



*The Panel on Takeovers and Mergers*  
CENTRAL CHAMBER OF COMMERCE OF FINLAND

# **RECOMMENDATION REGARDING THE PROCEDURES TO BE COMPLIED WITH IN TAKEOVER BIDS**

*(UNOFFICIAL TRANSLATION)*

**HELSINKI TAKEOVER CODE**

## TAKEOVER CODE WORKING GROUP AND THE PREPARATION OF THE RECOMMENDATION

On 23 November 2005 the Confederation of Finnish Industries EK, The Central Chamber of Commerce of Finland and OMX Exchanges Ltd established a working group ("Takeover Code working group") in order to prepare a recommendation, the purpose of which was to promote good securities markets practice and provide direction for the procedures to be complied with in takeover bids.

Group Chief Counsel Ilona Ervasti-Vaintola was appointed Chairman of the working group.

The members of the working group included:

Attorney-at-law Johan Aalto,  
Senior Advisor Manne Airaksinen,  
Attorney-at-law Tomas Lindholm,  
Senior Deputy Director Leena Linnainmaa,  
Director Jaakko Raulo and  
Executive Director Joakim Åberg.

The secretariat of the working group included Attorney-at-law Klaus Ilmonen, Attorney-at-law Paula Linna, and from The Central Chamber of Commerce of Finland, Legal Counsel Anne Horttanainen and Legal Counsel Jaakko Turunen.

In addition, on 2 March 2006 the Confederation of Finnish Industries EK, The Central Chamber of Commerce of Finland and OMX Exchanges Ltd established a monitoring committee, which was heard and kept informed during the course of the assignment of the working group. The monitoring committee was composed of representatives of issuers, other parties operating in the securities markets and representatives of the authorities.

Attorney-at-law Pekka Merilampi was appointed Chairman of the monitoring committee.

The members of the monitoring committee included:

Senior Legislative Counsellor, Ilkka Harju, Ministry of Finance,  
Attorney-at-law Mika Ilveskero, Finnish Bar Association,  
Head of Legal Affairs Timo Kaisanlahti, Federation of Finnish Insurance Companies and Varma Mutual Pension Insurance Company,  
Director Erkki Kontkanen, Finnish Bankers' Association,  
Managing Director Antti Mäkinen, eQ Bank Ltd,  
Authorised Public Accountant, Partner Rabbe Nevalainen, Finnish Institute of Authorised Public Accountants,  
Director, Head of Office, Jarmo Parkkonen, Financial Supervision Authority,  
Chairman Kari Rytönen, Finnish Venture Capital Association,  
Group Vice President, General Counsel Juha Salonen, Huhtamäki Plc,  
Managing Director Markku Savikko, Finnish Association of Securities Dealers,  
Professor Matti J. Sillanpää, Turku School of Economics,  
Vice President, Assistant General Counsel Kaarina Ståhlberg, Nokia Plc,  
Chief Counsellor Pekka Timonen, Ministry of Trade and Industry and  
Director Tapani Varjas, Aventum Partners Ltd.

During the course of its work, the working group met 24 times and the monitoring committee 5 times. The working group examined the practices complied with in takeover bids for drafting the recommendation. The working group also examined the self-regulatory structures relating to takeover bids in the United Kingdom and Sweden. The chairman and the secretaries of the working group familiarised themselves with the functioning of the self-regulatory body of the United Kingdom in London, and the working group, during the course of its work, heard Rolf Skog, who took part in the preparation of the Swedish regulations on takeover bids.

The working group circulated the recommendation for comments in September 2006. Comments were requested from a total of over 70 parties including the most relevant ministries, universities, the Financial Supervision Authority and interest groups, law firms, auditing entities and investment banks operating with takeover bids. During October–December 2006, the recommendation was finalised on the basis of the comments received.

The working group stated that the procedures and practices to be complied with in takeover bids develop constantly. Therefore, domestic and international development shall be followed and the recommendation updated when necessary.

## THE PANEL ON TAKEOVERS AND MERGERS AT THE CENTRAL CHAMBER OF COMMERCE OF FINLAND

The Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland is an independent body at The Central Chamber of Commerce of Finland. The Panel promotes good securities markets practice in Finland. The Chamber of Commerce Act and the Securities Markets Act include provisions relating to the Panel. The Panel started its operations on 1 September 2006.

Pursuant to Section 1 of the Rules of the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland the Panel shall issue, in accordance with Chapter 6, Section 17 of the Securities Markets Act, recommendations and statements promoting compliance with good securities markets practice, which shall relate to the actions of the management of the offeree company regarding a 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 addition, in accordance with Chapter 6, Section 17 of the Securities Markets Act, the Panel may, upon application, issue recommendations for resolutions regarding individual issues relating to the recommendations. The Panel may also by other means promote the development of good securities markets practice.

The Chairman of the Panel is Professor Matti J. Sillanpää. The first Vice-Chairman of the Panel is Master of Laws Birgitta Kantola and the second Vice-Chairman is Licentiate of Laws, Attorney-at-law Juhani Erma.

The other members of the Panel include (the personal deputies of each member have been stated in parenthesis):  
Group Chief Counsel Ilona Ervasti-Vaintola (Vice President Marja Hanski),  
Group Vice President Kari Hietanen (Vice President, Assistant General Counsel Kaarina Ståhlberg),  
Head of Legal Affairs Timo Kaisanlahti (Professor, Deputy Director Matti Turtiainen),  
Professor Eva Liljebloom (Professor Seppo Villa),  
Partner Kari Rytönen (Researcher Sari Lounasmeri),  
Group Vice President, General Counsel Juha Salonen (General Counsel Harri Pynnä),  
Authorised Public Accountant Anna-Maija Simola (Director of Corporate Development Eija Kuittinen) and  
Executive Director Tarja Tyni (Executive Director Joakim Åberg).

The Central Chamber of Commerce of Finland shall elect the Chairman, Vice-Chairmen and the other members of the Panel for three years at a time. The term of office of the above-mentioned members continues until 31 August 2009.

Legal Counsel Anne Horttanainen and Legal Counsel Jaakko Turunen act as the secretaries of the Panel.

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## RECOMMENDATION REGARDING THE PROCEDURES TO BE COMPLIED WITH IN TAKEOVER BIDS

Pursuant to Chapter 6, Section 17 of the Securities Markets Act, the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland shall issue recommendations and statements promoting compliance with good securities markets practice, which shall relate to the actions of the management of the offeree company regarding a 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 addition, the Panel may, upon application, issue recommendations for resolutions regarding individual issues relating to the recommendations, or by other means promote the development of good securities markets practice.

On 15 December 2006, the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland, after having received a statement from the Financial Supervision Authority, issued the following recommendation pursuant to Chapter 6, Section 17 of the Securities Markets Act:

### INTRODUCTION

#### 1. OBJECTIVES OF THE RECOMMENDATION

The purpose of the recommendation is to promote the development of good securities markets practice and provide direction for the procedures to be complied with in takeover bids (public tender offers).

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

#### 2. REGULATIONS REGARDING TAKEOVER BIDS AND THEIR SCOPE OF APPLICATION

The regulation of takeover bids in Finland is based on legislation. This recommendation is meant to supplement the legislation applicable to takeover bids, and therefore the recommendation 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 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 implementation of the Takeover Directive has mainly been achieved by means of amendments to the Securities Markets Act and to the Act on the Financial Supervision Authority. The amendments of the law enacted in order to implement the Takeover Directive as well as thereto relating decrees by the Ministry of Finance entered into force on 1 July 2006.

*Securities Markets Act.* The provisions concerning takeover bids are included in Chapter 6 of the Securities Markets Act (495/1989, "SMA"), which regulates both voluntary and mandatory bids. The provisions apply, as provided for by the Directive, to a bid, which is made for securities that are publicly traded in Finland, or which entitle to such securities. In certain parts the provisions of the Securities Markets Act also concern bids for securities that are publicly traded in another state, where these securities have been issued by a company registered in Finland.

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

minority shareholders at a fair price. The provisions correspond to the requirements set by the Takeover Directive.

*Act on the Financial Supervision Authority.* The Financial Supervision Authority supervises compliance with the Securities Markets Act, and the scope of its authority also includes takeover bids. The Act on the Financial Supervision Authority (587/2003) includes specific provisions regarding the right of the Financial Supervision Authority to supervise the actions of certain parties taking part in takeover bids. The Financial Supervision 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.

*Standards and interpretations issued by the Financial Supervision Authority.* The Financial Supervision Authority has issued Standard 5.2c concerning takeover bids ("Takeover Bid and the Obligation to Launch a Bid"). The provisions of the Standard are partly based on the duties assigned to the Financial Supervision Authority in Chapter 6 of the Securities Markets Act and partly on the authority of the Financial Supervision Authority as the supervisor of the securities markets. The Standard also contains reference to the recommendations issued by the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland. The Financial Supervision Authority has confirmed in the Standard that compliance with good practice in takeover bids usually requires that the offeror and the stockbrokers acting as advisors for the parties in a takeover bid shall comply with, among others, the recommendations and statements issued by the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland.

*Recommendations and statements issued by the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland.* The provisions regarding the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland were added to the Securities Markets Act by means of the Act on Amendment of the Securities Markets Act (442/2006). The purpose of the amendment of the Act was not to endow the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland with authority overlapping with the authority of the Financial Supervision Authority. Pursuant to Chapter 7, Section 1 of the Securities Markets Act, the Financial Supervision Authority shall supervise compliance with the Securities Markets Act and the provisions and regulations issued thereunder as well as with the rules and contract terms relating to public trading in securities and the other trading procedure referred to in Chapter 3, Section 16 of the Securities Markets Act. Pursuant to Chapter 6, Section 17 of the Securities Markets Act, the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland shall issue recommendations and statements promoting compliance with good securities markets practice, which shall relate to the actions of the management of the offeree company regarding a 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 Panel shall request a statement of the Financial Supervision Authority on the recommendations prior to their issue. The recommendations may also be included as a part of the Rules of the Stock Exchange. The Panel may also, upon application, issue recommendations for resolutions regarding individual issues relating to the recommendations.

## 3. PRINCIPLES OF INTERPRETATION OF THE REGULATIONS

Very different kinds of questions may arise in respect of takeover bids and the takeover bid procedures evolve continuously. The recommendations relating to 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; 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 offeree 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 an offeree 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 of the offeree 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 of an offeree 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 offeree 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 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.

- The offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

The above-mentioned 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 these recommendations. The principles are also included in Financial Supervision Authority Standard 5.2c.

The recommendations apply to situations where the purpose is to assign control of the offeree company through the means of a takeover bid. The recommendations provide guidelines for questions and problems arising in such situations and give recommendations regarding the procedures to be complied with relating to the actions of the offeror and the offeree company and the management and the shareholders of the offeree company. The recommendation is drafted for the purpose of voluntary takeover bids. However, in connection with mandatory takeover bids many questions arise, which are similar to those that arise in voluntary takeover bids. The recommendation shall also be complied with in these situations, when applicable. The recommendation shall not concern other types of mergers and acquisitions.

#### 4. VALIDITY OF THE RECOMMENDATION

Pursuant to Chapter 2, Section 1 of the Securities Markets Act, securities shall not be marketed or acquired in business by giving false or misleading information or by using procedure that is contrary to good practice or otherwise unfair. Good practice in securities trade means principles and rules, adherence to which is deemed, according to the informed and unbiased opinion among stock traders and stockbrokers, to constitute correct and, for all of the parties, fair and reasonable business practice. The aim has been to bring together in this recommendation, both in its drafting phase and when evaluating the views which have arisen in the commenting phase, such procedures as may be deemed, in the above-mentioned manner and, for all of the parties, fair and reasonable business practice. Compliance with the procedures in accordance with the recommendation shall be considered to be above-mentioned good practice in securities trade. The recommendation concerns all parties involved in a takeover bid, such as the offeror, the offeree company and their advisors.

According to Financial Supervision Authority Standard 5.2c ("Takeover Bid and the Obligation to Launch a Bid"), the compliance with good practice in a takeover bid usually requires, among others, that the offeror and the stockbrokers acting as advisors for the parties in a takeover bid shall comply with the recommendations and statements issued by the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland. The Financial Supervision Authority is able, within the limits of its authority, to take measures if the offeror, or the stockbroker acting as its advisor, acts contrary to it in an individual case.

The Limited Liability Companies Act governs the activity of the bodies of the offeree company also in takeover bids. The recommendation 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 offeree company in the different phases of a takeover bid. Compliance with the procedures in accordance with the recommendation 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 offeree company in takeover situations. Furthermore, such compliance also ensures that neither the offeror nor the offeree company 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 offeror and the offeree company has, in accordance with the requirement of Chapter 1, Section 8, acted with due care and promoted the interests of the shareholders in a takeover bid situation.

The procedures and practices to be complied with in takeover bids evolve constantly. In addition, very different situations and questions may arise in connection with takeover bids. This recommendation 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 recommendation. Nevertheless, the interpretation principles defined above in Section 3 shall be applied in such situations. In such situations, one may apply for a statement from the Panel on Takeovers and Mergers at The Central Chamber of Commerce of Finland on the basis of Chapter 6, Section 17 of the Securities Markets Act.

## RECOMMENDATIONS

### 1. PREPARATION OF A BID

#### RECOMMENDATION 1 - ENSURING PREREQUISITES TO COMPLETE A BID

##### Introduction

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

For functioning markets it is essential that relevant information regarding a 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 offeree company that the prerequisites for completing the takeover bid in accordance with its terms can be evaluated on the basis of the available information.

##### Recommendation 1

***Prior to making a takeover bid public, the offeror shall carefully ensure that it has the necessary prerequisites to complete the bid. The offeror shall especially ensure that it has sufficient cash funds at its disposal or that it has, prior to making the takeover bid public, ensured the availability of necessary financing. Furthermore, the offeror shall strive to find out whether there are any specific obstacles to the bid due to authority approvals or comparable reasons.***

##### Grounds

###### (a) Ensuring the Financing

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 6, Section 3, Subsection 4 of the SMA).

According to the preparatory work of the Securities Markets Act, ensuring means that the offeror has sufficient funds at its disposal or it has, prior to making the bid public, taken measures to arrange for necessary financing. Ensuring shall not, however, require that the cash amount agreed on in the financing arrangement would be in the offeror's possession at the time the bid is made public.

Prior to making the bid public, the offeror shall, if necessary, enter into an agreement with a credit institution regarding the financing of the takeover bid. In this regard, it may be considered sufficient that a decision regarding the availability of the financing has been made and the amount of financing and the main terms have been agreed between the credit institution and the offeror. The availability of the financing may be agreed on a conditional basis, so that the credit institution sets customary terms for providing the financing. The terms and conditions of the financing shall comply with the requirements imposed by the Securities Markets Act, meaning that they shall be customary on the financing markets. See Financial Supervision Authority Standard 5.2c, according to which financing may, for example, be conditional upon that no material adverse change takes place on the financing markets or in the offeree company, or upon the takeover bid being completed in accordance with its terms.

Any terms and conditions of the financing arrangements which are essential to the evaluation of a bid shall be made public at the time the bid is disclosed (see Recommendation 18 - "Disclosure of a Bid"). See also Financial Supervision Authority Standard 5.2c on this issue.

Prior to making the bid public, the offeror shall carefully strive to ensure that it has the prerequisites to pay in full also other types of considerations than cash. In this regard, the offeror must, for example, be able to convene a general meeting in order to issue new shares or other securities offered as a consideration. Any terms and conditions relating to the payment of other types of consideration than cash that are essential for the evaluation of the bid, shall also be made public at the time the bid is disclosed (see Recommendation 18 - "Disclosure of a Bid").

###### (b) Authority Approvals and Regulations

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.

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 offeree company and its shareholders, and information relating to these matters is important for the shareholders. The offeror shall, when making the bid public (see Recommendation 18 - "Disclosure of a Bid"), indicate its opinion regarding the authority approvals required and its estimate of the duration of the process.

Compliance with different regulations and minimum requirements (for example, minimum capital requirements) is required in certain business areas. The offeror shall ensure that it fulfils or is able to fulfil these requirements.

If the offeror is unable to make an assessment of the necessary authority approvals and regulations, this shall be mentioned when making a bid public. The situation mentioned above may mainly arise as a consequence of time constraints, for example, when making competing bids public.

### **(c) Other Conditions for the Completion of a Bid**

If the completion of a bid requires special measures by the offeror, such as resolutions by a general meeting or the issuance of securities, the offeror shall prepare for these measures prior to making the bid public. According to the grounds of the Securities Markets Act, for example, ensuring payment of a share consideration requires that, if necessary, a general meeting is convened at the time of disclosure of a bid in order to approve a directed issue of shares. However, the offeror is not required beforehand to ascertain the position of the company's shareholders on the resolutions required at a general meeting. However, if the offeror has specific reason to believe that a sufficient number of shareholders will not vote in favour of the proposal, the offeror should, prior to making the bid public, also find out, to the extent possible taking into account applicable insider regulations, the opinion of those shareholders whose support is in practice needed for the resolutions to be adopted by the general meeting.

See also Recommendation 18 - "Disclosure of a Bid" on this issue.

## **2. POSITION AND DUTIES OF THE BOARD OF DIRECTORS OF THE OFFEREE COMPANY**

### **RECOMMENDATION 2 - DUTY OF THE BOARD OF DIRECTORS TO CONSIDER A PROPOSAL RELATING TO A BID**

#### **Introduction**

An offeror often approaches the board of directors or the managing director of an offeree company prior to making a bid public. At the latest the decision of the offeror to launch a takeover bid as referred to in the Securities Markets Act shall be made public and communicated to the offeree company (Chapter 6, Section 3, Subsection 1 of the SMA). The Securities Markets Act also imposes the board of directors of the offeree company certain obligations relating to a takeover bid.

The Limited Liability Companies Act does not contain provisions specifically relating to the position and duties of the board of directors of the offeree company in a takeover bid situation. 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 is generally considered to have an active role also in connection with ownership arrangements relating to the company. In practice, the ownership structure of the company may, among other things, affect the role of the board of the offeree company, for example in a situation where the offeree company has a majority shareholder and the offeror has first approached such shareholder.

#### **Recommendation 2**

***If the board of directors of the offeree company is contacted with a proposal relating to 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 shall acquire sufficient and appropriate information to support its evaluation.***

#### **Grounds**

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). 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).

A 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 the interests of the shareholder collective, in which situation 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. The board has the duty to seek the best outcome for the shareholders. This may require the board to undertake active measures.

If the board of directors of the offeree company is approached with a proposal relating to a takeover bid, the chairman of the board of the offeree company often receives the first contact. The contact may also be directly addressed to the board as a whole or to one of its individual members or also to the managing director of the company. If an individual person 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, the whole board shall always be informed that such contact has been made.

When the board of directors of the offeree company receives information on a contact relating to a takeover bid, it shall consider whether the contact 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 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, without undue delay, 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. This requires careful evaluation of, besides the bid itself, the other alternatives available to the company (on this issue see Recommendation 3 - "Evaluation of the Alternatives of 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 (principle of equality, see Chapter 1, Section 7 of the CA). The board shall also ensure that any possible conflicts of interest of its individual members or other side effects do not affect the functioning of the board (situations of incompetence due to the likelihood of bias; see Chapter 6, Section 4 of the CA and Recommendation 7 - "Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid").

### RECOMMENDATION 3 - EVALUATION OF THE ALTERNATIVES OF THE COMPANY

#### Introduction

When the board of directors of the offeree company has received information about a proposal relating to a takeover bid that is of a serious nature, its task is to seek the best possible outcome for the shareholders. The proposed takeover bid is not necessarily the best possible alternative for the shareholders, rather the company may also have other alternatives. Examining and evaluating these alternatives forms a part of the evaluation of the bid. The board of directors of the offeree company does not, however, have an obligation to seek competing bids.

#### Recommendation 3

***The board of directors shall carefully evaluate the proposed takeover bid and explore other alternatives available to the company. The board shall seek the best outcome for the shareholders. This may in practice mean that negotiations are initiated with the offeror unless the board considers that continuing the company's operations as an independent company or some other solution is the best alternative for the shareholders.***

#### Grounds

In a takeover bid situation, the interests of the shareholders require that the board of directors evaluates the bid itself and its consequences and also compares 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 offeree 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, the board shall, however, consider whether it would be in the interests of the shareholders to approach such other party.

The board of directors of the offeree 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 14 - "Measures of the Offeree 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 might 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.

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. The task of the board is then to achieve the best possible price for the securities of the company, and 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 shall also decide who will represent the company in the negotiations. Possible issues of disqualification of the members of the board shall be taken into account in the decision-making (see Recommendation 7 - "Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid").

The board of directors does not have an 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. In its decision-making, the board shall place specific emphasis on ensuring that the decision is in the interests of the shareholders, and not, for example, in the interests of the operative management of the company.

The possible measures that may be taken by the board of directors in respect of frustrating a bid have been discussed separately in Recommendation 9 - "Possible Measures of the Board of Directors Due to a Bid".

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## RECOMMENDATION 4 - DISCUSSIONS WITH MAJOR SHAREHOLDERS

### *Introduction*

The completion of the bid is usually conditional upon the acquisition of a certain ownership level. The takeover bid

requires the support of the shareholders in order for it to be successful. If the offeree 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. The offeror may therefore seek to assess the prerequisites for the completion of the bid by entering beforehand into discussions with the major shareholders of the offeree company (on this issue see Recommendation 15 - "Arrangements Between the Offeror and the Major Shareholders of the Offeree Company"). Also the board of directors of the offeree company shall evaluate whether the board may and whether the board should acquire information on the opinion of such shareholders in relation to the bid even before making the bid public. The board does not, however, have an obligation to discuss the bid beforehand with the shareholders.

### **Recommendation 4**

***In certain situations it may be justified for the board of directors to inquire the opinion on the bid of those shareholders who are relevant for the completion of the bid before deciding to contribute to the bid.***

### **Grounds**

The board of directors of the offeree company has a duty to treat all shareholders equally (see Chapter 1, Section 7 of the CA). The board of directors also has, in accordance with its duty of care and loyalty, a duty to seek the best outcome for the shareholders in a takeover bid situation.

Assessment of the prerequisites to complete the bid is in the interests of both the company and all of its shareholders. If the completion of the bid is, for example, conditional upon the offeror acquiring a certain ownership level, and if the company has one or a few major shareholders, who could alone or together prevent the completion of the bid, entering into discussions with such shareholders may be justified. As a rule, such discussions shall not be considered to cause unjustified benefit to the shareholders in question at the expense of the other shareholders of the company or the company. If it becomes apparent in such discussions that the prerequisites to complete the bid do not exist because the shareholders in question 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.

If the board of directors decides to contact the major shareholders of the company in order to acquire information on their opinion on the bid, it shall ensure that insider information and confidentiality issues are appropriately taken care of in the discussions (see on this issue also Recommendation 10 - "Administration of Insider Issues").

Pursuant to Chapter 5, 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 Financial Supervision Authority Standard 5.2b, 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. Such a situation may arise, for example, 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. A takeover bid is a typical example of such a situation. The prohibition to disclose insider information does not therefore limit the possibility of the board of directors of the offeree 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 insider information and confidentiality issues are handled appropriately (see on this issue Recommendation 10 - "Administration of Insider Issues").

The fact that shareholders who have been informed of the bid will generally become insiders shall be taken into account in connection with possible discussions.

## RECOMMENDATION 5 - COMMITTING TO A NEGOTIATION PROHIBITION

### Introduction

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

- so-called 'exclusivity arrangements' where the board is requested to agree not to, under any circumstances, discuss potential competing transactions with other parties; and
- so-called '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 offeree company shall carefully assess whether it is able to accept possible negotiation prohibitions and to what extent.

### Recommendation 5

***The board of directors shall ensure that in all circumstances it is able to fulfil its duty of care and loyalty towards the company and its shareholders. The board may limit its possibilities to act by committing itself to a negotiation prohibition only for a certain fixed period to the extent it is in the interests of the shareholders.***

### Grounds

The board of directors of the offeree company shall act with due care and seek the best outcome for the shareholders. In a takeover bid situation, the interests of the shareholders require that the board explores the other alternatives available to the company 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 duty of care and loyalty and to comply with the principle of equality of the shareholders. Exclusivity arrangements are therefore problematic from the view of the duties of the board.

If the offeror sets a negotiation prohibition as a precondition for launching the bid and for making it public, the board of directors shall evaluate whether it would in any case be in the interests of the shareholders and therefore justifiable for the board to commit to the negotiation prohibition. In order for the negotiation prohibition to be in the interests of the shareholders, it shall usually be limited to a non-solicitation commitment, meaning that the board itself is not actively seeking competing bids or other alternative transactions.

The duration of the negotiation prohibition shall be limited. The negotiation prohibition shall not 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 (see in more detail competing bids, Recommendation 14 - "Measures of the Offeree Company in the Event of a Competing Bid"). The board should not commit to a negotiation prohibition before it has explored the alternatives available to the company and before having ascertained that the proposed bid is, in the opinion of the board, a good alternative for the shareholders. In practice, the negotiation prohibition has been agreed upon, for example, before starting a due diligence review or in a combination agreement between the offeror and the offeree company, in connection with the signing of which the board usually also decides to recommend the bid (on this issue see Recommendation 6 - "Entering into a Combination Agreement with the Offeror").

## RECOMMENDATION 6 - ENTERING INTO A COMBINATION AGREEMENT WITH THE OFFEROR

### Introduction

In Finnish takeover practice, the offeror and the offeree company have often signed a so-called 'combination agreement' prior to making the bid public. The combination agreement is usually a type of process document, where the offeror and the offeree 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 offeree company who are not parties to the agreement.

The combination agreement may serve on the one hand the interests of the offeror and on the other hand the interests of the offeree company and its shareholders. The board of directors of the offeree company shall evaluate whether it is appropriate to enter into a combination agreement in a certain case, and if so, what is the appropriate content of the agreement. A combination agreement is not necessarily feasible in all situations, nor is there any obligation to enter into such an agreement.

### Recommendation 6

***The board of directors may enter into a combination agreement with the offeror if the board considers this to be in the interests of the shareholders. However, the combination agreement shall not prevent the board of directors from acting in the interests of the shareholders, for example in a situation where a competing bid is launched for the offeree company. The offeree company shall make information on the signing of the combination agreement and its material terms and conditions public through its own stock exchange release immediately after the signing of the agreement.***

### Grounds

When evaluating the feasibility of a combination agreement, the board of directors shall base its evaluation on the interests of the company and its shareholders. By negotiating a combination 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 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 beforehand on the procedures to be followed in connection with the bid.

The board of directors shall ensure that the combination 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 (on this issue see Recommendation 5 - "Committing to a Negotiation Prohibition"). The board shall, among other things, issue its possible recommendation regarding the bid with the qualification that the board retains the possibility to examine any potential competing bid and, if necessary, to amend or withdraw its recommendation. Further, the combination agreement shall not unreasonably limit the conducting of the business of the offeree company during the validity of the agreement.

The board of directors of the offeree company should be careful in agreeing to pay a so-called 'break-up fee'. The break-up fee is defined as an arrangement where the offeree company (or the offeror) promises to pay the offeror (or the offeree 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 on in the combination agreement between the parties or otherwise.

The board of directors of the offeree 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 (on this issue see Recommendation 21 - "Resolutions of a General Meeting Relating to a Bid").

If the offeror establishes as a precondition for launching a bid potentially beneficial for the shareholders that the offeree 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 offeree 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 offeree company shall make the information on the signing of the combination 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 be deemed material are, among others, the terms concerning 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. The main content of the combination agreement shall be described in the offer document to be made public subsequently.

## RECOMMENDATION 7 - DISQUALIFICATION ISSUES AND OTHER CONNECTIONS OF THE MEMBERS OF THE BOARD OF DIRECTORS TO A BID

### Introduction

The board of directors and its individual member shall, unconstrained by secondary influences, further the interests of the shareholder collective. If the board or its members have material connections to the offeror or interests connected to the bid, or if a member of the board is, directly or indirectly, personally involved in the launching 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.

### Recommendation 7

***A member of the board of directors shall comply with the disqualification rules of the Limited Liability Companies Act, and a disqualified member of the board shall not participate in the decision-making regarding the takeover bid.***

***A member of the board who has material connections to the offeror and the completion of the bid shall assess whether he or she is able to participate in the consideration of the bid. A member of the board of the offeree company or another person belonging to the management of the offeree company participating in the launching of the bid may be considered to have a material connection to the offeror and to the completion of the bid and he or she shall not participate in the preparation of the decision regarding the bid in the offeree company.***

***A member of the board shall disclose his or her material connections relating to the offeror and the completion of the bid to the board. The board shall, in connection with its statement regarding the takeover bid, inform the shareholders of all disqualifications of the members of the board and of their material connections to the offeror or to the completion of the bid, as well as how these have been taken into account when the board has evaluated the bid.***

## Grounds

### (a) Disqualification and Material Connections

Members of the board of directors shall 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 (see Chapter 6, Section 4 of the CA). However, the board or its members may have connections to the offeror or to the major shareholders of the company or another connection 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 these situations, the member of the board in question shall assess whether he or she is able to participate, unconstrained by secondary influences, in the decision-making relating to the bid. When evaluating the situation, the board member shall also consider whether he or she is expected to receive such substantial benefit or detriment through the completion of the bid that does not concern the shareholders of the offeree company in a similar manner. The shareholders of the offeree company and other investors shall receive information on such connections or relations when evaluating the bid, which is why these shall be made public. Such disclosure can be made in connection with the disclosure of the statement by the board of the offeree company regarding the takeover bid.

Special attention shall be given to the position of the board of directors of the offeree 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, launch a takeover bid for the offeree company, or where a member of the board is a major shareholder in the offeror. A member of the board of the offeree 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. 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.

The management of the offeree company and the members of the board of directors often possess unpublished information that is likely to have a material effect on the value of the securities of the offeree company. In situations where the

members of the board of the offeree company or persons who are members of the management of the company participate in the making of the bid, special attention shall be paid to compliance with insider rules (on this issue see Recommendation 12, part (e) - "Due Diligence Review in the Offeree Company - Insider Issues"). In addition, it should be noted that information received by the management of the company regarding the company is generally confidential and shall not be used against the interests of the company or its shareholders.

#### **(b) Preparation of the Measures and Decision-making of the Board of Directors of the Offeree Company**

The board of directors of the offeree company may, if necessary, nominate those of its members who do not have the above-mentioned connections to prepare the measures to be taken by the board relating the bid, in which case the members of the board who do have such connections shall not participate in the evaluation of the bid. The members of the board, who are free from such connections, shall act independently in accordance with their normal duty of care and loyalty in the preparation of the bid. The members shall focus carefully on the preparation work and acquire information needed for preparation work. 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. If all the members of the board have in a takeover bid situation 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 responsibility and obligations of the board.

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 duty of 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. In a takeover bid situations, 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. However, it is possible that in this case the board does not constitute a quorum. In such a situation, those members of the board who are free from connections would prepare the measures of the board, but the board should consider whether 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) Disclosure of Material Connections**

Pursuant to the Securities Markets Act, the board of directors of the offeree company shall make its statement regarding the takeover bid public. In connection with the disclosure of the statement, the board shall disclose:

- the above-mentioned connections, including material connections relating to the completion of the bid;
- which members of the board have participated in the consideration of the bid and in giving the statement; and
- whether only those members of the board who do not have the above-mentioned connections have prepared the measures of the board of directors resulting from the bid.

A member of the board of directors shall inform the other members of the board of all such matters concerning his or her connections relating to the bid that are essential for evaluating whether his or her independence may be questioned.

#### **(d) 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 and other associated entities may own shares or other securities (options and other share derivatives) in the offeree company. Ownership of shares or other securities of the offeree company does not, in itself, prevent a member of the board from evaluating the bid unconstrained by secondary influences. In some cases, the option and other incentive programmes include terms and conditions relating to the completion of a takeover bid, including, for example, terms and conditions for using the subscription right or special rewards. Such arrangements may generally be considered 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 offeree 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 secondary influences to participate in the consideration of the bid in the offeree company. For example, an employee position may create a relationship of dependency with the offeror. 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 offeree company. Because the aim of a takeover bid is to transfer control to the offeror, such a person

should not participate in the consideration of the bid at least on the board of the offeree company. Such a person is still bound by the duty of loyalty under by the Limited Liability Companies Act and is, for instance, not permitted disclose confidential information about the offeree 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 shall, as a rule, be considered as a factor on the basis of which the member of the board cannot be considered to be unconstrained by secondary influences when considering the bid.

*Acceptance of the bid.* Offerors often aim to obtain a prior commitment from the major shareholders to accept the bid. Moreover, a member of the board of directors or his or her employer or other associated entity may, for its part, give such a commitment. However, it shall be noted that a commitment given by the last-mentioned parties will, as a rule, impact the ability of the member of the board to evaluate the bid unconstrained by secondary 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 secondary 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 offeree company may be dependent on the offeree 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 offeree company unconstrained by secondary 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.

## RECOMMENDATION 8 - STATEMENT OF THE BOARD OF DIRECTORS OF THE OFFEREE COMPANY REGARDING A BID

### Introduction

The board of directors of the offeree company shall draft and make public a statement regarding a takeover bid. The statement of the board is often of great significance for the completion of the bid. It is important for the shareholders of the offeree 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.

### Recommendation 8

***The board of directors of the offeree company shall, pursuant to Chapter 6, Section 6 of the Securities Markets Act, provide a well-founded assessment on the takeover bid for the decision-making of the holders of the securities subject to the bid and evaluate the effects of the plans presented by the offeror on the operations and employment of the offeree company. The board shall provide such an assessment to the best of its abilities. If the board is not able to evaluate the merits of the bid, it shall state this as its statement and provide grounds for its view.***

### Grounds

#### (a) Preparation of the Statement

Pursuant to Chapter 6, Section 6 of the Securities Markets Act, the statement shall set out a well-founded assessment on:

- 1) the bid from the perspective of the offeree company and the holders of the securities subject to the bid; and on
- 2) the strategic plans of the offeror presented in the offer document and on their likely effects on the operations and employment of the offeree company.

Providing a statement regarding the bid is part of the duties of the board of directors and it shall ensure that it has acted with due care and in accordance with the principles of the Limited Liability Companies Act in the preparation of the statement. The board shall, to a sufficient extent, examine the bid and its effect on the offeree 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 stand 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.

Pursuant to the Securities Markets Act, the board of directors of the offeree company shall set out a well-founded assessment on the bid from the perspective of the offeree 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.

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 offeree 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. The board does not, according to the grounds of the Securities Markets Act, have a special duty to otherwise examine the plans of the offeror. However, the board shall aim to evaluate the plans published by the offeror, especially in relation to the company's own strategy.

According to the grounds of the Securities Markets Act, it is not sufficient that the board describes the bid in a neutral manner, rather it shall adopt a stand regarding the bid. However, this shall not mean that the board should always either recommend the acceptance or the refusal of the bid. 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. If the board is not able to recommend acceptance or refusal of the bid, it shall provide a justified reason for its opinion.

The statement of the board of directors shall include information as to 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. If the opinion of the board on the statement is not unanimous, this shall be mentioned in the statement. These issues may be essential for the shareholders of the offeree company when evaluating the bid.

See Recommendation 7 - "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.

#### **(b) Expert Opinion**

The board of directors of the offeree company may use advisors when evaluating the 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 offeree company participate in the

launching of the bid or have committed to accept it on their part.

External advisors may, for example, be used for the evaluation of the merits of the consideration offered (a so-called 'fairness opinion'). In such a situation, the financial advisor seeks to evaluate the value of the company on business grounds and provides a statement to the board of the offeree company regarding the sufficiency or fairness of the consideration offered from the point of view of the shareholders of the offeree company. The financial advisors usually have their own internal principles for preparing the above mentioned statements, including, among other things, requirements for the examinations to be conducted as the basis of the statement and the procedures for internal approval of the statement. It should be noted that the purpose of the statement is only to support the evaluation of the board of directors on the merits of the bid.

On this issue see also Recommendation 7 - "Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid".

#### **(c) Statement Possibly Provided by the Representatives of the Personnel**

The representatives of the personnel of the offeree company have a possibility to provide a separate statement about the effects of the bid on the employment at the company. If the offeree 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 pursuant to Chapter 6, Section 6, Subsection 4 of the Securities Markets Act.

Even though the legislation shall not impose a duty for 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 the Securities Markets Act (see Chapter 6, Section 3, Subsection 2 of the SMA).

#### **(d) Contribution of the Offeree Company to the Drafting of an Offer Document**

As mentioned above, the offeror shall in the offer document present its strategic plans regarding the offeree company and its assessment on their likely effects on the operations and employment of the offeree company. In addition to this, certain information regarding the offeree company shall be provided in the offer document. However, the board of directors of the offeree company is under no obligation to contribute to the drafting of the offer document by, for example, providing the offeror with information needed for

the offer document. According to the grounds of the Securities Markets Act, the management of the offeree company has no obligation to co-operate with the offeror in drafting the offer document. The information regarding the offeree company in the offer document may therefore be completely based on information publicly available. The offeror is not responsible for information concerning the offeree company that has been made public by the offeree company. However, the offeror shall state in the offer document the sources on which the information regarding the offeree company presented in the offer document is based.

The above-mentioned does not limit the possibilities of the board of directors of the offeree 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.

For details on the offer document, its content and disclosure see the provisions of the Securities Markets Act (Chapter 6, Section 4 of the SMA), the decree of the Ministry of Finance on the content and disclosure of an offer document and the reciprocal recognition of an offer document accepted in the European Economic Area (479/2006) and Financial Supervision Authority Standard 5.2c.

## RECOMMENDATION 9 - POSSIBLE MEASURES OF THE BOARD OF DIRECTORS DUE TO A BID

### Introduction

A takeover bid made without the support of the board of directors or management of the offeree company, may be considered to be hostile. The board or the management of the offeree company may attempt to frustrate such a bid. However, the board, already on the basis of the general principles of the Limited Liability Companies Act, shall always act in the interests of the company and its shareholders, and seek the best possible outcome for the shareholders. On the basis of Chapter 1, Section 7 of the Limited Liability Companies Act, measures that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder shall not be taken in the offeree company. In turn, pursuant to Chapter 1, Section 8 of the Limited Liability Companies Act, the board of directors shall act with due care and promote the interests of the shareholders of the company in a takeover bid situation.

### Recommendation 9

***If the board of directors intends, after having received information on a forthcoming takeover bid, to undertake measures that may endanger the launching of the bid or its completion, the board shall usually convene a general meeting to consider the planned measures.***

### Grounds

After having received information regarding a prospective takeover bid, the board of directors shall carefully evaluate the bid and the other alternatives available to the company and seek the best outcome for the shareholders. The board may, in its evaluation, 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.

Pursuant to the general principles of the Limited Liability Companies Act, it has been considered that the board of directors of the offeree company may only very exceptionally undertake measures that have the purpose of preventing the completion of a takeover bid. According to the Limited Liability Companies Act, mere stabilisation of the ownership base, for example, has not been considered to be a sufficient economic reason for a directed share issue (Chapter 9, Section 4 of the CA). A takeover bid is directed to the shareholders of the offeree company and, as a rule, the board should not prevent the launching of the bid, as such, through its own measures.

Takeover bids may include terms and conditions relating to the business or structure of the offeree company. For example, in the bid may be required that the business of the company continue as normal during the offer period. However, the offeree company may have pending mergers or acquisitions or it may plan transactions as part of its normal business. The takeover bid made for the securities of the offeree company does not, in itself, prevent the offeree company and its board of directors from conducting, for example, a merger or acquisition or other corresponding transactions, or continuing the planning and fulfilment of transactions which are already pending. The board shall always carefully evaluate whether the measure is in the interests of the company and its shareholders and whether it is necessary, from the point of view of the shareholders, to convene a general meeting to discuss the planned measures. If a transaction may endanger the launching of the bid or its completion, the board should usually convene a general meeting to consider the planned measures. However, there may be situations in which the board considers that convening a general meeting

is not required from the point of view of the shareholders if the matter, for example, concerns a transaction based on the strategy of the company which has already to a great extent been prepared, or a transaction which relates to the normal business operations of the company. However, these situations shall always be considered on a case-by-case basis. On this issue see also Recommendation 21 - "Resolutions of a General Meeting Relating to a Bid" and Recommendation 25, part (b) - "Provisions Based on the Articles of Association of the Offeree Company" - "Provisions Regarding Defensive Measures in Article 9 of the Takeover Directive".

## RECOMMENDATION 10 - ADMINISTRATION OF INSIDER ISSUES

### Introduction

Insider information shall mean information of a precise nature relating to a security subject to public trading which has not been made public or which otherwise has not been available in the markets and which is likely to have a material effect on the value of the said security (see Chapter 5, Section 1 of the SMA). Abuse of insider information is a criminal offence under the Penal Code (see Chapter 51, Sections 1 and 2 of the Penal Code). In addition, the Securities Markets Act imposes a general prohibition on the use of insider information and the disclosure of insider information to another party without a justified reason (see Chapter 5, Section 2 of the SMA).

It depends on the stage of preparations of a bid whether information on the bid constitutes insider information. It is important for the undisrupted operation of the markets that information regarding a prospective bid and the preparations relating thereto remain confidential until the bid has been made public.

### Recommendation 10

***Depending on the stage of preparations of the takeover bid, information on the fact that the offeree company has been contacted in relation to a takeover bid may constitute insider information. The matter shall, in general, constitute an insider project if the offeree company has received such a proposal relating to a takeover bid that the board of directors considers it to be of a serious nature. The board of the offeree company has an obligation to administer insider information with care and to ensure that it remains confidential as required by the takeover process.***

### Grounds

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. 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.

The evaluation of insider issues by the authorities or by the courts is made in arrears. Even though the first contacts would not generally be considered to constitute insider information, it is justified to exercise caution in communicating information relating to such contacts and in trading in the securities of the company that has been contacted. 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.

If the offeree company is approached with a proposal relating to a takeover bid, the offeree 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 Insider Guidelines of the Helsinki Stock Exchange (see the Insider Guidelines of the Helsinki Stock Exchange, clause 7.3.2). In a takeover bid situation preparations regarding a bid shall usually be defined as an insider project if the offeree company has received a contact, as referred to in Recommendation 2, 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 (see Recommendation 2 - "Duty of the Board of Directors to Consider a Proposal Relating to a Bid"). Information on the contact regarding a bid may constitute insider information to the persons aware of it, even before the offeree company has had the time to make a decision to establish a project-specific insider register.

A matter shall 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 offeree company has agreed to commence negotiations regarding the bid with the offeror;
- the board of the offeree company has otherwise decided to take concrete preparation measures in the matter; or

- the board of the offeree company has – regardless of the prospective contact regarding the bid – independently decided to take concrete measures aimed at achieving a takeover bid to be made for the securities of the company.

If the offeror is a listed company, the information regarding the preparations of a bid may constitute insider information also in respect of the securities of the offeror.

The board of directors shall ensure that a project-specific insider register for the matter is established in the company and that the register is maintained in the manner required by the insider regulations (for further details on the insider register see Chapter 5, Sections 8 to 11 of the Securities Markets Act, Financial Supervision Authority Standard 5.3 and the Insider Guidelines of the Helsinki Stock Exchange). The board shall also ensure that the 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 estimated 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 offeree 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 would return to the matter in the near future or that the offeror would otherwise continue the preparation of the matter.

Insider issues in connection with the due diligence review that may be conducted in the offeree company are separately discussed in Recommendation 12, part (e) - “Due Diligence Review in the Offeree Company” - “Insider Issues”.

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## RECOMMENDATION 11 - DUTY OF DISCLOSURE

### Introduction

The preparations regarding a 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 undisrupted functioning of the markets in turn requires that information relating to the prospective bid or preparations for it is not leaked to the markets before the bid is made public.

### Recommendation 11

***The board of directors of the offeree company shall ensure that the company fulfils its duty of disclosure during the different stages of the takeover process. In addition, the board shall endeavour to prevent information leaks by taking care of confidentiality aspects. The board shall, however, be prepared in advance for the possibility that information regarding the proposed takeover bid may leak to the markets prior to the bid being made public. It is recommended that in a takeover situation the board prepares a communication and action plan for possible leaks.***

### Grounds

Pursuant to the so-called ‘continuous duty of disclosure’, the offeree 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 (see Chapter 2, Section 7 of the SMA). There is, however, no requirement to disclose matters that are under preparation.

When the offeror decides to launch a takeover bid, it shall make its decision public without delay (Chapter 6, Section 3, Subsection 2 of the SMA; see on this issue Recommendation 18 - “Disclosure of a Bid”). The offeree company shall, pursuant to its continuous duty of disclosure, make the information regarding the decision of the offeror public also by means of the company's own stock exchange release. If the offeree company and the offeror have entered into a combination agreement, the offeree company shall make information regarding the agreement and its material terms and conditions public without delay after the signing of the agreement. The material terms and conditions of the agreement may be considered to include, among others, terms and conditions relating to the consideration offered, time schedule, possible break-up fee and negotiation prohibition, as well as all terms and conditions relevant for the evaluation of the bid itself (see Recommendation 6 - “Entering into a Combination Agreement with the Offeror”). Usually, the signing of a combination agreement and the final decision of the offeror to launch a bid take place simultaneously and therefore are also made public simultaneously.

The signing of a prospective combination 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 offeree company and the offeror may enter into different procedural agreements during the preparation phase. Usually such agreements and, for example, the decision of the offeree company regarding the due diligence review may be considered to be a 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.

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

- the statement given by the board regarding the bid and later possible amendments to it;
- the possible statement by the personnel of the offeree company regarding the bid;
- information regarding the possible general meeting convened as a result of the bid
- information regarding a prospective competing bid;
- information regarding the outcome of the bid;
- so-called 'flagging notifications' regarding the ownership of the offeror and the shareholders;
- information regarding a prospective mandatory takeover bid and its outcome;
- 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 offeree 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 offeree company has been made public to the markets, the offeree company shall also make information on the termination of such negotiations public.

The board of directors of the offeree company shall be prepared for the possibility that information regarding the forthcoming bid may leak to the markets prior to the bid being made public. It is recommended that the board prepares a separate communication and action plan setting forth ways to control and appropriately manage the communications by the company in various leak situations that may occur during the process.

If the board of directors has well-founded reason to believe that information regarding the forthcoming bid has been leaked to the markets, the board shall make public a release regarding the matter without undue delay. The board shall also in other ways 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 detail on this issue see the Rules of the Helsinki Stock Exchange).

In order to avoid information leaks, the offeree company and the offeror shall enter into a non-disclosure agreement in the earliest possible stage of the process. If the preparation of the bid requires the offeree company to discuss also with other parties, the board of directors of the offeree company shall ensure that each such party signs a non-disclosure agreement or is otherwise obliged to keep the information confidential. Otherwise the offeree company might be obliged to make the information public to the markets (Chapter 2, Section 7, Subsection 3 of the SMA).

Issues relating to the duty of disclosure in connection with a due diligence review conducted in the offeree company have been separately discussed in Recommendation 12, part (f) - "Due Diligence Review in the Offeree Company" - "Duty of Disclosure".

### 3. DUE DILIGENCE REVIEW

#### RECOMMENDATION 12 - DUE DILIGENCE REVIEW IN THE OFFEREE COMPANY

##### Introduction

In connection with the preparation of a takeover bid, the offeror often requests the possibility to conduct a so-called 'due diligence review' in the offeree company in order to acquire more information about the company. A due diligence review may include 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.

##### Recommendation 12

*If the offeree company receives a request regarding a due diligence review, the board of directors of the offeree company shall evaluate whether the offeree company may and should allow such a review. The scope of the review shall be evaluated separately in each case. The board shall make an express decision on allowing or refusing the due diligence review. If the board allows the review, it shall ensure that confidentiality and insider issues are appropriately attended to.*

*If the offeror receives insider information in connection with the due diligence review, the offeror is not allowed to launch a takeover bid for the shares before the insider information received in the due diligence review has been made public.*

##### Grounds

###### (a) Allowing Due Diligence Review

There must be a special reason to give information regarding the company to a party outside the company. A due diligence review may be allowed in a situation where the review is considered to be in the interests of the shareholders. Allowance of the review, its scope and schedule 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.

In takeover bid situation the board of directors has an obligation to seek the best outcome for the shareholders. If conducting a due diligence review is a precondition for making a takeover bid to the shareholders, and if the bid is beneficial, considered as a whole from the point of view of

the shareholders, the review may usually be considered to be in the interests of the shareholders.

The board of directors of the offeree 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.

###### (b) Equality of the Shareholders

In a takeover bid situation the purpose of allowing a due diligence review is to create prerequisites for the completion of the bid to be made to all shareholders, regardless of whether or not the offeror already owns shares in the offeree 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 (see Chapter 1, Section 7 of the CA), even where the offeror is already a shareholder of the company. The equality regulations of the Limited Liability Companies Act do not, therefore, generally limit the possibility of the board of directors of the offeree 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 (however, see the issues relating to insider information below in part (e) - "Insider Issues").

###### (c) Confidentiality Issues

If the board of directors decides to allow a due diligence review, it shall ensure that the offeror and the offeree company 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, the Limited Liability Companies Act and Securities Markets Act shall not impose limitations on the nature and amount of the information to be provided. However, the board of directors has the duty to protect the interests of the company when making a decision regarding information to be provided to a certain offeror. The board shall also evaluate whether, for example, revealing trade secrets of the company may cause damage to the company, regardless of the non-disclosure agreement signed by the offeror. If the offeror and the company are competitors, the provisions of competition legislation may impose restrictions in respect of the information to be provided.

The scope of the review shall be defined separately in each individual case. The person of the offeror also has an effect on the evaluation, i.e. whether the offeror in question is a competitor of the offeree company or another strategic purchaser or, for example, a private equity investor. Information may also be given in different phases. When making the decision regarding the due diligence review, the board of directors shall carefully consider what information, when and in what manner it may be disclosed to a certain offeror. The board shall endeavour to limit the review to only information that is necessary for launching the bid.

Allowing the due diligence review in the event of a competing bid has been separately discussed in Recommendation 14 - "Measures of the Offeree Company in the Event of a Competing Bid".

In making the decision regarding the terms and conditions of the due diligence review, the board of directors shall also pay attention to the timing of the review. The interests of the offeree company usually require that the review is conducted in its entirety before 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. The board shall take care of the insider and confidentiality aspects related to the due diligence process and shall also prepare for the possibility that the information may leak to the markets (see on this issue Recommendations 10 - "Administration of Insider Issues" and 11 - "Duty of Disclosure").

If the offeror is not in contact with the board of directors of the offeree 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.

The board of directors of the offeree company shall ensure that the due diligence process is appropriately documented. The 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. The board shall also ensure that the review causes as little disruption to the normal business operations of the company as possible.

#### **(e) Insider Issues**

The board of directors of the offeree 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 a pending insider project in the offeree company or otherwise insider information regarding the company. In this context it is worth noting that not all of the unpublished information of the offeree company shall necessarily constitute insider information.

According to Financial Supervision Authority Standard 5.2b, the prohibition to disclose insider information included in the Securities Markets Act shall not usually prevent the disclosure of insider information in negotiation situations (for example in mergers and acquisitions) to the other party to the negotiation and its advisor. In a takeover bid situation conducting a due diligence review is usually part of the negotiations between the offeror and the offeree 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 offeree company from giving information to the offeror in connection with a due diligence review. However, the offeree 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 by ensuring that the information remains confidential (see Chapter 5 of the SMA and Financial Supervision Authority Standard 5.2b for more detailed information about insider regulations).

The offeree company shall aim to limit the number of people receiving insider information and enter all the persons that receive insider information in its company-specific insider register (see Chapter 5, Sections 8 to 11 of the SMA, Financial Supervision Authority Standard 5.3 and the Insider Guidelines of the Helsinki Stock Exchange for more detailed information about the insider register). The offeree 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 offeree company during a certain period of time (so-called 'stand still agreement'). Such an undertaking may also be connected to a non-disclosure agreement.

If the offeror receives insider information in connection with the due diligence review, offeror may not launch the bid or otherwise trade in the securities of the offeree company before such information has been made public. If the offeree 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. 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 offeree 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, be made public in connection with the bid and be included in the offer document prepared by the offeror.

The board of directors of the offeree company shall ensure that the information is first made public by means of a stock exchange release of the company and only subsequently in the offer document.

#### **(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 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 offeree company. However, the special characteristics of a specific individual situation and the arrangements possibly agreed upon between the offeror and the offeree company may affect the evaluation. For this reason, the disclosure issues shall be considered separately in each situation.

An exception to the principal rule described above is a situation where the board of directors of the offeree company receives a request concerning a due diligence review only after the bid has been made public. If the offeror has made its decision to launch a takeover bid public, but the due diligence review in the offeree company is set as a condition for launching or completing the bid, the decision of the offeree company as to whether to allow such a review has a direct effect on the prerequisites for completing the bid. In such situation, the decision of the board regarding the due diligence review shall, as a rule, be made public.

The offeree company does not, as a rule, have an obligation to make public the information disclosed to the offeror in the due diligence review (see the exceptions regarding insider information in Recommendation 12, part (e) - "Due Diligence Review in the Offeree Company" - "Insider Issues"). However, if the due diligence review reveals an essential fact not previously known to the company, the board of directors of the offeree 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.

If the offeror decides to withdraw from a bid it has already made public or, for example, amends the terms and conditions of the bid on the basis of the due diligence review it has conducted, the board of directors of the offeree company shall, pursuant to Chapter 2, Section 7 of the Securities Markets Act, make its own release regarding the matter public (see Recommendation 19, part (c) - "Validity of the Bid and Its Terms and Conditions" - "Withdrawing a Bid" for more detailed information on withdrawal from the bid).

## **RECOMMENDATION 13 - DUE DILIGENCE REVIEW REGARDING THE OFFEROR**

### **Introduction**

The consideration to be offered in a takeover bid may be paid in cash, in securities or as a combination thereof (see Chapter 6, Section 12 of the SMA). The board of directors of the offeree company shall set out a well-founded assessment on the bid in its statement regarding the bid (see Chapter 6, Section 6 of the SMA). If the consideration offered consists of securities, the board of directors shall ascertain the value of the securities offered as consideration in order to be able to make a well-founded assessment on the bid, and to thus fulfil its duty of care.

### **Recommendation 13**

***In order for the board of directors of the offeree company to be able to make a well-founded assessment on a takeover bid, it shall acquire sufficient and appropriate information about the securities possibly offered as consideration. This may require conducting a due diligence review regarding the offeror. The offeror should allow such a due diligence review to the extent required in each individual case.***

### **Grounds**

In evaluating the bid, the board of directors of the offeree company shall act with 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 support its evaluation. Publicly available information is not always sufficient for making a well-founded assessment. The board of the offeree company shall evaluate whether making the assessment requires conducting a due diligence review regarding the offeror.

If the offeror receives a request from the offeree company regarding a due diligence review, it is recommended that the offeror allow such a review to the extent necessary, so that the board of directors of the offeree company is able to make a well-founded assessment of the bid. The scope of the due diligence review shall be determined separately in each individual situation.

If the offeror does not co-operate with the board of directors of the offeree company, it may be impossible for the board to acquire the information described above. In such a situation, the board of the offeree company shall not be required to conduct a due diligence review regarding the offeror.

If the board of directors of the offeree 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, the board shall make its view on the matter public in the statement of the board regarding the bid or, if necessary, in a separate release (see on this issue also Recommendation 8, part (d) - "Statement of the Board of Directors of the Offeree Company Regarding a Bid" - "Contribution of the Offeree Company to the Drafting of an Offer Document").

## 4. COMPETING BIDS

### RECOMMENDATION 14 - MEASURES OF THE OFFEREE COMPANY IN THE EVENT OF A COMPETING BID

#### Introduction

Once a bid for an offeree company is made public, it is possible that the board of directors of the offeree 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.

#### Recommendation 14

*The board of directors of the offeree company shall act in such a manner that all offerors of a serious nature have equal possibilities to launch a takeover 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.*

#### Grounds

##### (a) General Responsibilities of the Board of Directors of the Offeree Company

During the takeover bid process, the offeree company may be contacted by several offerors competing with each other. The Securities Markets Act imposes to the board of directors an obligation to supplement its previously disclosed statement in the event of a competing bid and sets certain obligations to inform the employees of the company (see Chapter 6, Section 8 of the SMA), but the legislation does not otherwise stipulate measures of the board of directors or its obligations in the event of a competing bid. The role and duties of the board shall therefore 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 Offeree Company".

In a takeover bid situation, the board of directors of the offeree 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 Consider a Proposal Relating to a Bid" and Recommendation 3 - "Evaluation of the Alternatives of the Company"). The board shall endeavour to

seek the best price possible for the securities of the company, but also ensure that the competing bid is feasible. In practice, this may require entering into negotiations with the competing offeror. A combination agreement or a negotiation prohibition possibly made by the board of the offeree company with the first offeror may 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 (for more detailed information about this issue, see Recommendation 5 - "Committing to a Negotiation Prohibition" and Recommendation 6 - "Entering into a Combination Agreement with the Offeror").

In order for the board of directors of the offeree company to facilitate genuine competition between the possible competing offerors and, in so doing, to obtain the highest possible price for the securities of the company, the board of the offeree company shall, as a rule, act in such a manner that all competing offerors of a serious nature have equal possibilities to launch a bid for the securities of the company. If, for example, the board of the offeree 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 (for more information on this issue see Recommendation 12, part (d) - "Due Diligence Review in the Offeree Company" - "Nature and Scope of Information to Be Provided"). If the first bid has already been made public, allowing a due diligence review requires also that the proposed competing bid has, in the opinion of the board, realistic possibilities to be completed, which means that the competing bid shall generally be, from the point of view of the 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, in the opinion of the board of directors of the offeree company, the proposed competing bid is of a serious nature and realistic as to its potential of being completed, the board shall consider whether the board should inform the first offeror of the competing contact it has received. The combination agreement, possibly already entered into between the offeree company and the first offeror, may also include provisions regarding the procedures to be complied with in the event of a competing bid (for more information on this issue see Recommendation 6 - "Entering into a Combination Agreement with the Offeror"). Because procedures concerning competing bids included in the combination 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 Offeree Company and Possible Changes Thereto**

If a competing contact results in a bid being made public in a situation where the board of directors of the offeree company has already made its statement on the first bid public, the board shall, pursuant to Chapter 6, Section 8 of the Securities Markets Act, supplement its statement as soon as possible after the competing bid has been made public. The statement shall be supplemented at the latest five (5) banking days prior to the earliest possible close of the first bid. If the competing bid is made public during the final days of the offer period under the first bid, the Financial Supervision Authority shall, as a rule, demand that the offer period of the first bid is extended so that the board of the offeree company has time to supplement its statement and so that those securities holders who have already accepted the bid have sufficient time to consider withdrawing their acceptance (see on this issue Financial Supervision Authority Standard 5.2c).

When supplementing its statement, the board of directors shall compare the first bid with the competing bid and in accordance with Chapter 6, Section 6 of the Securities Markets Act, express its opinion on the new competing bid (see also Recommendation 8 - "Statement of the Board of Directors of the Offeree Company Regarding a 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 8 - "Statement of the Board of Directors of the Offeree Company Regarding a Bid" shall be adhered when applicable.

In the event of a competing bid, the board of directors shall also, in other respects, consider continuously whether 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**

Chapter 6, Section 8 of the Securities Markets Act regulates the position of the first offeror in the event of a competing bid. Pursuant to the Act the first offeror has, among others, 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. The first offeror may also decide to withdraw its bid before the offer period under the competing bid has expired. This right is restricted to voluntary bids only; a mandatory bid is based on a statutory obligation and shall therefore not be withdrawn. The Securities Markets Act also includes provisions on disclosing decisions regarding amendments to or a lapsing of a bid and on the Financial Supervision Authority's possibility to extend the offer period under the first bid in certain situations.

Pursuant to Chapter 6, Section 8 of the Securities Markets Act, in the event of a competing bid, those holders of securities of the offeree 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.

#### (d) Insider Issues

Information of a prospective competing bid may, depending on stage of preparations of the bid, be considered insider information before the competing bid is made public. The board of directors of the offeree company is obliged to administer insider information and to ensure that it remains confidential as required by the takeover bid process (for more on insider issues see Recommendation 10 - "Administration of Insider Issues").

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 a 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 offeree company in accordance with the terms and conditions of the bid (see Chapter 5, Section 2, Subsection 5 of the SMA). Information on a competing bid does prevent, however, purchases of securities of the offeree company outside of the takeover bid.

## 5. ARRANGEMENTS RELATING TO A BID

### RECOMMENDATION 15 - ARRANGEMENTS BETWEEN THE OFFEROR AND THE MAJOR SHAREHOLDERS OF THE OFFEREE COMPANY

#### Introduction

The acquisition of a certain proportion of shares in the offeree company is often set as condition to completion of a takeover bid. When preparing the bid, the offeror may seek to explore the feasibility of its bid through direct discussions with the major shareholders of the offeree company. The offeror may also request an undertaking from the major shareholders to accept the forthcoming bid or purchase shares from certain major shareholders even before the bid is made public. For investor protection it is important that such arrangements do not breach the principle of equivalent treatment of shareholders.

#### Recommendation 15

*The offeror may negotiate and agree on the proposed takeover bid with the major shareholders of the offeree company before the bid is made public. The offeror may also agree on the purchase of the shares in the offeree company from certain shareholders even before the bid is made public or obtain an undertaking from the shareholders to accept the forthcoming bid. All holders of the securities subject to the bid must, however, be afforded equivalent treatment in the actual takeover bid. The offeror shall disclose the information on the aforementioned arrangements when the bid is made public.*

*The offeror shall take care of confidentiality aspects and the appropriate administration of insider information in connection with the negotiations with the aforementioned shareholders.*

#### Grounds

##### (a) Undertaking by Shareholders to Accept a Forthcoming Takeover Bid

Pursuant to Chapter 6, Section 2 of the Securities Markets Act, the offeror shall not place the holders of the securities of the offeree company in an unequal position. Neither the Securities Markets Act nor the Limited Liability Companies Act contain in other respects restrictions on the possibility of the offeror to enter into discussion in advance with certain shareholders of the offeree company on the forthcoming bid. Discussions with certain shareholders do not, as such, generally place

holders of the securities of the offeree company in an unequal position, provided that the terms and conditions of the actual bid are equal for all holders of the securities of the same class subject to the bid.

A prior undertaking by certain shareholders to accept a forthcoming bid does not place holders of the securities of the offeree company in an unequal position either, provided that such shareholders are not given a higher consideration, in one form or another, than other holders of the securities of the company. There is nothing to prevent some of the shareholders from committing themselves voluntarily to more stringent or unfavourable terms and conditions than other holders of securities.

The undertaking given by shareholders to accept a forthcoming bid represents a contractual arrangement between the offeror and the said shareholder that is not included in the takeover bid through which the shareholder may, if they so wish, waive their rights under the Securities Markets Act, for example, the right of the shareholder under Chapter 6, Section 8, Subsection 2 of the Securities Markets Act, in the event of a competing bid to withdraw their acceptance of the first bid during the validity period of the first bid.

For disclosure and flagging issues relating to undertakings given by shareholders see Recommendation 18 - "Disclosure of a Bid", flagging provisions under the Securities Markets Act (Chapter 2, Section 9 of the SMA) and Financial Supervision Authority Standard 5.2b.

### **(b) Prior Transactions**

The principle of equivalent treatment in the Securities Markets Act shall not prevent an offeror from entering into a separate agreement with one or several shareholders regarding the acquisition of shares own by them even before the takeover bid to be made to the other shareholders is made public. However, pursuant to the provisions of the Securities Markets Act, such prior transactions may affect the amount of the consideration to be offered in a forthcoming bid or in a possible mandatory bid; the value of the consideration offered in a bid shall at least correspond to the consideration paid in prior transactions, also taking into account, in addition to the consideration, other benefits that may have been offered (see Chapter 6, Sections 11 and 12 of the SMA and Recommendation 16 - "Acquisition of Securities of the Offeree Company from the Market Prior to the Commencement of the Offer Period").

If an offeror pays for the shares acquired through prior transactions, for example, with its own shares, the principle of equivalent treatment shall not generally require that the consideration to be offered in a bid be identical as to its form. The offeror may thus, as a rule, offer in the bid only cash, for example. However, according to Financial Supervision Authority Standard 5.2c, this requires that the prior transaction may, assessed as a whole, be considered

as a transaction clearly separate from the takeover bid. If the offeror has acquired at least five per cent of the voting rights of the offeree company in prior transactions for cash, then a cash consideration shall at least be offered as an alternative in the bid (see Chapter 6, Section 12 of the SMA). The offeror is not liable to pay interest or similar compensation to other shareholders due to some shareholders having received consideration for their shares prior to other shareholders.

For disclosure and flagging issues relating to prior transactions see Recommendation 18 - "Disclosure of a Bid", the flagging provisions under the Securities Markets Act (Chapter 2, Section 9 of the SMA) and Financial Supervision Authority Standard 5.2b.

### **(c) Position of the Board of Directors of the Offeree Company in Connection with Shareholder Arrangements**

An undertaking possibly given by a shareholder to accept a forthcoming bid, likewise a prior share transaction concerning the shares of the shareholder represents an arrangement between the shareholder and the offeror. If the board of directors of the offeree company becomes aware of such arrangements, the board shall, however, endeavour to assess the matter and take the arrangements into account when evaluating a takeover bid and other alternatives available to the company (on this issue see Recommendation 3 - "Evaluation of the Alternatives of 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 statement of the board regarding the bid.

Possible discussions by the board of directors of the offeree company with major shareholders of the offeree company are discussed in Recommendation 4 - "Discussions with Major Shareholders".

Situations in which a member of the board of directors of the offeree company or his or her associate entity is a party to prior transactions or gives an undertaking to accept a bid are discussed separately in Recommendation 7 - "Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid".

### **(d) Confidentiality and Insider Issues**

According to Financial Supervision Authority Standard 5.2b, prohibition to disclose insider information in 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). The disclosure of information concerning a prospective bid to a certain shareholder with the aim of obtaining an undertaking from the shareholder to accept the forthcoming bid or to acquire shares owned by such a shareholder may be considered a negotiation as referred to in the Financial Supervision Authority Standard.

It should be noted that during discussions between the offeror and the shareholders, those shareholders with information on a prospective bid might become insiders. Prospective prior transactions between the offeror and certain shareholders may, depending on the circumstances, also involve other insider issues, which should be given careful consideration.

To avoid possible information leaks, the offeror shall ensure that confidentiality and insider issues are dealt with appropriately in shareholder discussions.

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## RECOMMENDATION 16 - ACQUISITION OF SECURITIES OF THE OFFEREE COMPANY FROM THE MARKET PRIOR TO THE COMMENCEMENT OF THE OFFER PERIOD

### Introduction

The offeror may seek to acquire securities of the offeree company also directly from the markets before it has decided to launch a takeover bid and made the decision public pursuant to the Securities Markets Act (Chapter 6, Section 3 of the SMA). 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 offeree company or its securities. Acquisitions of securities of the offeree company prior to the bid is made public, may affect the amount and form of consideration to be offered. Potential acquisitions of securities shall be made public pursuant to the so-called 'flagging provisions'. In other respects, the Securities Markets Act does not contain specific provisions regarding the issue.

### Recommendation 16

***The offeror may acquire securities of the offeree company from the market prior to the takeover bid is made public only within the limits of the insider regulations.***

### Grounds

The abuse of insider information is a criminal offence under the Penal Code (see Chapter 51, Sections 1 and 2 of the Penal Code). The Securities Markets Act also imposes a general prohibition to use insider information in securities trading (see Chapter 5, Section 2 of the SMA). However, the grounds of the Securities Markets Act previously in force have 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 having made a decision regarding the bid or prior to the disclosure of the bid, is not considered to constitute insider information (see Government Bill 318/1992, p. 35) and no changes have since taken place regarding the matter. Similar opinions have also been adopted in other countries.

It is generally considered that information on the own intent of an offeror to launch a takeover bid does not prevent the acquisition of securities of the offeree company on the offeror's account prior to the bid is made public. However, any natural persons employed by the offeror or otherwise aware of the bid may not acquire securities of the offeree 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.

The situation may, however, be considered differently if the offeror has commenced discussions concerning the bid with the board of directors of the offeree company or with the major shareholders of the company and received a favourable response from them. If, for example, the major shareholders of the offeree company have expressed their preliminary interest in accepting a prospective bid at the price proposed by the offeror or if the board of the offeree 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 offeree company towards the proposed bid, the closer one is to such information that prevents the offeror from acquiring securities of the offeree company prior to the bid being made public.

If the offeror is otherwise in possession of insider information concerning the offeree 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 offeree company or launch a bid before such information is made public.

Acquisitions of securities of the offeree company prior to a bid may affect the pricing of the forthcoming bid. The Financial Supervision Authority Standard 5.2c includes 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 Recommendation 18 - "Disclosure of a Bid", the flagging provisions under the Securities Markets Act (Chapter 2, Section 9 of the SMA) and Financial Supervision Authority Standard 5.2b.

## RECOMMENDATION 17 - ACQUISITION OF SECURITIES OF THE OFFEREE COMPANY DURING THE OFFER PERIOD AND THEREAFTER

### Introduction

In many cases, the holders of securities sell their securities on the stock exchange once a bid has been made public. For an offeror who strives to acquire full ownership in the offeree company, it is important to be able to acquire securities on sale. Often larger blocks of securities of the offeree company are offered directly to the offerors.

### Recommendation 17

*The offeror may during or after the offer period, at times determined by the offeror, acquire the securities subject to the bid also outside of the takeover bid. When acquiring such securities, the offeror shall afford equivalent treatment to all holders of the securities subject to the bid.*

### Grounds

When a bid has been made public, the offeror may before and during the offer period acquire the securities subject to the bid also outside of the takeover bid, for example, in public trading on the stock exchange. The offeror may decide when to make such acquisitions and it may, at its discretion, interrupt or entirely discontinue the acquisitions. Acquisitions may not, however, be made if the offeror possesses insider information. See on this issue Recommendation 12 - "Due Diligence Review in the Offeree Company" - Section (e) "Insider Issues".

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.

The offeror may not acquire the securities subject to the bid for a price higher than the consideration offered outside of the bid during the offer period or during a period of nine (9) months after the completion of the bid without increasing the consideration offered or paying compensation (see Chapter 6, Section 13 of the SMA).

Prior to commencing acquisitions, the offeror shall make public its intention to acquire securities also outside of the takeover bid. This information may be included in other releases regarding the bid.

## 6. A BID AND ITS TERMS AND CONDITIONS

### RECOMMENDATION 18 - DISCLOSURE OF A BID

#### Introduction

The disclosure of information regarding a takeover bid may have a significant effect on the price of the securities of the offeree company. Information on a takeover bid may also affect the business operations of the offeree 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.

#### Recommendation 18

*The offeror shall in its releases regarding 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, the following matters can be considered as such:*

- *information on the offeror;*
- *information on the securities owned or otherwise controlled by the offeror and which are issued by the offeree company and are subject to the bid;*
- *the proportion of share capital and voting rights in the offeree company held by the offeror;*
- *the securities that are subject to the bid;*
- *the material terms and conditions of the bid, including the consideration offered, the premium offered in relation to the market value of the offeree 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 material conditions set for the completion of the bid;*
- *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 consideration offered, information on the effects of the bid and of the consideration paid on the business operations, profit and financial position of the offeror (effect calculated per share, if possible);*

*- estimate on the date when the offer document will be made public;*

*- information about the necessary authority approvals; and*

*- estimate on 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.*

## Grounds

### (a) Time of Disclosure

The offeror shall make information on the bid public immediately after the offeror has reached a decision on the matter. Pursuant to the Securities Markets Act, the decision to launch a takeover bid shall be made public without delay as well as communicated to the company that has issued the securities subject to the bid (offeree company), the party in charge of the public trading in question and the Financial Supervision Authority. 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 offeree company and the offeror (see Chapter 6, Section 3, Subsections 1 and 2 of the SMA and Financial Supervision Authority Standard 5.2c).

In certain circumstances, there may be 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, already the information on the fact that a bid is

being planned may affect both the business operations of the offeree company and the price of its shares. For this reason, the principles applied in making public a decision to launch a takeover bid shall also be applied, as applicable, when disclosing information on a planned takeover bid. In such a situation, information on any factors of uncertainty concerning the completion of the takeover plans should also be made public. In particular, the offeror shall ensure that false markets are not created in the securities of the offeree company in such a way that the rise or the fall of price of the securities becomes artificial and the normal functioning of the markets is distorted. On this issue see also Financial Supervision Authority Standard 5.2c.

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

### (b) Information to Be Provided in Connection with the Disclosure

Pursuant to the Securities Markets Act, when a takeover bid is disclosed the information made public shall indicate the volume of the securities subject to the bid, the offer period under the bid and the consideration offered as well as any other terms of material importance to the completion of the bid. The information made public shall also indicate the procedure to be applied if acceptances cover a greater volume of securities than that subject to the bid (see Chapter 6, Section 3, Subsection 3 of the SMA).

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 on the merits of the bid are made public when the bid is made public.

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## RECOMMENDATION 19 - VALIDITY OF THE BID AND ITS TERMS AND CONDITIONS

### Introduction

It may be important for the offeror to set conditions for the completion of the bid, and the Securities Markets Act contains reference to conditions set for the completion of the bid (see Chapter 6, Section 3 of the SMA). Material conditions include, among others, authority approvals required and conditions thereof, the obtaining of a certain ownership threshold as a result of the bid or important information or changes regarding the offeree company. As, however, a takeover bid also has considerable significance from the point of view of the offeree company and its shareholders, the terms and conditions of the bid and the information disclosed thereon shall be clear and unambiguous.

**Recommendation 19**

***A takeover bid shall be addressed equivalently to the holders of the securities subject to the bid. The offeror is obliged to launch the bid after a decision on the bid has been made public. The bid may not be withdrawn after it has been launched. The offeror may, nevertheless, set conditions for the completion of the bid. The conditions shall be such that their satisfaction is clearly verifiable. The conditions shall not be such that the completion of the bid is in fact at the free discretion of the offeror. Invoking a condition set for the completion of the bid also requires that the condition remaining unfulfilled has a significant meaning for the offeror in view of the planned takeover.***

**Grounds****(a) Equivalent Treatment**

Pursuant to Chapter 6, Section 2 of the Securities Markets Act, an offeror shall afford equivalent treatment to all holders of the securities of the offeree company. According to the grounds of the Securities Markets Act, the requirement of equivalent treatment presumes that, with respect to a security of the same class, a bid shall not be made to a given owner under terms and conditions that differ from those offered to other owners of securities. In certain situations it is, however, possible that a separate agreement has been made on the consideration and the terms and conditions of acceptance with shareholders who have given a prior undertaking, or that the offeror purchases the shares of certain shareholders in advance.

The requirement of equivalent treatment presumes that the consideration offered is the same in form and amount offered for securities of the same class. Consideration may, however, be paid partly in cash and partly in securities, provided that there is a justified reason for doing so. The offeror may, for example, pay each shareholder a consideration in cash for a certain portion of the securities and offer securities as consideration for the remaining portion.

According to the grounds of the Securities Markets Act, bids for different classes of securities shall be reasonable and fair between and in relation to each other. The values of different classes of securities may, however, differ from each other, and they may have different market values. In that case, it is clear that the consideration offered for different classes of securities may differ from each other. This may be affected by, for example, voting rights and entitlements to dividends related to the security.

A certain form of consideration may be optional provided that by this means, there is no specific aim to place shareholders in unequal position. The offeror may offer holders of the

securities subject to the bid the possibility to choose, for example, between a consideration in cash and different considerations in securities. The Securities Markets Act does not provide that different types of consideration offered as alternatives should be of equal value. For example, the price of a consideration in securities need not be equal to the cash consideration offered as an alternative. When accepting a consideration in securities, there is both an expectation that the value will increase in the future and the risk that the value will decrease.

Tax treatment resulting from the bid and other effects of regulation may vary for different holders of the securities subject to the bid. This shall not, however, be considered to be relevant for the evaluation of equivalent treatment under the bid, unless the bid aims to treat the holders of the securities unequally.

In general, a bid shall be addressed to all the holders of a certain class of securities. However, delivery of the 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 offer documents are made available as provided for by the Securities Markets Act. In certain special cases, however, equivalent treatment requires that a takeover bid also be extended to such countries. Such a special case may arise, for example, when a company has made public offerings in certain countries. Special cases must always be considered on a case-by-case basis.

See also Financial Supervision Authority Standard 5.2c on this issue.

**(b) Conditionality of a Bid**

The offeror may set conditions for the completion of the bid. Various sections of the grounds of the Securities Markets Act refer to conditional bids. According to the grounds of the Act, the availability of financing may, for example, be agreed to be conditional (see Recommendation 1 - "Ensuring Prerequisites to Complete a Bid"). Invoking the conditionality of financing requires that the availability of financing has been explicitly named as a condition to completion of the bid. Legislation does not regulate the contents of other possible conditions or the kinds of conditions that are permitted in a takeover bid.

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

the completion of the bid. Often, it is important for the offeror to acquire complete control of the offeree company, and reaching the 90 per cent squeeze-out threshold is normally a condition to completion of the bid. When, in addition, a bid is made on the basis of information available to the offeror, the offeror may require that no material change has taken place in the offeree company such of which the offeror was unaware or that otherwise has a material effect on the bid.

If a takeover bid is made in agreement with the board of directors of the offeree company, it is possible that the offeror and the offeree company will draft a specific combination agreement. It may be important to the parties that the bid is completed in compliance with the combination agreement and only provided that the parties remain in agreement on the completion date. Hence, the validity of combination agreement has also been often set as a condition for the completion of a bid.

However, not any type of conditions may be set for the completion of a takeover bid. Pursuant to the general rule in Chapter 2, Section 1 of the Securities Markets Act, securities shall not be acquired among others by using procedure that is contrary to good practice or otherwise unfair. According to Chapter 6, Section 3 of the Securities Markets Act, in connection with the disclosure of a decision to launch a bid, the offeror shall make public information on the material conditions set for the completion of the bid. This provision aims to satisfy the requirements of the Directive regarding making bids public in such a way as to ensure the openness and integrity of the markets with regard to the securities of the offeree company, the offeror and also other companies affected by the bid and to prevent disclosure and dissemination of false and misleading information.

As regards the information made public on the offer document, the Securities Markets Act requires that essential and sufficient information for evaluating the merits of the bid shall be included in the offer document. On the basis of the given regulations, it can be deemed that the conditions set for completion of the bid and the information made public thereon shall be such as the holders of the securities subject to the bid may evaluate the merits of the bid. In this respect, the likelihood of completion of the bid is essential for making the aforementioned evaluation. The offeror shall make public such information on the conditionality of the bid that the satisfaction of the conditions may, when necessary, be clearly verified. The conditions of the bid shall not be such that the completion of the bid is, in fact, at the free discretion of the offeror.

On this issue see also Financial Supervision Authority Standard 5.2c.

### (c) Withdrawing a Bid

An offeror is bound to the bid it has made and the bid may not be withdrawn after it is launched except in certain circumstances permitted by law. If the offeror has set conditions to the completion of the bid, then the offeror may, however, decide not to complete the bid in accordance with its conditions.

As the disclosure of the bid may have significantly affected the price of the security of the offeree company and also its business operations, non-completion of the bid may have a detrimental effect on both the offeree company and the holders of its securities. For this reason, it is important that the conditions set for the completion of the bid are formulated so unambiguously that if the conditions are not satisfied this may be clearly verified. Invoking a condition set for the completion of the bid also requires that the condition remaining unfilled has a significant meaning for the offeror regarding the planned takeover. The offeror shall, as far as possible, seek to ensure that the conditions set for the completion of the bid are satisfied.

The offeror may withdraw the bid, for example, if the offeror has set the completion of the bid as conditional for the reaching of a certain ownership threshold in the offeree company or for a particular resolution being made by the general meeting of the offeree company and it is evident that such a condition will not be satisfied. If the completion of the bid was subject to a due diligence review in the offeree company, the offeror may not invoke the due diligence review condition with regard to factors which were already known to the offeror at the time of launching the bid. Invoking such a condition requires that a due diligence review, conducted after the bid was launched, reveals such factors that were not known to the offeror when the terms and conditions of the bid were drafted and which have a significant meaning for the offeror in view of the planned takeover. If the offeror has set other conditions for the completion of the bid and it is clear that one of these conditions will not be satisfied, then the offeror shall carefully evaluate whether the condition left unsatisfied has such significance for the offeror regarding the planned takeover that it is justifiable not to complete the bid.

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 (see on this issue also Recommendation 22 - "Disclosure of the Result of a Bid").

Pursuant to Chapter 6, Section 8, Subsection 3 of the Securities Markets Act, if a competing bid is made, the first offeror may decide on the lapsing of its bid. Competing bids are discussed separately in Recommendation 14 - "Measures of the Offeree Company in the Event of a Competing Bid."

See also Financial Supervision Authority Standard 5.2c.

## RECOMMENDATION 20 - OFFER PERIOD UNDER A BID

### Introduction

Pursuant to Chapter 6, Section 5 of the Securities Markets Act, the time allowed for the acceptance of a bid may not be less than three or more than ten weeks. The offer period of a bid may, for special reasons, be more than ten weeks provided that the business operations of the offeree company are not hindered for an unreasonably long period of time.

### Recommendation 20

***If the board of directors of the offeree company has not contributed to the preparation of the takeover bid, it is recommended that the offer period under the bid is at least four weeks.***

### Grounds

The three-week minimum offer period laid down in law may be sufficient for the board of directors and shareholders of the offeree company when the offeree company has contributed to the preparation of the bid and the board of the offeree company has already provided its statement on the bid when the bid was made public. If the board of the offeree company has not contributed to the bid before it is made public, the board shall take appropriate measures immediately after the bid is made public in order to provide a well-founded assessment on the bid and other possible alternatives available to the company, and in order to make its statement on the bid public within the time provided in the Securities Markets Act (see Chapter 6, Section 6 of the SMA and Recommendation 8 - "Statement of the Board of Directors of the Offeree Company Regarding a Bid"). The board of the offeree company may, if necessary, convene a general meeting to consider the bid (see Chapter 6, Section 5, Subsection 2 of the SMA and Recommendation 21 - "Resolutions of a General Meeting Relating to a Bid"). In order for the board of the offeree company to be able to fulfil its duty of care when evaluating the situation and giving its statement on the bid, and to convene, if necessary, a general meeting in accordance with the Limited Liability Companies Act, it is recommended that the offer period under the bid is always at least four weeks in cases where the board of the offeree company has not contributed to the preparation of the bid.

The offeror may in the terms and conditions of the bid reserve the right to extend or to discontinue the initial offer period. The Securities Markets Act contains separate provisions relating to the extension of the offer period in the event of a competing bid and the possibility for the Financial Supervision Authority to extend the offer period in certain circumstances. For more detailed information on the offer period, see Financial Supervision Authority Standard 5.2c.

## RECOMMENDATION 21 - RESOLUTIONS OF A GENERAL MEETING RELATING TO A BID

### Introduction

A takeover bid is addressed to the shareholders of the offeree company and therefore does not, as a rule, require decision-making by the company or a resolution of the general meeting of shareholders of the offeree company. It may, nevertheless, be necessary to convene a general meeting to consider the bid or the measures taken as a result of it. On this issue, see also Recommendation 9 - "Possible Measures of the Board of Directors Due to a Bid".

The purpose of a takeover bid is, primarily, to transfer control in the offeree company. As a result of the launched takeover bid, companies may, however, take measures that may affect the completion of the takeover bid. Moreover, companies may have structures that may already in advance affect the exercise of control in the company or the transfer thereof and which, as a result, also affect the completion of a takeover bid. The aforementioned constraints may be derived from the articles of association of the company, shareholder agreements or the company's own commitments.

### Recommendation 21

***A general meeting of shareholders may be convened to consider the takeover bid and the measures required by it. If the board of directors proposes to the general meeting of the offeree company such a resolution that may endanger the completion of the bid, special attention shall be paid to the interests and the equal treatment of all the shareholders when preparing the proposal for decision.***

***The board of directors shall, in general, convene a general meeting in situations referred to in Recommendation 9.***

### Grounds

#### (a) Need for a General Meeting

Pursuant to Chapter 6, Section 5, Subsection 2 of the Securities Markets Act, the Financial Supervision Authority may, upon an application by the offeree company and even, where necessary, without hearing the offeror, order that the offer period under the takeover bid be extended so that the offeree company may convene a general meeting to consider the bid. However, the offeror shall have the right, due to such extension, to waive the bid. According to the grounds of the Act, it is considered important that, in order to evaluate the bid, the methods available to the shareholders to whom the bid is addressed are as comprehensive as possible. Considering the matter in the general meeting may be considered to

be one such method. The board of directors may therefore convene a general meeting to consider the bid when a general meeting is required to pass a resolution in relation to the bid or when the board considers it otherwise necessary to consider the bid in a general meeting. If the board intends, after having received information on a forthcoming takeover bid, to undertake actions that may endanger the launching of the bid or its completion, it shall usually convene a general meeting to consider the planned actions. On this issue see also Recommendation 9 - "Possible Measures of the Board of Directors Due to a Bid."

The offeror may make the completion of the bid subject to conditions that aim to restrict the activities of the offeree company or its board of directors. The bid may, for example, be subject to a condition that neither payment of dividends nor other distribution of assets shall be made in the offeree company or that the offeree company shall not implement any mergers or acquisitions. However, the aforementioned conditions are not as such binding on the offeree company or its board. Because of the aforementioned conditions, the board may, however, consider it necessary to convene a general meeting to consider the measures referred to in the conditions.

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). When the board of directors of the offeree company has contributed to the bid, a general meeting of shareholders may be readily convened. When the board opposes the bid, it may not be prepared to convene a general meeting to consider a decision set forth in the conditions. In accordance with the duty of care in the Limited Liability Companies Act, the board may in a takeover situation be obliged to take such measures that are necessary to achieve as good a bid as possible. This obligation may also include convening a general meeting.

A general meeting shall, in general, also be convened to consider other measures that are considered necessary by the board of directors in relation to the bid. If the board of the offeree company does not consider the bid to be beneficial for the shareholders of the company, the board may take measures with the aim of seeking a competing bid or other alternative transaction. Such transactions may include measures that require a resolution of a general meeting or that may otherwise be of such a nature that, from the shareholders' perspective, it is necessary to convene a general meeting to consider the contemplated arrangement.

#### **(b) Procedures After a Bid is Disclosed**

A general meeting may also consider measures that would be likely to frustrate the completion of a takeover bid made for the securities issued by the company. Such measures may, for

example, include the implementation of directed share issue, or the selling of significant business operations. Amendments to the articles of association may also be proposed in order to frustrate a takeover bid.

A general meeting of the offeree company shall, in its resolutions, adhere to the general principles of the Limited Liability Companies Act and, in particular, to Chapter 1, Section 7 of the Limited Liability Companies Act, which provides that a general meeting shall not make resolutions that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder. Resolutions that aim to frustrate the completion of a bid may violate the aforementioned provision of the Limited Liability Companies Act.

Pursuant to Chapter 1, Section 5 of the Limited Liability Companies Act, the purpose of a company is to generate profits for the shareholders. Defensive measures that are aimed at frustrating the bid but that lack economic justification do not relate to the purpose of a company and thus violate the provisions of the Limited Liability Companies Act.

#### **(c) Anticipatory Measures**

In accordance with the Securities Markets Act, the board of directors of a company shall, in the annual report presented to the annual general meeting, disclose such factors that may significantly affect a takeover bid for the securities of the company. Pursuant to the decree of the Ministry of Finance (538/2002), such factors include, among others, the rights and duties attached to different classes of securities, redemption and consent clauses, shareholder agreements that may restrict the transfer of shares or securities entitling to shares or the exercise of voting rights, and material agreements which the company is a party to, which will either enter into force, be amended or terminate upon a change of control in the company as a result of a takeover bid.

Different classes of shares and securities provide a possibility to efficiently use the capital markets to finance the company, and market practice may require that change of control clauses are included, for example in financing agreements. As the aforementioned provisions affect the completion of a takeover bid it is deemed, based on the Securities Markets Act, that such clauses must be disclosed in the annual report in sufficient detail to allow parties in the market, including prospective offerors, to evaluate the prerequisites for a change in the control of the company and the effects of such provisions on the price of the securities of the company.

## RECOMMENDATION 22 - DISCLOSURE OF THE RESULT OF A BID

### Introduction

After the expiration of the offer period, the offeror shall, without delay, make the result of the bid public pursuant to the provision of the Securities Markets Act. If the bid has been conditional, it shall simultaneously be notified whether the offeror shall complete the bid (Chapter 6, Section 9 of the SMA). On this issue see also Financial Supervision Authority Standard 5.2c.

### Recommendation 22

***Pursuant to Chapter 6, Section 9 of the Securities Markets Act, the offeror shall make information on the result of the takeover bid public without delay after the acceptances of the bid have been calculated. At the same time, the offeror shall, if possible, make public its possible decision to initiate squeeze-out proceedings under the Limited Liability Companies Act or the articles of association or to purchase more securities of the offeree company on the market.***

### Grounds

It is important for the offeree company and the holders of its securities to be informed of the result of the bid as soon as possible after the offer period under the bid has expired. Pursuant to the Securities Markets Act, the result of the bid shall be made public without delay after the expiration of the offer period (see Chapter 6, Section 9 of the SMA). In practice, this means disclosure immediately after the acceptances of the bid have been calculated. The offeror may make the initial result of the bid public first (usually on the following banking day after the expiration of the offer period) and the final result of the bid once it has been confirmed (usually three to five banking days after the expiry of the offer period).

If the bid was conditional, the offeror shall simultaneously notify whether the conditions for completion of the bid have been satisfied, or whether the offeror will waive a particular condition for completion of the bid, and whether the offeror will complete the bid. If the offeror completes the bid, then the offeror shall simultaneously notify when the consideration offered is expected to be paid to those holders of securities who have accepted the bid.

If the offeror has acquired more than nine tenths (9/10) of the shares and voting rights of the offeree company as a result of the takeover bid and has decided to initiate squeeze-out proceedings 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 (on the initiating of squeeze-out proceedings under the Limited Liability Companies Act, see Recommendation 23 - "Squeeze-out Proceedings under the Limited Liability Companies Act"). If the offeror has decided to purchase more securities of the offeree 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.

The offeree company shall make the notice of the offeror regarding the result of the bid public also through its own stock exchange release.

For flagging issues relating to a takeover bid, see the flagging provisions of the Securities Markets Act (Chapter 2, Section 9 of the SMA) and Financial Supervision Authority Standard 5.2b.

## 7. OTHER ISSUES

### RECOMMENDATION 23 - SQUEEZE-OUT PROCEEDINGS UNDER THE LIMITED LIABILITY COMPANIES ACT

#### Introduction

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 the 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 a squeeze-out (redemption). The right of squeeze-out (redemption right) only concerns the shares in the offeree company and not other securities issued by the offeree company. Although the right of squeeze-out and the related squeeze-out proceedings are separate from the mandatory bid procedure under the Securities Markets Act, both may become applicable in connection with a takeover bid. Often, it is most appropriate that the offeror initiates squeeze-out proceedings under the Limited Liability Companies Act and that the squeeze-out of all remaining minority shares is dealt with in the same proceedings.

#### Recommendation 23

*The offeror shall to the extent possible already in the offer document regarding the takeover bid disclose its intention to demand a squeeze-out under the Limited Liability Companies Act. The offeror shall demand the squeeze-out as soon as possible after having acquired more than nine tenths (9/10) of the shares and voting rights carried by the shares in the offeree company. This way the squeeze-out of all remaining minority shares may be dealt with in the same proceedings.*

#### Grounds

##### (a) Relation to the Provisions of the Securities Markets Act

It is important for the holders of the securities subject to the bid to know the prerequisites under which a voluntary takeover bid will be followed by a mandatory bid under the Securities Markets Act, or by squeeze-out proceedings under the Limited Liability Companies Act. The offeror shall in the offer document disclose its intention to redeem the shares of other shareholders of the offeree company if the offeror gains title to more than nine tenths (9/10) of the shares and voting rights carried by the shares in the company.

The right of squeeze-out and squeeze-out proceedings are separate from the mandatory bid procedure under the Securities Markets Act. The right of squeeze-out is based on the provisions of the Limited Liability Companies Act (see Chapter 18 of the CA). The right of squeeze-out arises when the offeror has acquired more than nine tenths (9/10) of the shares and voting rights carried by the shares in the offeree company. The offeror, on the other hand, shall launch a mandatory bid pursuant to the Securities Markets Act for all remaining shares in the offeree company and for securities entitling to such shares when the offeror has acquired more than three tenths (3/10) or more than half (1/2) of the voting rights carried by the shares in the offeree company. However, an obligation to launch a mandatory bid does not arise if a voluntary bid has been made for all of the shares in the offeree company and for securities entitling to such shares. In practice, it is further required that the consideration offered corresponds at the minimum to the highest price paid by the offeror for the securities subject to the bid within the six-months preceding the bid (Chapter 6, Section 12, Subsection 3 of the SMA).

In a squeeze-out under the Limited Liability Companies Act, the redemption price shall be the fair price of the shares. The Limited Liability Companies Act contains specific provisions on determining the fair price in a takeover situation. Where the rights of a squeeze-out and sell-out have arisen as a result of a voluntary bid, as referred to in Chapter 6 of the Securities Markets Act, and the redeemer has on the basis of that bid obtained more than nine tenths (9/10) of the shares subject to the bid, pursuant to the Limited Liability Companies Act, the price quoted in the takeover bid shall serve as the fair price, unless there is a special reason to determine otherwise. Where the squeeze-out has been preceded by a mandatory bid, as referred to in Chapter 6, Section 10 of the Securities Markets Act, the price quoted in the mandatory bid, pursuant to the Limited Liability Companies Act, shall serve as the fair price, unless there is a special reason to determine otherwise. In particular, when squeeze-out proceedings under the Limited Liability Companies Act also time wise follow immediately after a preceding takeover bid or mandatory bid, then basing the fair price on the prior consideration offered may be considered to be justified. The Takeover Directive deems that a demand for a squeeze-out should be presented within three (3) months from the completion of the bid.

##### (b) Proceedings in a Squeeze-out under Company Law

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 recommended 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.

A minority shareholder also has the right to squeeze-out (right of sell-out) and it is therefore important for the minority

shareholder to know as early as possible whether the offeror will initiate squeeze-out proceedings or whether the minority shareholder him- or herself should demand squeeze-out, if he or she so wishes. It is recommended that the offeror, if not obliged to launch a mandatory bid, commences squeeze-out proceedings immediately upon receiving the right of squeeze-out. In such a case, the need for minority shareholders themselves to demand squeeze-out decreases. An offeror that demands squeeze-out of the minority shares may commence proceedings by notifying the company thereof (Chapter 18, Sections 1 and 2 of the CA). Disputes concerning the right of squeeze-out and the redemption price in a squeeze-out under the Limited Liability Companies Act shall be resolved in arbitration. On the other hand, disputes concerning a mandatory bid under the Securities Markets Act, including disputes relating to consideration offered, shall be settled in a court of law.

## RECOMMENDATION 24 - INTEGRATION MEASURES

### Introduction

An offeror usually intends to acquire the entire share capital of the offeree company and other securities entitling to shares in the offeree company and to delist the securities of the offeree company and integrate the business operations of the offeree company or to initiate other proceedings in order to gain control over the company and its business operations. To initiate the aforementioned proceedings it is required that the offeror has obtained the necessary authority approvals for the acquisition of the offeree company, including the approvals of the competition authorities. Further, the integration measures may not violate the rights of the minority shareholders.

### Recommendation 24

***If the intention of the offeror is to combine the offeree company with the offeror through a merger or to execute other similar transactions regarding the offeree company, this shall be mentioned in connection with the offeror making public its plans regarding the continuance of the operations of the offeree company. After the offeror has gained control of the offeree company, the board of directors of the offeree company shall ensure that no business transactions shall confer an undue benefit to the offeror at the expense of the offeree company or its other shareholders.***

### Grounds

Integration and other control measures are often executed after the completion of a takeover bid when the offeror has

ensured the acquisition of the entire share capital of the offeree company. It is, however, possible for transactions to be executed between the offeror and the offeree company even when the offeror does not own the entire share capital of the offeree company. The offeree 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. Particular care shall be taken to ensure that transactions between the offeror and the offeree company comply with the general principles of the Limited Liability Companies Act. Especially equal treatment of the shareholders shall be ensured as long as the offeror does not own the entire share capital of the company.

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

## RECOMMENDATION 25 - PROVISIONS BASED ON THE ARTICLES OF ASSOCIATION OF THE OFFEREE COMPANY

### Introduction

The preparation, conditions and completion of a 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 offeree 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 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 process that is separate from the squeeze-out proceedings provided for by law.

A listed company may include provisions based on the so-called 'optional articles' of the Takeover Directive in its articles of association. Pursuant to the Takeover Directive, the implementation of the provisions in Articles 9 and 11 is at the discretion of each Member State. The provisions of the Limited Liability Companies Act, as such, are regarded as fulfilling the requirements in Article 9. On the basis of the Directive, however, the offeree company always has the independent option of adopting these provisions if the general meeting so resolves (Article 12(2)). Sections b) and c) of the grounds below aim to describe the procedures in compliance with the law and recommendations for a Finnish listed company to adopt the provisions of Articles 9 and 11 of the Takeover Directive pursuant to Article 12(2), if it so wishes.

### **Recommendation 25**

***The board of directors shall evaluate whether it is feasible to stipulate in the articles of association of the company on a separate redemption obligation based on the articles of association or whether it is necessary to include regulations pursuant to Articles 9 and 11 of the Takeover Directive in the articles of association and, if necessary, make a proposal on the matter to the general meeting of shareholders.***

### **Grounds**

#### **(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 votes in the offeree company. As control of a listed company may, in fact, already be acquired with a significantly smaller number of votes, a redemption obligation based on the articles of association was seen as a way to protect 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 securities entitling 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 6, Section 10 of the SMA). The number of voting rights triggering the obligation to launch a bid corresponds to a large extent to the redemption thresholds defined in the articles of association. This reduces 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 takeover bid made for all shares issued by the offeree company and for securities entitling to shares (see Chapter 6, Section 10 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 exemption. The articles of association may therefore provide for a redemption obligation arising also after a voluntary bid launched for all the securities of the offeree 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 enable speculative trading on the markets.

As a result of the problems caused by redemption clauses in articles of association, the offerors in a number of takeover bids completed in Finland have made the completion of the voluntary takeover bid subject to the removal of the redemption clause from the articles of association of the offeree 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 offeree 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 articles 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 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 6, Section 13 of the SMA).

If an offeror has a redemption obligation under the articles of association of the offeree company, then the provisions concerning takeover bids shall, according to Financial Supervision Authority Standard 5.2c, be complied with, as applicable and taking into account the provisions of the articles of association, in conjunction with the redemption bid based on the articles of association.

### **(b) Provisions Regarding Defensive Measures in Article 9 of the Takeover Directive**

According to Article 9 of the Takeover Directive, member states should ensure that the board of the offeree company shall refrain from defensive measures that may endanger the completion of the bid, unless the general meeting has authorised such measures after the board of the company has become aware of the bid. The provisions of the Limited Liability Companies Act, as such, are regarded as fulfilling the requirements in Article 9. In addition, Recommendation 9 - "Possible Measures of the Board of Directors Due to a Bid" of this recommendation embodies the principles of the Directive and Finnish legislation. The articles of association of a limited company may also provide that the board or other management body of offeree company shall obtain the authorisation of the general meeting of shareholders given for this purpose before taking any action which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company. More specific provisions on the aforementioned obligation may be included in the articles of association.

### **(c) 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 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 offeree 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 offeree company from exercising rights carried by the securities should, in certain circumstances, be removed when a general meeting resolves on defensive measures after a 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 Directive have not been implemented in Finnish legislation. Further, no similar provisions to those in Article 11 are used in articles of association in Finland.

The preparatory work of the Securities Markets Act 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 currently in force. 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 different number of votes per share or on voting restriction limiting the number of votes of a shareholder contained in the articles of association shall not be applicable during a 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, additionally required are 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.

The equal treatment of shareholders shall not be violated even by decisions taken by a qualified majority. 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 Directive, equitable compensation shall be provided for any loss suffered by the holders of those rights. The Limited Liability Companies Act shall not specifically provide for the possibility to pay the aforementioned compensation, and 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, restrictions on voting rights based on agreements between the holders of the offeree company's securities or restrictions on the transfer of securities could be intervened in also 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, not clear whether the provision intends 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 offeree company or the offeror, for example, by way of registration or through provisions corresponding to the articles of association of the offeree company. It is deemed in the preparatory work of the Securities Markets Act 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 offeree company or the offeror. According to the preparatory work of the Securities Markets Act, the 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.

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 PANEL SHOULD  
BE CONSULTED.*



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