competition law may impose restrictions in respect of the information to be provided.

The scope of the review shall be defined separately in each individual situation. The person of the offeror may also have an effect on the evaluation, i.e. whether the offeror in question is a competitor of the target company or another strategic purchaser or, for example, a private equity investor. Information may also be given in different phases and in different ways.

It may often be in the interest of the target company that the due diligence review is conducted in its entirety prior to making the bid public. The possible withdrawal of the offeror from an already announced bid after a due diligence review has been conducted may lead to speculation and disruptions in the market. If the offeror is not in contact with the board of directors of the target company and does not ask for permission to undertake a due diligence review before making the bid public but, for example, sets the conducting of the review as a condition to completion of the bid, the board may have to consider the request regarding the due diligence review also after the bid has been made public.

Allowing the due diligence review in the event of a competing bid has been separately discussed in Recommendation 8 - "Measures of the Target Company in the Event of a Competing Bid".

It is always advisable to document the due diligence process carefully, so that the target company shall be left with records that may be verified afterwards, evidencing what information was given in the due diligence review, and to whom and when it was given.

e. Insider Issues

The board of directors of the target company has the obligation to ensure that insider information is managed appropriately during the due diligence process, especially if the due diligence review is conducted during a period of time when there is, in addition to the takeover bid process, another pending insider project in the target company or otherwise insider information regarding the company. In this context, it is worth noting that not all of the unpublished information held by the target company shall necessarily constitute insider information.

In a takeover bid situation, conducting a due diligence review is usually part of the negotiations between the offeror and the target company. If the due diligence review is set as a precondition for a bid which is beneficial to the shareholders, allowing the review is usually also in the interests of the shareholders. Therefore, the prohibition to disclose insider information is usually not considered to prevent the target company from giving insider information to the offeror in connection with a due diligence review. However, the target company shall notify the offeror of the insider nature of the information and the legal obligations relating to it, as well as take care of the confidentiality aspects and appropriate insider register arrangements to ensure that the information remains confidential.

>> For more detailed information on insider issues and registers, see Section (d) Insider Issues of Recommendation 2 - "Duty of the Board of Directors to Take Measures due to a Proposal Relating to a Bid", Chapters 12-14 of the Securities Markets Act, FIN-FSA RAG on Disclosure Obligation, the Financial Supervisory Authority Standard 5.3 (Declarations of Insider Holdings and Insider Registers) and the NASDAQ OMX Helsinki Guidelines for Insiders.

If the offeror receives insider information in connection with the due diligence review, as a rule, the offeror may not launch the bid or otherwise trade in the securities of the target company before such information has been made public. If the target company has such insider information which cannot be made public within the schedule desired by the offeror (for example, pending negotiations on a corporate acquisition, when making them public would endanger the conclusion of the deal), insider issues relating to the situation and the possibility of giving such information to the offeror shall

be considered separately in each situation. Usually, the offeror does not want to receive such information because this prevents the launching of the bid. Nor should the target company deliberately strive to frustrate a takeover bid by handing over insider information to the offeror. It is therefore important to agree on the principles to be applied to the situation already before the offeror begins the due diligence review and receives possible insider information regarding the target company.

If the offeror has, during the due diligence review, received such insider information that may be made public within the schedule desired by the offeror, the insider information given to the offeror shall, unless it has already been made public previously on the basis of the target company's continuous duty of disclosure, be made public at the latest in connection with the bid. The (insider) information in question shall also be included in the offer document prepared by the offeror.

f. Duty of Disclosure

Usually the decision to allow a due diligence review does not in itself need to be made public. The due diligence review may be considered to be part of the preparation of a potential public takeover bid or another transaction and the decision regarding allowing the review does not, as a rule, fall within the scope of the duty of disclosure of the target company. However, the special characteristics of a specific individual situation and the arrangements possibly agreed upon between the offeror and the target company may affect the evaluation. For this reason, the disclosure issues shall be considered separately in each situation.

During the due diligence process, the target company and the offeror should also be prepared for the possibility that information on the planned takeover bid may leak to the markets.

>> See Recommendation 10 - "Preparing for Information Leaks".

As a rule, the target company is not obliged to disclose to the offeror information handed over during the due diligence review. However, if the due diligence review reveals an essential fact not previously known to the target company, the board of directors of the target company shall, without delay, evaluate whether this fact is likely to have a material effect on the value of the securities of the company, and whether it should therefore be made public pursuant to the continuous duty of disclosure of the company.

RECOMMENDATION 7 - DUE DILIGENCE REVIEW REGARDING THE OFFEROR

Introduction

The consideration to be offered in a voluntary public takeover bid may be paid in cash, in securities or as a combination of securities and cash (Chapter 11, Section 24 of the SMA). In a mandatory bid, the alternatives for a cash consideration may be offered as consideration in securities or as a combination thereof (Chapter 11, Section 23 of the SMA). The board of directors of the target company shall set out a well-founded assessment on the bid in its statement regarding the bid (Chapter 11, Section 13 of the SMA). If the consideration offered consists of securities, the board of directors must strive to set out a well-founded assessment on the value of the securities offered as consideration in order to be able to assess the bid. The offeror must not take such measures that prevent or materially hamper the completion of the public takeover bid or its conditions to completion (Chapter 11, Section 8 of the SMA).

Recommendation 7

In order for the board of directors of the target company to be able to make a well-founded assessment on a public takeover bid, it shall acquire sufficient and appropriate information about the securities possibly offered as consideration and, for this purpose, conduct a due diligence review regarding the offeror, if necessary. The offeror shall allow such a due diligence review to the extent required in each individual case, to allow the board of directors of the target company to reasonably assess the consideration offered.

Explanatory notes

In evaluating the bid, the board of directors of the target company shall act with due care in the interests of the shareholders. In order for the board to be able to make a well-founded assessment of the securities consideration offered, the board shall acquire sufficient and appropriate information to sup-

port its evaluation. The board of the target company shall evaluate on a case-by-case basis whether the information publicly available is sufficient for making a well-founded assessment or whether the assessment requires conducting a due diligence review regarding the offeror.

If the offeror receives a request from the target company regarding a due diligence review, it is recommended that the offeror shall allow such a review to the extent necessary, so that the board of directors of the target company is able to make a well-founded assessment of the consideration offered. The scope of the due diligence review shall be defined separately in each individual situation, taking into account also the person of the target company and the offeror (e.g. competitor status). Factors such as the stock exchange quotation of the security offered in consideration, the information publicly available on the security and the liquidity of the security may also have an impact on the assessment.

If the offeror does not co-operate with the board of directors of the target company, it may be impossible for the board to acquire the information described above. In such a situation, the board of directors of the target company may have a justifiable reason to deviate from the recommendation.

If the board of directors of the target company notices, on the basis of the due diligence review conducted by it or otherwise, that the offer document drafted by the offeror does not provide the holders of the securities with sufficient and correct information regarding the consideration offered, where such information may be material for the evaluation of the bid, and the offeror does not supplement the information, as a rule, the board should make its view on the matter public in the statement of the board regarding the bid or, if necessary, in a separate release.

>> See Section (d) "Contribution of the Target Company to the Drafting of an Offer Document" of Recommendation 5 - "Statement of the Board of Directors of the Target Company Regarding a Bid".

IV COMPETING BIDS

RECOMMENDATION 8 - MEASURES OF THE TARGET COMPANY IN THE EVENT OF A COMPETING BID

Introduction

Once a bid for a target company is made public, it is possible that the board of directors of the target company may be contacted by a prospective competing offeror. A competing contact may also arrive before the first bid is made public. The board of directors may also itself contact a competing offeror in order to achieve an alternative bid.

If a competing contact results in a competing bid being made public during the offer period under the first bid in a situation where the board of directors of the target company has already made its statement on the first bid public, the board of the target company shall supplement its statement as soon as possible after the competing bid has been made public, however, no later than five banking days prior to the earliest possible close of the offer period under the first bid (Chapter 11, Section 17(1) of the SMA).

A competing bid may lead to the first offeror extending the offer period of its bid or otherwise changing the terms and conditions of its offer on the basis of Chapter 11, Section 17(1) of the Securities Markets Act. According to Chapter 5.5 (53) of the FIN-FSA RAG on Takeover Bids, launching a competing bid generates an obligation to supplement the offer document, and in connection with approval of the supplement, the Financial Supervisory Authority may require the offer period to be extended by no more than ten banking days, so that the holders of the securities subject to the bid may reconsider the offer (Chapter 11, Section 11(4) of the SMA). If the competing takeover bids are likely to limit the conducting of the business of the target company for an unreasonably long time, the Financial Supervisory Authority may, upon application of the target company, impose a deadline on the competing offerors, after which the terms and conditions of the bids may no longer be amended (Chapter 11, Section 17(3) of the SMA).

Recommendation 8

The board of directors of the target company shall afford equivalent treatment to all offerors of a serious nature.

Explanatory notes

a. General Responsibilities of the Board of Directors of the Target Company

During the takeover bid process, the target company may be contacted by several offerors competing with each other. In the event of a competing bid, in addition to specific obligations imposed by the Securities Markets Act, the role and duties of the board shall be evaluated in accordance with the general principles of company law upholding, where relevant, the same principles as referred to above in Chapter 2 "Position and Duties of the Board of Directors of the Target Company".

In a takeover bid situation, on the basis of the general principles of the Limited Liability Companies Act, the board of directors of the target company shall seek the best possible outcome for the shareholders. If the board receives a contact of a serious nature from a competing offeror, the board shall assess the matter, acquire sufficient and appropriate information on the competing proposal and compare the proposal with the previous bid.

>> ***See also, where relevant, Recommendation 2 - "Duty of the Board of Directors to Take Measures Due to a Proposal Relating to a Bid".***

Ensuring the interests of shareholders usually requires that the board of directors strives to achieve as high a value for the company's securities as possible, but on the other hand, also ensures that the competing offer is feasible. In practice, this may require entering into negotiations with the competing offeror. As a rule, a combination agreement possibly made by the board of the target company with the first offeror or a negotiation prohibition must not prevent the possibility of the board to evaluate the competing contact or to commence negotiations with the competing offeror if this may be in the interests of the shareholders

>> ***See Recommendation 3 - "Contractual Arrangements with the Offeror".***

In order for the board of directors of the target company to facilitate genuine competition between the possible competing offerors and, in so doing, to obtain the highest possible value for the securities of the company, the board of the target company shall, as a rule, act in such a manner that all competing offerors of a serious nature are offered equal possibilities to make a bid for the securities of the company. The board shall, however, take into consideration the case-specific circumstances relating to each offeror and each proposed bid, and for these reasons the board of directors may have a justified reason to deviate from the recommendation.

If, for example, the board of the target company has allowed a due diligence review for the first offeror, the board shall, as a rule, upon the request of the competing offeror, allow such due diligence review for the competing offeror that is similar in its essential parts, provided that this is in the interests of the shareholders and the circumstances surrounding the competing bids and the offerors are otherwise similar. However, allowing a review and the scope of a possible review shall be considered separately in each individual case.

>> *See Section (d) "Nature and Scope of Information to Be Provided" of Recommendation 6 - "Due Diligence Review in the Target Company".*

If the first bid has already been made public, allowing a due diligence review also requires that the proposed competing bid has, in the opinion of the target board, realistic possibilities to be completed, which means that the competing bid shall usually be, from the point of view of the company's shareholders, more beneficial than or, if different types of consideration are offered, at least as beneficial as the first bid which has already been made public.

If the board of directors of the target company is contacted about a potential competing bid and, in the opinion of the board of the target company, the contact is of a serious nature and realistic as to its potential of being completed, the board shall seek the best possible outcome for the shareholders complying with Recommendation 2 - "Duty of the Board of Directors to Take Measures Due to a Proposal Relating to a Bid" also as regards the contact concerning the competing bid. A combination or transaction agree-

ment, possibly already entered into between the target company and the first offeror, may also include provisions regarding the procedures to be complied with in the event of a competing bid.

>> *See Section (b) "Entering into a Combination or Transaction Agreement with the Offeror" of Recommendation 3 - "Contractual Arrangements with the Offeror".*

Because procedures concerning competing bids included in the combination or transaction agreement shall be broadly described in the offer document, they will also be known to a competing offeror when it is planning the launching of a competing bid.

b. Statement of the Board of Directors of the Target Company and Possible Changes Thereto

When supplementing its statement due to a competing bid in accordance with Chapter 11, Section 17(1) of the Securities Markets Act, the board of directors shall compare the first bid with the competing bid and, in accordance with Chapter 11, Section 13 of the Securities Markets Act, express its opinion on the new competing bid. If the board decides in its evaluation to recommend the acceptance of the competing bid to the holders of the securities of the company, the board shall, in practice, withdraw its recommendation possibly given to the first bid and make public a new statement that recommends the acceptance of the competing bid. When the board of directors supplements its statement, the principles outlined above in Recommendation 5 - "Statement of the Board of Directors of the Target Company Regarding a Bid" shall be adhered to when applicable.

In the event of a competing bid, the board of directors of the target company shall also, in other respects, consider continuously whether they need to inform the markets of a prospective competing bid or possibly supplement the statement of the board on the bid.

c. Effects of a Competing Bid on the First Bid and the Target Company's Application for a Deadline for Amending the Terms and Conditions of the Takeover Bid

Pursuant to the Securities Markets Act, the first offeror has the right to extend the offer period under its bid to match that of the competing bid and also to otherwise amend the terms and conditions of the bid (Chapter 11, Section 17(1) of the SMA). In case of voluntary bids, the first offeror may also decide on the lapsing of its bid before the offer period under the competing bid has expired (Chapter 11, Section 17(2) of the SMA). In the event the competing bid has been made public, those holders of securities of the target company that have already accepted the first bid have the right to withdraw their acceptance of the first bid during the validity period of the first bid, provided that the completion trades of the first bid have not yet been made (Chapter 11, Section 16(3) of the SMA).

In certain situations, competing bids can be considered to limit the conducting of the business of the target company for an unreasonably long time. In such situations, the Financial Supervisory Authority may, upon application of the target company, impose a deadline on the competing offerors, after which the terms and conditions of the bids must no longer be amended. The deadline can be set no earlier than ten weeks from the date the first bid was made public (Chapter 11, Section 17(3) of the SMA). When considering whether to apply for a deadline, it is appropriate to examine the situation in light of the general principles of the Limited Liability Companies Act, taking account of the interests of both the company and all its shareholders.

d. Insider Issues

Information of a prospective competing bid may, depending on the stage of preparations of the bid, be considered insider information before the competing bid is made public. Both the offeror and the board of directors of the target company are obliged to administer insider information and to ensure that it remains confidential as required by the takeover bid process.

>> See Section (c) "Discussions with Major Shareholders of the Target Company" of Recommendation 1 - "Ensuring Prerequisites to Complete a Bid", and Section (d) "Insider Issues" of Recommendation 2 - "Duty of the Board of Directors to Take Measures Due to a Proposal Relating to a Bid".

If the offeror of the first bid receives information on a forthcoming competing bid before it is made public, the offeror is then considered an insider. However, information on the forthcoming competing bid shall not prevent the first offeror from completing its previously announced bid in accordance with the terms and conditions thereof. Because, in such a case, the terms and conditions of the bid have been drafted and made public already before the first offeror received insider information (i.e. information on a forthcoming competing bid), such information shall not prevent the offeror from acquiring securities of the target company in accordance with the terms and conditions of the bid (Chapter 14, Section 2(8) of the SMA). Information on a competing bid does, however, prevent purchases of securities of the target company outside of the public takeover bid.

V THE BID AND ARRANGEMENTS RELATING TO A BID

RECOMMENDATION 9 - ACQUISITION OF SECURITIES OF THE TARGET COMPANY FROM THE MARKET

Introduction

The offeror may also seek to acquire securities of the target company directly from the markets before it has decided to launch a public takeover bid and made the decision public pursuant to the Securities Markets Act (Chapter 11, Section 9 of the SMA). Prior to making a bid public, securities are generally acquired in order to promote the prerequisites to complete the forthcoming bid. A prerequisite to such acquisitions is that the offeror shall not possess insider information regarding the target company or its securities. Acquisitions of securities of the target company prior to the bid being made public may affect the amount and form of consideration to be offered. When certain limits are exceeded, prospective acquisitions of securities must also be made public pursuant to the flagging provisions under Chapter 9 of the Securities Markets Act. In other respects, the Securities Markets Act does not contain specific provisions regarding the issue.

The abuse of insider information is a criminal offence under the Penal Code (see Chapter 51, Sections 1–2 of the Penal Code). The Securities Markets Act also imposes a general prohibition to use insider information in securities trading (see Chapter 14, Section 2 of the SMA). However, the preparatory works of the Securities Markets Act previously in force stated that unpublished information on a decision made by a natural person, such as information on a takeover bid possessed by the offeror before the offeror made a decision regarding the public takeover bid or prior to the disclosure of the bid, is not considered to constitute insider information (see Government Proposal 318/1992, p. 35) and no changes have since taken place regarding the matter. Similar opinions have also been adopted in other countries.

In many cases, the holders of securities sell their securities on the stock exchange once a bid has been made public. Often larger blocks of securities of the target company are also offered directly to the of-

feror. For an offeror who strives to acquire full ownership in the target company, it is important to be able to acquire securities on sale also outside of the takeover bid. Once a bid has been made public, acquisitions outside of the takeover bid may be made within the rules concerning the use of insider information in public trading on the stock exchange or outside of it either before, during or after the closure of the offer period.

Recommendation 9

If the offeror intends to acquire securities subject to the bid outside of the public takeover bid after the bid has been made public, the offeror must disclose its intentions before launching the acquisitions.

Explanatory notes

a. Acquisitions of the Securities of the Target Company Prior to the Bid Being Made Public

It is generally considered that information on the intent of an offeror to launch a public takeover bid does not prevent the acquisition of securities of the target company on the offeror's account prior to the bid being made public.

The situation may, however, be considered differently if the offeror has commenced discussions concerning the bid with the board of directors of the target company or with the major shareholders of the company and received a favourable response from them. If, for example, the major shareholders of the target company have expressed their preliminary interest in accepting a prospective bid at the price proposed by the offeror or if the board of the target company has indicated its willingness to consider recommending the bid, information on such discussions is likely to increase the likelihood of the completion of the bid. The more certain information the offeror possesses with respect to the attitude of the major shareholders or the board of the target company towards the proposed bid, the closer one is to such information that prevents the offeror from acquiring securities of the target company prior to the bid being made public.

However, in this connection, it should be noted that under any circumstances any natural persons employed by the offeror or otherwise aware of the preparations for the bid may not acquire securities of the target company on their own account or on the account of a party other than the offeror without committing the offence of prohibited use of insider information.

If the offeror is otherwise in possession of insider information concerning the target company or its securities (for example, information acquired in a due diligence review regarding an insider project that is pending in the company), the offeror may not acquire securities of the target company or launch a bid before such information is made public.

Acquisitions of securities of the target company prior to a bid may affect the pricing of the forthcoming bid. The Financial Supervisory Authority's regulations and guidelines on takeover bids include interpretations regarding the consideration offered and circumstances under which and on what basis exceptions may or shall be made to the price set forth under the main rule of the Securities Markets Act.

>> For disclosure and flagging issues relating to acquisitions of securities prior to the bid, see the flagging provisions under the Securities Markets Act (Chapter 9 of the SMA) and the Financial Supervisory Authority's regulations and guidelines 8/2013 (The Reporting of Significant Holdings and Voting Rights).

A party planning to launch a takeover bid should also pay attention to the fact that the decision to launch a public takeover bid shall be made public immediately and communicated to the target company (see Chapter 11, Section 9 of the SMA).

b. Acquisitions of the Securities of the Target Company After the Bid has Been Made Public

When a bid has been made public, the offeror may before and during the offer period acquire the securities subject to the bid even outside of the public takeover bid, for example, in continuous public trading on the stock exchange. The offeror may decide when to make such acquisitions and it may, at its discretion, interrupt or discontinue the acquisitions entirely. Acquisitions may not, however, be

made if the offeror possesses insider information. On this issue, see Section e) "Insider Issues" of Recommendation 6 - "Due Diligence Review in the Target Company".

The offeror may also acquire the securities subject to the bid through block trade transactions executed on the stock exchange, or in trading that takes place outside the stock exchange.

Information about the intent to acquire securities outside of the public takeover bid must be made public. The relevant information can be included in other notices relating to the bid, such as the release that concerns making the bid public and/or the release relating to the result of the bid, depending on which phase of the bid the acquisitions are planned to be made in.

The offeror may not acquire securities subject to the bid at a higher price than the consideration offered outside of the bid or for nine (9) months after the completion of the bid without raising the consideration offered or paying compensation (see Chapter 11, Section 25 of the SMA).

RECOMMENDATION 10 - PREPARING FOR INFORMATION LEAKS

Introduction

The preparations regarding a public takeover bid are usually confidential and no information regarding the forthcoming bid is disclosed before a final decision on launching the bid has been made.

It is important for the protection of the investors that the company's shareholders receive sufficient and appropriate information in connection with the bid. The uninterrupted functioning of the markets in turn requires that information relating to a potential bid or preparations for it is not leaked to the markets before the bid is made public.

If the issuer or a party acting on its account or behalf discloses unpublished information that is likely to materially affect the value of the security to a party not obliged to keep the information confidential, the Securities Markets Act requires that the company discloses the information to the market at the same time. If the disclosure of information was unintentional, the company must disclose the information to the market without undue delay (Chapter 6, Section 6 of the SMA).

Recommendation 10

To prevent information leaks, both the offeror and the board of directors of the target company must take care of the confidentiality aspects at various stages of the bid process. The offeror and the board of the target company shall, however, be prepared in advance for the possibility that information regarding the proposed public takeover bid may leak to the markets prior to the bid being made public, and create sufficient readiness to attend to the provision of information in potential leak situations.

Explanatory notes

It is advisable for both the offeror and the board of directors of the target company to be prepared for the possibility that information regarding the forthcoming bid may leak to the markets prior to the bid being made public. Therefore, it is important to create sufficient readiness to attend to provision of information in a controlled and appropriate manner in the event of potential leak situations during the process.

If information regarding a forthcoming bid of a serious nature that the board of directors of the target company has knowledge of has leaked to the markets, the board shall make public a release regarding the matter without undue delay. The board shall also otherwise monitor publicly available information regarding the company and the development of the price of the securities of the company. If anything abnormal occurs in relation to these, the board shall consider whether the company should make public a release regarding the matter.

>> For more details on disclosure of information, see Chapter 6, Section 6 of the Securities Markets Act, NASDAQ OMX Helsinki Rules and Section 5.2.1 of FIN-FSA RAG on Takeover Bids.

In order to avoid information leaks, the target company and the offeror shall enter into a non-disclosure agreement at the earliest possible stage of the process. If the preparation of the bid requires the target company to discuss with other parties too, it is important for the board of directors of the target company to ensure that each such party signs a non-disclosure agreement or is otherwise obliged to keep the information confidential. Otherwise, the target company might be obliged to make the information public to the markets on the basis of Chapter 6, Section 6 of the Securities Markets Act.

The offeror shall also naturally take care of the confidentiality aspects in a similar manner to the target company. If the offeror is a listed company and the information regarding the preparations of a bid is also likely to have a material effect on the value of the securities of the offeror, the offeror might also be obliged to make the information public to the markets as described above in accordance with the duty of disclosure regulations concerning it.

Insofar as the obligations concerning administration of insider information, the confidentiality aspects and the duty of disclosure are based on mandatory legislation, binding official regulations or the rules of the stock exchange, they cannot be deviated from on the basis of the 'comply or explain' principle.

Issues relating to the duty of disclosure in connection with a due diligence review conducted in the target company have been separately discussed in Section f) "Duty of Disclosure" of Recommendation 6 - "Due Diligence Review in the Target Company".

RECOMMENDATION 11 - DISCLOSURE OF A BID

Introduction

The disclosure of information regarding a public takeover bid may have a material effect on the price of the securities of the target company. Information on a public takeover bid may also affect the business operations of the target company. For the reliable functioning of the markets it is important that the offeror makes public information on factors that affect the evaluation of a bid in a timely manner and to a sufficient extent.

The offeror shall make information on the public takeover bid public immediately after the offeror has reached a decision on the matter. Pursuant to the Securities Markets Act, the decision to launch a public takeover bid shall be made public immediately as well as being communicated to the company that has issued the securities subject to the bid (target company). After the decision is made public, it shall, without delay, be communicated to the representatives of the employees or, where there are no such representatives, to the employees in the target company and the offeror.

>> See Chapter 11, Section 9(1–2) of the SMA and Section 5.2.1 of FIN-FSA RAG on Takeover Bids.

Pursuant to Chapter 11, Section 9(3) of the Securities Markets Act, the following matters must be mentioned when making a takeover bid public:

- volume of the securities subject to the bid;
- validity period of the bid and the consideration offered;
- any other terms of material importance set for the completion of the bid;
- procedure to be applied if acceptances cover a greater volume of securities than that subject to the bid; and
- whether the offeror has committed itself to complying with the recommendation referred to under Chapter 11 Section 28(1) of the Securities Markets Act and if not, an explanation for not making the commitment.

In addition to the above, when a takeover bid is made public also any other factors affecting the evaluation of the merits of the bid must be made public.

>> See Section 5.2.1 (10) of FIN-FSA RAG on Takeover Bids.

Pursuant to the Securities Markets Act, the party under a duty to disclose towards investors under Chapter 11 of the Securities Markets Act is obliged to ensure all investors equal access to the factors likely to have a material effect on the price of the securities (Chapter 1, Section 4 of the SMA). An offeror shall afford equivalent treatment to all holders of the securities subject to the bid (Chapter 11, Section 7 of the SMA).

If a party planning to launch a takeover bid must make its plans concerning the potential bid public due to, for example, information leaks, in making the information public attention must be paid to the ensuring that on the basis of information made public the parties are able to evaluate what is the likelihood of the takeover bid to be published at a later date and what the prospective timing of the bid will be. According to the Financial Supervisory Authority's interpretation, a party planning to launch a takeover bid must make public the aspects it is aware of and which are essential for the evaluation of the merits of the bid at that time, and reveal any information on any factors of uncertainty concerning the completion of the takeover plans.

>> *On disclosure of plans concerning a takeover bid, see Section 5.2.1 (13)–(15) of FIN-FSA RAG on Takeover Bids.*

Recommendation 11

The offeror shall in its release regarding the announcement of the takeover bid make public matters that the offeror is aware of and which are essential for the evaluation of the bid and its merits. In addition to the information required by the Securities Markets Act, such matters include:

- ***information on the offeror;***
- ***information on the securities owned or otherwise controlled by the offeror and which are issued by the target company and are subject to the bid;***
- ***the proportion of share capital and voting rights in the target company held by the offeror;***
- ***the securities that are subject to the bid;***
- ***the material terms and conditions of the bid, including the premium offered in relation to the market value of the target company and the principles used for the calculation of the premium;***
- ***information on the financing required or other necessary arrangements related to the consideration;***

- ***information on the shareholders of the offeror who have announced that they will support possible measures relating to the completion of the bid at the general meeting of the offeror;***
- ***information on how many shareholders have committed themselves, conditionally or unconditionally, to accept the bid and how many have otherwise announced their support for the bid;***
- ***information on other arrangements relating to the bid between the offeror and holders of the securities subject to the bid;***
- ***information on the reasons for the bid;***
- ***if securities of the offeror are being offered as offer consideration, information on the effects of the bid and of the consideration paid on the business operations, profit and financial position of the offeror (incl. effect calculated per share, if possible);***
- ***estimate of the date when the offer document will be made public;***
- ***information about the necessary authority approvals; and***
- ***estimate of the duration of the takeover bid process and on the completion of related arrangements, or information about why the offeror is not able to make such an estimate.***

In addition, the offeror shall state how it has ensured that it has the necessary prerequisites to complete the bid. In particular, it shall be mentioned if there are special elements of uncertainty relating to the completion of the bid.

Explanatory notes

In order to avoid disturbing the price formation of the securities subject to the bid, it is important that all matters known to the offeror that affect the value of the securities and are essential in relation to the evaluation of the bid and its merits are made public when the bid is made public. The duty to disclose information pursuant to the Securities Markets Act cannot be deviated from on the basis of the 'comply or explain' principle.

In certain circumstances, due to, for example, a threat or actual information leaks concerning the takeover bid project, there may be a particular need to make information on a planned takeover bid public, even though the decision regarding the bid has not yet been reached. Even when there is no certainty that a bid will be launched, the information on the fact that a public takeover bid is being planned may already affect both the business operations of the target company and the price of its shares. In particular, the offeror shall ensure that false markets are not created in the securities of the target company in such a way that the rise or the fall of the price of the securities becomes artificial and the normal functioning of the markets is distorted.

>> On this issue, see also Section 5.2 (13)–(15) of FIN-FSA RAG on Takeover Bids.

The obligation to make a decision to launch a takeover bid public shall not be avoided by arbitrarily postponing a formal decision on the bid. In the leak situations described above, the target company is, in any event, required to comply with the disclosure obligations under the Securities Markets Act and the rules of the stock exchange.

In general, in compliance with the principle of equal treatment, a bid shall be addressed to all the holders of a certain class of securities. However, delivery of the releases or offer documents to holders of the securities who are domiciled or have an address outside Finland might require compliance with the legislation (securities markets legislation, in particular) and other special regulations of the country in question. This may result in significant additional costs for the offeror, and require, in certain circumstances, unreasonable enquiries or measures. In accordance with the requirement of

equivalent treatment, it shall be considered to be sufficient that the releases and offer documents concerning the bid are made available as provided for by the Securities Markets Act. In certain special cases, however, equivalent treatment may require that a public takeover bid is also extended to such countries. Such a special case may arise, for example, when a company has made public offerings in certain countries or a large number of holders of the securities of the target company are domiciled in a certain country. Special cases must always be considered on a case-by-case basis.

RECOMMENDATION 12 - INVOKING A CONDITION SET FOR THE COMPLETION OF THE BID

It may be important for the offeror to set conditions for the completion of the bid. Pursuant to the Securities Markets Act, the offeror of a voluntary bid may set conditions for the completion of the bid. A mandatory takeover bid can be conditional only on acquisition of the necessary official decisions (Chapter 11, Section 15 of the SMA). With the exception of the mandatory takeover bid, there is no specific legal regulation on the content of the conditions set on the completion of prospective bids or on what kind of conditions are allowed on completion of voluntary public takeover bids.

However, not all types of conditions may be set on the completion of a takeover bid. Pursuant to the Securities Markets Act, an offeror shall afford equivalent treatment to all holders of the securities of the target company (Chapter 11, Section 7 of the SMA). Pursuant to the general rule under Chapter 1, Section 2 of the Securities Markets Act, any activities on the securities markets must be conducted in compliance with good securities markets practice. The offeror must not take such measures that prevent or materially hamper the completion of the public takeover bid or fulfilment of its material conditions (Chapter 11, Section 8(1) of the SMA).

According to the Financial Supervisory Authority, the offeror must not invoke a condition set for the completion of the bid, unless non-completion of the condition is of material significance to the offeror with a view to the planned takeover. The Financial Supervisory Authority recommends that the offeror, as far as possible, should seek to ensure that the conditions set for the completion of the bid are satisfied.

>> See Section 4.3(15) and Section 5.4 (45) of FIN-FSA RAG on Takeover Bids.

Recommendation 12

If the offeror decides to invoke a condition set for the completion of the bid and not to complete the bid, the grounds for such a decision shall be made public in the release on the matter.

Explanatory notes

If the offeror has set conditions for the completion of the bid and it is clear that one of these conditions will not be satisfied, then the offeror should carefully evaluate whether the condition left unsatisfied has such material significance for the offeror regarding the planned takeover that it is justifiable not to complete the bid.

[On invoking a condition for a takeover bid, see also Section 4.3 (15) and Section 5.4 (45) of FIN-FSA RAG on Takeover Bids].

The provisions of the Securities Markets Act and the regulations of the Financial Supervisory Authority applied to invoking a condition for a takeover bid cannot be deviated from on the basis of the 'comply or explain' principle.

Frequently used conditions in voluntary public takeover bids include, among others, the condition that the offeror obtains the required authority approvals for the acquisition of the target company, and that the terms and conditions of such approvals are commercially acceptable to the offeror. In particular, approvals granted by the competition authorities are often essential to the completion of the bid.

Completion of a takeover bid may require approvals by the competition authorities on more than one jurisdiction. This may create a situation in which the authorities in some countries may have significantly longer processing times for the matter than the market areas that are significant for the completion of the takeover. To avoid endangering the completion of the takeover bid or it becoming unreasonably extended due to the duration of the administrative processes in jurisdictions of lesser importance, in such situations, the offeror may consider waiving a condition set for approval by com-

petition authorities for a country which is not a significant market area with a view to the takeover. As a rule, the offeror should not invoke the condition for official approval if it is not essential in the relevant phase of the bidding process with a view to overall evaluation and it is possible to waive it.

Often, it is important for the offeror to acquire complete control of the target company, for which reason reaching, for example, the 90 per cent squeeze-out threshold is often a condition to completion of the bid. The offeror may withdraw the bid, for example, if the offeror has set the completion of the bid conditional on reaching a certain ownership threshold in the target company or on a particular resolution being made by the general meeting of the target company and it is evident that such a condition will not be satisfied. When, in addition, a bid is made on the basis of information available to the offeror, the offeror may require that no such material change has taken place in the target company of which the offeror was unaware or that otherwise has a material effect on the bid.

If conducting a due diligence review in the target company has been a precondition for completing the bid, the offeror should not invoke a due diligence condition regarding such matters that were clearly not known to the offeror already at the time when the bid was launched.

>> See also Section 4.3 (15) of FIN-FSA RAG on Takeover Bids.

As a rule, invoking such a condition would require that information that the offeror has not been aware of when the terms and conditions of the offer have been drafted and that are of material significance to the offeror with a view to the planned acquisition become revealed during the due diligence review conducted after the launch of the bid or otherwise.

If a public takeover bid is made in agreement with the board of directors of the target company, it is possible that the offeror and the target company will draft a specific combination or transaction agreement. It may be important to the parties that the bid is completed in compliance with such an agreement and only on the provision that the parties remain in agreement on the completion date

of the bid. In other words, validity of the combination or transaction agreement has thus been set as a condition to completion of the bid. In the combination or transaction agreement, the target company often gives the usual representations and warranties concerning the target company and its business operations. Insignificant or non-essential breach of such representations and warranties is not usually considered a factor that would entitle the offeror to withdraw from the bid due to a potential termination or expiry of the combination or transaction agreement.

Invoking the conditionality of financing requires that the availability of the financing has been explicitly named as a condition to completion of the bid. Availability of the financing cannot be named as a condition to completion of the bid if the financing of the bid is not conditional.

VI MEASURES AFTER THE BID

RECOMMENDATION 13 - INTENTION TO ACQUIRE THE REMAINING SECURITIES OF THE TARGET COMPANY

Introduction

The offeror often aims to acquire title to all the securities of the target company. In a takeover bid situation, a 100 per cent approval level is seldom achieved, for which reason the offeror usually first aims to gain ownership of 90 per cent of the shares and voting rights in the target company with the help of the bid, after which it aims to acquire the remaining shares in a squeeze-out procedure pursuant to the Limited Liability Companies Act.

Pursuant to the Limited Liability Companies Act, a shareholder with more than nine-tenths (9/10) of the shares in the company and voting rights carried by all the shares (redeemer) has the right to redeem the shares of the other shareholders at a fair price. A shareholder whose shares may be redeemed shall have the right to demand that the shareholder's share be redeemed (Chapter 18, Section 1 of the CA). Both the offeror and the minority shareholders therefore have the right, but not the obligation, to demand redemption of the minority shares (squeeze-out/sell-out). The squeeze-out/sell-out right only concerns the shares in the target company and not other securities issued by the target company.

After the expiration of the offer period, the offeror shall, without delay, make the result of the bid public, pursuant to the provisions of the Securities Markets Act. If the bid has been conditional, it shall simultaneously be notified whether the offeror shall complete the bid or not (Chapter 11, Section 18 of the SMA).

The offeror is also entitled to extend the offer period after the offeror confirms that it will complete the bid and the bid becomes unconditional. This makes it possible for the offeror to acquire additional shares on the market and the remaining shareholders an opportunity to accept the bid even after the completion of the bid has been confirmed and the first completion trades under the takeover bid have already been made.

>> See also Section 5.3.2 (32) of FIN-FSA RAG on Takeover Bids.

After the offer period has ended, the offeror may also otherwise seek to acquire more securities in the target company on the market to increase its share of ownership. To ensure openness of the markets, the offeror should make any such intentions public.

Recommendation 13

The offeror shall already in the offer document regarding the public takeover bid disclose its potential intention to demand a squeeze-out of minority shares under the Limited Liability Companies Act. In the release regarding the result of the bid, the offeror shall make public its intention to initiate squeeze-out proceedings under the Limited Liability Companies Act or to purchase more securities of the target company on the market. If the offeror has announced that it will initiate squeeze-out proceedings under the Limited Liability Companies Act, the offeror shall demand a squeeze-out without undue delay after the offeror has gained title to more than nine-tenths (9/10) of the shares and voting rights carried by the shares in the target company.

Explanatory notes

If the offeror intends to redeem the shares of other shareholders of the target company after having gained title to more than nine-tenths (9/10) of the shares and voting rights carried by all the shares in the company, the offeror shall disclose such intentions already in the offer document.

Both a minority shareholder and an offeror may, for their part, demand squeeze-out of the minority shares under the Limited Liability Companies Act and initiate squeeze-out proceedings. The offeror may demand the squeeze-out of all the shares owned by minority shareholders in the same proceedings. It is generally expedient that the offeror initiates the squeeze-out proceedings and that the squeeze-out of all the remaining minority shares is dealt with in the same proceedings.

If the offeror has acquired more than nine-tenths (9/10) of the shares and voting rights in the target company through the public takeover bid or otherwise in connection with the bid, and intends to initiate squeeze-out proceedings of minority shares under the Limited Liability Companies Act, then notice of the forthcoming squeeze-out proceedings shall be included in the release regarding the result of the bid.

If the offeror has decided to purchase more securities of the target company on the market after the close of the offer period, the notice of such intention shall also be included in the release regarding the result of the bid.

RECOMMENDATION 14 - INTEGRATION MEASURES

Introduction

An offeror usually intends to acquire the entire share capital of the target company and other securities giving title to shares in the target company and to delist the securities of the target company and integrate the business operations of the target company or to initiate other proceedings in order to gain control over the company and its business operations. Such integration measures must not violate the rights of the minority shareholders.

The offeror may consider a merger as a possible alternative arrangement in a situation where it has not, through the public takeover bid, gained title to more than nine-tenths (9/10) of the shares and voting rights carried by the shares in the target company. A limited liability company may merge with another limited liability company, in which event the assets and liabilities of the merging company are transferred to the acquiring company, and the shareholders of the merging company receive shares in the acquiring company as merger consideration. The merger consideration may also consist of cash, other assets and future undertakings (Chapter 16, Section 1 of the CA). The principle of equal treatment is usually applied in mergers, taking into consideration that, if they so wish, the shareholders of the merging company may continue as shareholders in the acquiring company. If some other consideration than shares in the offeror is offered in the merger following the bid, there must be a justified reason for this.

Recommendation 14

If the intention of the offeror is to combine the target company with the offeror through a merger or to execute other similar transactions regarding the target company in connection with the bid, this shall be mentioned in connection with the offeror making public its plans regarding the continuance of the operations of the target company in the offer document.

If the intention in a merger is to offer other merger consideration than shares in the acquiring company, this shall be mentioned in the offer document.

Explanatory notes

Integration and other measures aimed at acquiring control are often executed after the completion of a public takeover bid when the offeror has ensured the acquisition of the entire share capital of the target company. It is, however, possible for transactions to be executed between the offeror and the target company, even when the offeror does not own the entire share capital of the target company. The target company is, however, a separate company from the offeror and its activities shall continue to comply with the provisions of the Limited Liability Companies Act. After the offeror has gained control of the target company, the board of directors of the target company shall ensure that no business transactions shall confer an undue benefit to the offeror at the expense of the target company or its other shareholders. In takeover bid situations, it is important to pay special attention to ensuring that transactions between the offeror and the target company comply with the general principles of the Limited Liability Companies Act. It is especially important to ensure equal treatment of the shareholders as long as the offeror does not own the entire share capital of the company.

The completion of a bid is often conditional on that the offeror gains title to more than nine-tenths (9/10) of the shares and of the voting rights carried by the shares in the target company, so that the offeror may redeem the shares of the minority shareholders and control the target company as the sole

shareholder. It may nevertheless be possible to combine the target company with the offeror, even though the offeror has not gained title to the entire share capital of the target company. If, for example, the offeror has acquired more than two-thirds ($2/3$) of the voting rights carried by the shares in the target company, the offeror usually controls a sufficient majority to decide on a merger of the target company with the offeror. The offeror may consider a merger as a possible alternative arrangement in a situation where it has not, through the public takeover bid, gained title to more than nine-tenths ($9/10$) of the shares and voting rights carried by the shares in the target company. If the intention of the offeror is to merge the target company into the offeror in such a case, information about such an intention shall be made public in the offer document. The offer document shall also, if possible, specify the amount and type of merger consideration.

If some other type of consideration than shares in the acquiring company is offered in the merger following the takeover bid, there should be a specific reason for doing so. Such reason can be based on, for example, the company's prerequisites for running business operations or the synergies achieved through the ownership structure. If the purpose of offering other consideration is, for example, to prevent certain shareholders from becoming shareholders in the acquiring company, the procedure may violate the principle of equal treatment. As specified in the preparatory works of the Limited Liability Companies Act (Government Proposal 109/2005, p. 146), the use of cash consideration may be necessary insofar as the conversion ratio would otherwise lead to granting of fractional shares. Without a justified reason, the conversion ratio of shares shall not be set as such that in a merger, minor shareholders would only receive a cash consideration while major shareholders mainly receive a share consideration.

VII OTHER OBSERVATIONS

OBSERVATIONS REGARDING PROVISIONS BASED ON THE ARTICLES OF ASSOCIATION OF THE TARGET COMPANY

Introduction

The preparation, terms and conditions, and completion of a public takeover bid may, in addition to the provisions of the Securities Markets Act, be affected by various provisions in the articles of association of the target company.

The articles of association of some Finnish listed companies impose an obligation to redeem the remaining shares in the company on a shareholder who has acquired a certain holding in the company. Usually, the redemption threshold is set at one-third (1/3) and one-half (1/2) of the shares or the voting rights carried by the shares in the company. Typically, the articles of association contain detailed provisions on the redemption price and the procedures to be complied with in redemption. The provisions of the articles of association concerning both the redemption price and procedures often differ from the corresponding provisions of the Securities Markets Act and the Limited Liability Companies Act. This results in various practical problems and leads to an additional offer process that is separate from the tender offer and squeeze-out proceedings provided for by law.

A listed company may include provisions based on the 'optional articles' of the Takeover Directive in its articles of association. Pursuant to the Takeover Directive, the implementation of the provisions in Article 9 (Obligations of the board of the target company) and Article 11 (Breakthrough) is at the discretion of each Member State. If a Member State has not implemented said articles on the basis of the Directive, however, the target company always has the independent option of adopting these provisions if the general meeting so resolves (Article 12(2) of the Takeover Directive). The provisions of Chapter, 11 Section 14 of the Securities Markets Act and of the Limited Liability Companies Act are regarded as fulfilling the requirements of Article 9.

Finland has not implemented the provisions of Article 11. The following section b) describes the procedures in compliance with the applicable laws and recommendations for a Finnish company to adopt the more detailed provisions of Article 11 of the Takeover Directive pursuant to Article 12(2), if it so wishes.

a. Redemption Obligation Based on the Articles of Association

Pursuant to the provisions of the Securities Markets Act previously in force, the threshold triggering the obligation to launch a bid was two-thirds (2/3) of the voting rights in the target company. As control of a listed company may, in fact, already be acquired with a significantly smaller proportion of voting rights, a redemption obligation based on the articles of association was seen as a way of protecting the company's minority shareholders in a situation where control of the company is concentrated on a certain party.

Pursuant to the provisions of the Securities Markets Act presently in force, a shareholder is obliged to launch a mandatory bid for all the shares in the company and for all the securities giving title to shares when the portion of the shareholder in the company exceeds three-tenths (3/10) or alternatively one-half (1/2) of the voting rights carried by the shares in the company (see Chapter 11, Section 19 of the SMA). The voting rights threshold triggering the obligation to launch a bid thus corresponds to a large extent to the redemption thresholds traditionally defined in the articles of association. This has reduced the need to retain separate provisions regarding the redemption obligation in the articles of association.

The Securities Markets Act contains an exemption from the obligation to launch a bid where the redemption threshold has been reached by acquiring the securities through a public takeover bid made for all the shares issued by the target company and for all the securities giving title to shares (see Chapter 11, Section 21 of the SMA). This principle corresponds to the provisions of the Takeover Directive. The redemption provisions typically included in articles of association do not contain such an exemp-

tion. The articles of association may therefore provide for a redemption obligation arising even after a voluntary bid launched for all the securities of the target company.

The process resulting from the articles of association, which may be either separate from or parallel to the processes provided for by law, causes practical difficulties and confusion, not least because the provisions included in the articles of association on the redemption price and the procedures usually differ from those of the corresponding provisions in the Securities Markets Act and the Limited Liability Companies Act. A redemption clause in the articles of association may also cause speculative trading on the market.

As a result of the problems caused by redemption clauses in articles of association, the offerors in a number of public takeover bids completed in Finland have made the completion of the voluntary takeover bid conditional on the removal of the redemption clause from the articles of association of the target company by the resolution of a general meeting before title to the securities tendered in the bid passes to the offeror. If the bid was subject to such a condition, the general meeting of the target company has usually resolved to remove the redemption clause in accordance with the terms and conditions of the bid and, as a result, the redemption clause has not provided such protection for the minority shareholders of the company as originally intended.

If, in spite of the provisions of the Securities Markets Act concerning mandatory bids, a provision concerning the redemption obligation in the articles of association is considered necessary, it is recommended that the price determination and the procedures prescribed by it correspond to the corresponding provisions of the Securities Markets Act. Uniformity of the provisions on price determination and procedures tends to reduce the practical problems described above. With regard to redemption clauses already contained in the articles of association of listed companies, achieving such uniformity requires amendment of the articles of association. It may, however, be difficult to amend or totally remove a redemption clause already existing in the articles of association of a company where the ar-

ticles of association require a particularly large majority to resolve on such amendments or removals.

If a redemption clause in the articles of association does not correspond to the provisions of the Securities Markets Act in the manner described above and the provisions of the articles of association result, for example, in a higher price than the provisions of the Securities Markets Act, the offeror shall launch two separate bids possibly running parallel to each other, one in compliance with the Securities Markets Act and another in compliance with the articles of association. The offeror shall clearly present the differences between the two bids, either in each offer document or in other documentation relating to the bid. The provisions of the Securities Markets Act on the obligation to increase the price or to pay compensation may also become applicable in such circumstances (see Chapter 11, Section 25 of the SMA).

If an offeror has a redemption obligation under the articles of association of the target company, then, in conjunction with the redemption bid based on the articles of association, the provisions concerning public takeover bids shall be complied with, as applicable and taking into account the provisions of the articles of association.

>> See *FIN-FSA RAG on Takeover Bids, Section 5.1 (5)*.

b. Breakthrough Clause in Article 11 of the Takeover Directive

Pursuant to the optional Article 11 of the Takeover Directive, Member States should ensure that certain restrictions on the transfer of securities and voting rights shall not apply vis-à-vis the offeror during the offer period or where, following the bid, the offeror holds at least three-quarters (3/4) or more of the capital carrying voting rights. According to Article 11 of the Directive, such restrictions on the transfer of securities that prevent the offeror from acquiring securities of the target company shall not be invoked during the offer period. Similarly, the effects of such restrictions on voting rights that prevent the holders of securities of the target company from exercising rights carried by the securities should, in certain circumstances, be removed when a general meeting resolves on defensive measures after a public takeover bid has been announced.

Such restrictions include, for example, voting restrictions that restrict the exercise of voting rights in a general meeting and agreements between the holders of securities by which the exercise of voting rights or the transfer of shares or other securities have been restricted. These provisions of the Takeover Directive have not been implemented in Finnish legislation.

Further, no similar provisions to those in Article 11 of the Takeover Directive have been used in articles of association of Finnish listed companies.

The preparatory works of the Securities Markets Act concerning the implementation of the Takeover Directive (Government Proposal 6/2006) state that a company has the option of applying the provisions of Article 11 as required by the Directive pursuant to the Limited Liability Companies Act. On the basis of the provisions of the Limited Liability Companies Act concerning the amendment of the articles of association, the articles of association may provide that the provisions on a different number of votes per share or on a voting restriction limiting the number of votes of a shareholder contained in the articles of association shall not be applicable during a public takeover bid. Chapter 5, Sections 28 and 29 of the Limited Liability Companies Act shall be taken into account when deciding on the provisions of the articles of association. Pursuant to Chapter 5, Section 28 of the Limited Liability Companies Act, when resolving on an amendment of the articles of association that reduces the rights of an entire share class, both the consent of the shareholders holding the majority of the relevant share class and the support of the shareholders holding at least two-thirds (2/3) of the shares of the relevant class represented at the meeting are additionally required.

The equal treatment of shareholders shall not be violated even by decisions taken by a qualified majority. Even in this case, the effect of decision-making on the fair price of the shares held by different shareholders shall be taken into account. If rights are removed due to decisions taken on the basis of Article 11, then pursuant to the Takeover Directive, equitable compensation shall be provided for any loss suffered by the holders of those rights. The Limited Liability Companies Act does not specifi-

cally provide for the possibility to pay the aforementioned compensation. There are cases in Finnish corporate practice where, in conjunction with the combination of share classes, the voting rights lost by the holders of shares with multiple voting rights have, for example, been compensated for by way of a directed share issue, but there are also cases where no compensation has been paid for the combination of share classes. A directed share issue without payment, provided for in the Limited Liability Companies Act, might be used for this purpose. In such situations, the requirements set for the decision-making process in the combination of share classes may still be applied.

Pursuant to Article 11 of the Takeover Directive, restrictions on voting rights based on agreements between the holders of the target company's securities or restrictions on the transfer of securities could also be subject to intervention in a takeover bid situation. It could thus be provided in relation to a particular company that restrictions on voting rights based on agreements between the holders of the company's securities or restrictions on the transfer of securities shall not be applied in relation to the offeror in a takeover bid situation. It is, however, unclear whether the provision is intended to be or may be used to intervene in a contractual relationship between two parties. The provision may be interpreted as concerning national structures which are such that the aforementioned contractual arrangements are variously binding on the target company or the offeror, for example, by way of registration or through rules corresponding to the articles of association of the target company. It is deemed in the aforementioned preparatory works of the Securities Markets Act (Government Proposal 6/2006, p. 12) that, in Finland, the provisions in shareholder agreements concerning the exercise of voting rights or the conveyance of shares are binding primarily only on the contracting parties and not, for example, on the target company or the offeror. Thus, the Takeover Directive may be interpreted as not preventing an arrangement in accordance with the laws of Finland as currently in force, according to which a party that breaches a shareholder agreement, for example, by exercising voting rights or conveying shares is contractually liable towards the other contracting parties.

OBSERVATIONS ON THE DUTY OF DISCLOSURE AT VARIOUS STAGES OF THE TAKEOVER BID PROCESS

Pursuant to the ‘continuous duty of disclosure’, the target company has a duty to disclose all its decisions as well as all information on the company that are likely to have a material effect on the value of the securities of the company (Chapter 6, Section 4 of the SMA). There is, however, no requirement to disclose matters that are under preparation. When the offeror is the issuer as referred to under Chapter 6, Section 1(2) of the Securities Markets Act, the continuous duty of disclosure pursuant to the Securities Markets Act is applicable to the offeror as well.

When the offeror decides to launch a public takeover bid, pursuant to the Securities Markets Act, it shall make its decision public immediately (Chapter 11, Section 9(1) of the SMA)

>> See Recommendation 11 - “Disclosure of a Bid”.

The target company shall, pursuant to its continuous duty of disclosure, also make the information regarding the decision of the offeror public by means of the company’s own stock exchange release. If the target company and the offeror have entered into a combination or transaction agreement, the target company shall make information regarding the agreement and its material terms and conditions public without delay after the signing of the agreement.

>> See Section b) “Entering into a Combination or transaction Agreement with the Offeror” of Recommendation 3 - “Contractual Arrangements with the Offeror” for terms and conditions deemed essential.

Usually, the signing of a combination or transaction agreement and the final decision of the offeror to launch a bid take place simultaneously and thus are also made public simultaneously.

The signing of a possible combination or transaction agreement and disclosure of the bid is usually preceded by a preparation phase between the parties. The preparation phase of the bid often includes, for example, conducting negotiations in respect of the non-disclosure agreement and its signing, the possible due diligence review and negotiations regarding the bid. The target company and the offeror may also enter into different procedural agreements during the preparation phase. Usually, such agreements and, for example, the decision of the target company regarding the due diligence review, may be considered part of the preparation of the bid and there is thus, as a rule, no requirement to make them public. The disclosure issues shall, however, be considered separately in each individual case.

In the later stages of the takeover process, the board of directors of the target company shall also ensure that the company fulfils its duty of disclosure. Typically, the target company will have to make public, among others:

- the statement given by the board regarding the bid, including an indication as to whether the target company is committed to complying with the Takeover Code and if not, an explanation as to why not, and potential amendments made to the statement later;
- the possible statement by the personnel of the target company regarding the bid;
- information regarding the possible general meeting convened as a result of the bid;
- pursuant to Chapter 11, Section 14 of the Securities Markets Act, the reason for a potential decision to refrain from transferring an issue to the general meeting for a decision;
- information regarding a prospective competing bid;
- information regarding the result of the bid;
- ‘flagging notifications’ regarding the ownership of the offeror and the shareholders;
- information regarding a prospective mandatory takeover bid and its result;
- information regarding the prospective squeeze-out proceedings under the Limited Liability Companies Act; and
- information regarding the possible delisting of the securities of the company.

Depending on the takeover bid process, the target company may also have to make other matters relating to the bid public, which is why the list set out above is not exhaustive. If, for example, information regarding the negotiations taking place between the offeror and the target company has been made public to the market, the target company shall also make information on the termination of such negotiations public.

See Recommendation 11 - “Disclosure of a Bid”

In addition to making the bid public, the offeror’s duty to disclose also includes, for example, giving flagging notifications regarding ownership. When the offeror is an issuer as referred to under Chapter 6, Section 1(2) of the Securities Markets Act, the continuous duty of disclosure pursuant to the Securities Markets Act is applicable to the offeror as well. >> **See FIN-FSA RAG on Takeover Bids, Section 5.7 (58)–(61) concerning public statements related to takeover bids.**

During the offer period, if the offeror intends, in addition to giving flagging notifications, to give notifications on the progress of the takeover bid, the Financial Supervisory Authority recommends that the offeror indicates this in the offer document. In accordance with the Financial Supervisory Authority’s regulations and guidelines, providing information on the progress of the takeover bid should in such a case be systematic and based either on notifications given at specified times notified in advance (e.g. on a weekly basis) or the achievement, passing or falling short of predetermined ownership or voting rights thresholds.

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The image features a dark teal background with several large, white, curved shapes that resemble stylized leaves or petals. These shapes are layered and overlap, creating a sense of depth and movement. The bottom portion of the image transitions into a lighter, muted green color, with more abstract, flowing shapes that suggest a landscape or a continuation of the organic forms above.