The Helsinki Takeover Code 2022

Securities Market Association

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FOREWORD

Background and goals of the revision of the Takeover Code

The previous Takeover Code preceding this newest Takeover Code entered into force on 1 January 2014. Since then, the legislation relevant to the Takeover Code has changed in several ways, including as a result of the entry into force of the Market Abuse Regulation[1] (MAR) and the national implementation of the amendment to the Shareholder Rights Directive[2]. Market practice has also evolved.

The revision of the Takeover Code has taken into account legislative changes since the previous Takeover Code was published, as well as experiences gained from the practical application of the previous Code. In addition, in the reform of the Takeover Code, we have assessed the need to develop self-regulation with respect to competing mergers and acquisitions and the need to broaden the scope of the Takeover Code to apply to takeover bids in a multilateral trading facility (MTF) such as First North Finland. Ways to promote the transparency of the practical application of the Takeover Code and the formation of the Takeover Board's opinions have also been assessed in the revision of the Takeover Code.

During the preparation of the Takeover Code, consideration was also given to the possibility of including recommendations concerning takeover bids for shares traded on an MTF and the obligation to make a mandatory bid on an MTF in the Takeover Code. However, instead of self-regulation, the Securities Market Association decided to submit an initiative to the Ministry of Finance to amend the Securities Markets Act.

Key changes

Scope of application of the Takeover Code

The scope of the Takeover Code has been extended to include public takeover bids on an MTF and mergers. With respect to mergers and takeover bids on an MTF, the Takeover Code is based on genuine self-regulation, as the mandatory 'comply or explain' obligation of Chapter 11 of the Securities Markets Act is only applicable to public takeover bids targeting a listed company.

Structure of the Takeover Code

The structure of the Takeover Code has been changed to correspond to the structure of the Finnish Corporate Governance Code by replacing the recommendation-specific introductions with chapter-specific introductions. Sections on insider regulations included in the explanatory notes of the recommendations have been moved to a separate section at the end of the Takeover Code, Notes on insider regulations in different stages of the takeover bid process.

Contractual Arrangements with the Offeror (Recommendation 3)

The wording of the recommendation has been changed to reflect prevailing market practice. At the same time, the explanatory notes for the recommendation have been specified, for example, with regard to the commitment to pay a break-up fee.

Preparing for Information Leaks (Recommendation 10)

The recommendation has been amended to include a recommendation that the offeror must maintain a project list of persons with access to inside information about the project. In particular, this recommendation covers situations in which the offeror is not obligated to draw up an insider list on the basis of the MAR.

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1 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

2 Directive (EU) 2017/828 of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

Disclosure of a Bid (Recommendation 11)

The recommendation has been updated to include a requirement to disclose the material terms of conditional commitments given by shareholders and the material terms of a combination or transaction agreement. The purpose of the changes is to promote transparency in the bid process and, in particular, the terms and conditions related to competing bids.

Binding Nature of the Intentions and Plans of the Bid Process (Recommendation 12)

A new Recommendation 12 has been added to the Takeover Code, which deals with the binding nature of intentions and plans announced by the offeror regarding the bid procedure. The recommendation covers any kind of information disclosed by the offeror about its intentions or plans to do or refrain from doing something in relation to the bid process, if such information is likely to impact the assessment of the bid by the target company, holders of securities subject to the bid, or other investors.

Application of the Takeover Code in Mergers (Recommendation 16)

A new Recommendation 16 has been added to the Takeover Code, which deals with the application of the Code to mergers. According to the Recommendation, recommendations 1 to 4 and 6 to 13 also apply to mergers. The acquiring company shall afford equivalent treatment to all holders of securities of the merging company. The acquiring company is also obligated to disclose information on its acquisitions of securities of the merging company and the consideration it has paid for them. In turn, in connection with the disclosure of the draft terms of merger, the board of directors of the merging company has a duty to disclose information similar to that of the board of directors of the target company in a statement regarding a takeover bid.

Other changes

Clarifications of a technical nature have also been made to some of the other recommendations. In addition, changes and clarifications have been made to the explanatory notes to all recommendations as a result of changes in legislation, recommendations, and market practice.

Working group

In March 2021, the Board of Directors of the Securities Markets Association appointed a working group to prepare a proposal for the new Takeover Code.

Chair of the working group

Attorney, Senior Partner Jan Ollila (Dittmar & Indrenius Attorneys)

Members of the working group

Head of Corporate Finance Pekka Hiltunen (Danske Bank / Corporate Finance)
Board Professional Mammu Kaario
CEO Annika Paasikivi (Oras Invest)
Chief Legal Officer Outi Raekivi (Technopolis)
CEO Reima Rytsölä (Solidium)
Group General Counsel Juha Surve (eQ)
Board Professional Arja Talma
Managing Director Alexandra Therman-Londen (Nordea Bank / Corporate Finance)
Head of Surveillance Susanna Tolppanen (Nasdaq Helsinki)

Secretariat of the working group

Attorney, Managing Associate Anniina Järvinen (Hannes Snellman Attorneys)
Senior Advisor Ville Kajala (Finland Chamber of Commerce)
Attorney, Partner Mia Mokkila (Borenius Attorneys)

The working group convened 10 times during its mandate. The working group consulted a wide range of authorities and market participants in the course of its work. An extensive consultation was organised in the winter of 2021–2022, and a total of 12 statements were received.

Approval and entry into force of the Takeover Code

The Board of Directors of the Securities Market Association approved this Takeover Code on 30 May 2022.

The new Takeover Code 2022 will enter into force on 1 October 2022 and will replace the previous Takeover Code that entered into force on 1 January 2014. This Takeover Code shall apply to takeover bids that are published after the Code's entry into force and to mergers for which the draft terms of merger are published after the Code's entry into force.

Helsinki, 30 May 2022

Board of Directors of the Securities Market Association

Risto Murto Chair	Henrik Husman Vice-Chair	Timo Kokkila	Leena Niemistö	Laura Raitio

The Securities Market Association is a cooperative body established in December 2006 by the Confederation of Finnish Industries EK, the Finland Chamber of Commerce and NASDAQ Helsinki. The Association promotes good securities market practice and, in particular, self-regulation by market participants. The Association maintains the Finnish Corporate Governance Code and the Takeover Code and participates in other development of self-regulation. The Association's boards issue interpretations, recommended decisions, and guidelines on the application of the codes. Information about the Association and the history of the Takeover Code can be found on the Securities Market Association website: www.cgfinland.fi

INTRODUCTION

1. Objectives of the Takeover Code

The Takeover Code is a recommendation within the meaning of Chapter 11, Section 28 of the Securities Markets Act. Its purpose is to promote the development of good securities market practice and to provide direction for the procedures to be followed in takeover bids and mergers.

The objective of the Takeover Code is to standardise the procedures to be complied with in takeover bids and mergers in Finland, thereby improving the legal protection of parties in corporate transactions. The Takeover Code supplements the legislation on takeover bids and mergers, and the Code should be applied and interpreted in accordance with the objectives and provisions of the Securities Markets Act and the Limited Liability Companies Act.

The recommendations of the Takeover Code apply to questions and issues that emerge in takeover bids and mergers. The Takeover Code gives recommendations regarding the activities of the parties to the transaction, as well as those of the management and shareholders of the target company and the merging company. The Takeover Code also addresses integration measures and the squeeze-out of minority shareholders in accordance with the Limited Liability Companies Act, which often follow the completion of a bid.

The Takeover Code applies to takeover bids and mergers. However, the Takeover Code also addresses questions that may arise in other corporate transactions. As such, by observing the recommendations of the Code, compliance with good securities market practice can also be ensured in connection with other corporate transactions, where applicable.

2. Structure of the Takeover Code

The Takeover Code is divided into three sections: i) introduction, ii) recommendations, and iii) notes on the application of regulations.

The ***Introduction section*** describes the objectives, structure and scope of application of the Takeover Code and the ‘comply or explain’ principle applied to the recommendations. The introduction section also provides an overview of the practices followed in Finnish takeover bids and mergers.

The ***Recommendations section*** consists of individual recommendations, divided into separate chapters I to VII. At the start of each chapter, there is a description of the regulations and general principles applicable to that theme.

- Individual recommendations (1–16) are listed in numerical order in bold. An explanation must be provided for deviations from a recommendation and the grounds for this.

- Each individual recommendation is followed by explanatory notes describing the grounds for the recommendation, aspects that explain and clarify the recommendation, and possible references to the section ‘Notes on the Application of Regulations’. Where applicable, the explanatory notes describe examples or practices for which deviations do not need to be reported or explained. The explanatory notes therefore do not include a recommendation-specific compliance obligation, but only derogations from the actual recommendation must be reported and explained. The explanatory notes of some recommendations also contain references to statutory obligations, which must be complied with.

The section ***Notes on the Application of the Regulations*** discusses practical issues related to the interpretation and procedures of the regulations which often occur in takeover bids and mergers. The section contains separate comments on provisions based on the target company’s articles of association, the duty of disclosure at different stages of the bid process, and insider regulations at various stages of the bid process. Deviations from the procedures described in this section do not need to be reported or explained. However, to the extent that the practices described in the section are based on binding legislation, no deviations from the obligations are possible.

3. Application of the Takeover Code

The Takeover Code applies to:

- takeover bids in which the shares of the target company are admitted to trading on a regulated market in Finland or, by application of or with the consent of the target company, admitted to trading on an MTF; and
- mergers in which the merging company is a Finnish limited liability company whose shares are admitted to trading on a regulated market in Finland or, by application of or with the consent of the merging company, admitted to trading on an MTF.

In addition, the recommendations of the Takeover Code concerning the target company apply to takeover bids and mergers in which the target company or merging company is a Finnish limited liability company whose shares are traded on a regulated market in an EEA country other than Finland.

Recommendation 16 specifies which individual recommendations of the Takeover Code apply to mergers.

The Takeover Code is not applicable to other corporate transactions as such. However, the Takeover Code also addresses questions that may arise in other corporate transactions. As such, by observing the recommendations of the Code, compliance with good securities market practice can also be ensured in connection with other corporate transactions, where applicable. For example, the explanatory notes to Recommendation 16 describe the application of the Code's principles to a Finnish limited liability company acting as the acquiring company.

(a) 'Comply or explain' principle

The Takeover Code is applied in accordance with the principle of 'comply or explain'. With respect to takeover bids for listed companies, the obligation of the offeror and the target company to comply with the Takeover Code in accordance with the 'comply or explain' principle is based on the provisions of Chapter 11 of the Securities Markets Act.[3] In the case of takeover bids on an MTF and mergers of listed companies and companies traded on an MTF, the 'comply or explain' procedure is based on this Takeover Code and good securities market practice.

The aforementioned 'comply or explain' principle applies to complying with the Takeover Code in general. As a rule, all recommendations of the Takeover Code should be followed. However, compliance with the Takeover Code is also possible by deviating from an individual recommendation and explaining the reason for this.

If a company deviates from the Takeover Code or its individual recommendations, the reasons given must be sufficiently clear and detailed to enable the holders of the target company's or the merging company's securities and other investors to make their own assessment of the significance of the deviation. An explanation that states the reasons for the deviation in a transparent and comprehensive manner and explains the alternative course of action chosen is likely to strengthen the confidence that the company complies with good securities market practice.

For each non-compliance, the following shall be explained:

- how the recommendation has been deviated from;
- the reason for the deviation;
- how the decision to deviate from the recommendation was taken;
- where appropriate, the action taken instead of following the recommendation; and
- an explanation of how compliance with good securities market practice and, in the case of the target company, the general principles of the Limited Liability Companies Act has been ensured.

Information on compliance with the Code or the reasons for non-compliance must be disclosed at the latest either at the time of the disclosure of the bid (offeror), at the time of release of the statement by the board of directors of the target company

3 For the offeror, Chapter 11, Section 9(3) of the SMA. For the target company, Chapter 11, Section 13(3) of the SMA.

(target company), or at the time of disclosure of the draft terms of merger (acquiring and merging company). However, it is usually reasonable to disclose information about the commitment to comply with the code as early as possible, for example when the offeror or the target company first discloses information related to a bid or potential bid. If the offeror, target company, acquiring company or merging company has committed to comply with the Takeover Code but deviates from its individual recommendations, the reasons for the deviation shall be disclosed as early as possible and usually no later than when the need for the deviation becomes known. Some of the recommendations of the Takeover Code concern situations where information about the takeover bid, merger or possible competing bid has not yet been disclosed. Any deviation from such recommendations should be disclosed only if information about the bid, merger or potential competing bid is disclosed.

To ensure that the Takeover Code gives a comprehensive understanding of the procedures to be observed in takeover bids and mergers, the provisions of the Limited Liability Companies Act (CA), Securities Markets Act (SMA), and Market Abuse Regulation (MAR), as well as the regulations and guidelines by the Finnish Financial Supervisory Authority (FIN-FSA), have been taken into account in drafting the Code. The recommendations have been drafted in such a way that acting according to them would be in line with binding regulations. To the extent that the recommendations contain obligations arising from legislation or official regulations, it is not possible to deviate from them on the basis of the 'comply or explain' principle. Each actor must ensure compliance with the Limited Liability Companies Act, the Securities Markets Act, the Market Abuse Regulation, and other mandatory regulations on a case-by-case basis.

(b) Interpretation of the Takeover Code

Takeover bids and mergers can give rise to a wide range of issues, and the procedures and practices associated with such arrangements are constantly evolving. In addition, the situations arising in the context of takeover bids and mergers can vary to a high degree. This Takeover Code cannot proactively or comprehensively provide guidance in accordance with good practice in each individual situation. Situations may also arise in which there is a legitimate reason to deviate from the procedures specified in the Takeover Code.

In each situation, the recommendations of the Takeover Code should be interpreted in the light of the objectives of the Code. In doing so, it is important that the procedure chosen in each individual case is likely to:

- increase the predictability of the process,
- increase the parties' access to information and enhance the transparency of securities markets, and
- ensure the legal protection of parties to the arrangement.

In questions of interpretation related to the recommendations of the Takeover Code, it may be necessary to request an opinion from the Takeover Board. The opinion of the Takeover Board can also be requested in order to determine whether a planned procedure complies with the general principles of the Takeover Code, good securities market practice, or the general principles of the Limited Liability Companies Act. The opinions published by the Board on the application of the Takeover Code support the Code's general objective of harmonising procedures and practices.

As a rule, the interpretation of individual provisions of the Securities Markets Act falls within the competence of the Financial Supervisory Authority. However, the Financial Supervisory Authority recommends that the board of directors of the target company request a statement from the Takeover Board if it does not intend to transfer a decision on a directed share issue or other measure or arrangement referred to in Chapter 11, Section 14 of the SMA to the general meeting for a decision (Section 4.4 (18) of FIN-FSA RAG on Takeover Bids). The Financial Supervisory Authority may also take into account the statement issued by the Takeover Board on the matter when considering the conditions for deviating from the minimum price of the offer consideration (Section 7.3.2 (18) of FIN-FSA RAG on Takeover Bids). Under Chapter 11, Section 26(1) of the Securities Markets Act, the Financial Supervisory Authority may, upon application and for a special reason, grant permission to derogate from the obligation to launch a bid, provided that the exemption does not violate the general provisions of Chapter 1, Sections 2–4 of the SMA or the general principles of Chapter 11, Section 7 and Chapter 11, Section 8 of the SMA, or Article 3 of the Takeover Directive. When applying for an exemption, it may often be relevant that the arrangement complies with the general principles of the Limited Liability Companies Act and that the rights of minority shareholders are realised in connection with the corporate transaction. Upon request, the Takeover Board may issue an opinion on, among other issues, whether, in the Board's view, the planned transaction is deemed to comply with the general principles of the Limited Liability Companies Act or whether the planned procedures of company law comply with good securities market practice. In addition, the explanatory notes to the recommendations below give examples of matters where it is possible to request the opinion of the Takeover Board.

The Takeover Directive provides for the following principles that must be taken into account when implementing the Directive in Member States:

- all holders of the securities of a target (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 a target company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the target company must give its views on the effects of implementation of the bid on employment, conditions of employment, and the locations of the company's places of business;

- the board of a target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;

- false markets must not be created in the securities of the target company, of the offeror company, 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;

- an offeror must announce a bid only after ensuring that they can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration; and

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

The above principles are binding on the Member States. The principles support the realisation of an appropriate takeover bid process and, where applicable, must also be followed in the interpretation of the recommendations of this Takeover Code.

(c) Compliance with good securities market practice

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

Although the Takeover Code applies to the parties of takeover bids and mergers, from the point of view of maintaining confidence in the functioning of the securities markets and in the self-regulation of the business community, it is important that the advisers of these parties also commit to promoting good securities market practice. According to the preliminary work on the Securities Markets Act, the prohibition to act contrary to good securities market practice applies to natural and legal persons operating on the market and participating in market activities. As such, the provisions of the law apply to, for example, investment service providers, parties to securities transactions (buyer, seller and potential intermediary), issuers and other offerors of securities, offerors of takeover bids, and other parties offering to buy securities, as well as their representatives and those acting on their behalf (Government Proposal 32/2012, p. 95).

(d) Limited Liability Companies Act

Although the Limited Liability Companies Act does not contain explicit provisions related to takeover bids, some of its provisions apply to activities of the target company's governing bodies in the event of a takeover bid. In drafting the Takeover Code, the applicability of the provisions of the Limited Liability Companies Act on the actions of the board of directors and the general meeting of shareholders of the target company at different stages of the bid process and merger has been taken into account. In particular, compliance with the procedures of the Takeover Code promote the realisation of the general principles mentioned in Chapter 1 of the Limited Liability Companies Act and the fulfilment of the rights of the shareholders of the target company or the merging company in takeover and merger situations. At the same time, following the procedures laid down in the Takeover Code helps the target company or the merging company not to take any action referred to in Chapter 1, Section 7 of the Limited Liability Companies Act that is likely to give a shareholder or other person undue advantage at the expense of the company or another shareholder, and that the management of the target company or the merging company has acted with due care in the event of a takeover bid or merger in the manner required by Chapter 1, Section 8 of the Limited Liability Companies Act. The same applies to a Finnish limited liability company acting as the offeror or acquiring company.

4. Key Content and Application Practice of the Rules on Takeover Bids and Mergers

The procedures to be followed in takeover bids are specified in Chapter 11 of the Securities Markets Act and in the Financial Supervisory Authority's regulations and guidelines 9/2013 on Takeover Bid and the Obligation to Launch a Bid (FIN-FSA RAG on Takeover Bids). The Limited Liability Companies Act, on the other hand, contains provisions on the obligations the board of directors of the target company, squeeze-out of shares, and mergers, among other issues. This section briefly describes the key content of the legislation and the related application procedure.

Obligations of the Offeror

Ensuring the financing of a bid

Prior to announcing a bid, the offeror shall ensure that it can fulfil in full any cash consideration, if such is offered, and take all reasonable measures to secure the implementation of any other type of consideration (Chapter 11 Section 9(4) of the SMA).

» *See Recommendation 1 – Ensuring Prerequisites to Complete a Bid.*

Promoting the successful outcome of a bid

The offeror may not take measures that prevent or materially impede the completion of the bid or the conditions for its completion (Chapter 11, Section 8(1) of the SMA). The law also prohibits the offeror and persons acting in concert with it from disposing of shares in the target company or securities entitling thereto issued by the target company after the disclosure of the bid and prior to the disclosure of its outcome. If securities are disposed of for a special reason, the offeror shall disclose information on the planned disposal in good time and at the latest five banking days before the disposal of the securities (Chapter 11, Section 8(2) of the SMA).

Equivalent treatment

The offeror launching a takeover bid must afford equivalent treatment to all holders of securities in the target company (Chapter 11, Section 7 of the SMA). This provision has been interpreted as meaning that, in assessing the achievement of equivalent treatment, transactions between the offeror and holders of securities in the target company outside the bid process are also taken into account if they are connected to the bid. As such, in share transactions prior to the bid, the offeror cannot agree on special benefits afforded to the shareholders in question if such benefits result in those shareholders de facto receiving a better consideration than what is offered in the bid (Section 4.2 of FIN-FSA RAG on Takeover Bids).

In takeover practice, in transactions outside the bid process, it has been possible to agree on a consideration that differs from the consideration offered in the takeover bid if the transaction as a whole can be assessed to be sufficiently separate from the takeover bid. The overall assessment may also take into account the purpose of the share transaction and the terms other than those relating to the quality and quantity of the consideration. For example, in consortium bids, the assessment of whether a transaction is a sufficiently separate from the takeover bid may take into account the following factors, among others:

- on what basis the shareholders of the target company participating in the consortium have been selected,
- whether the shareholders of the target company participating in the consortium have committed themselves to the consortium bid prior to its disclosure,
- under what terms the shares in the consortium are determined and whether the terms have been confirmed prior to the disclosure of the takeover bid,
- whether the shareholders of the target company participating in the consortium assume financial risk from the preparation and completion of the takeover bid and the future development of the target company,
- for how long the shareholders of the target company participating in the consortium commit to the consortium and, consequently, to the target company, and
- whether the shareholders of the target company that are parties to the consortium receive special benefits in connection with the transaction, such as a de facto better consideration or the right to a guaranteed return upon break-up.

Similar criteria have also been applied when assessing other transactions outside the bid process.

Pricing of the bid

In a voluntary takeover bid, the consideration offered may be paid in cash, securities, or a combination of these. In situations where the securities offered as consideration are not traded on a regulated market and are not applied to be admitted to trading on a regulated market in connection with the takeover bid, a cash consideration must be offered at least as an alternative. The same applies in situations where, between the six months preceding the disclosure of the bid and the close of the offer period, the offeror or a person acting in concert with the offeror has acquired securities representing at least five per cent of the voting rights in the target company (Chapter 11, Section 24 of the SMA).

In the event that a voluntary takeover bid is made for all the shares and securities entitling thereto issued by the target company, the starting point for determining the consideration shall be the highest price paid by the offeror or by a person acting in concert with the offeror during the six months preceding the disclosure of the takeover bid. Deviations from this price are possible for a special reason (Chapter 11, Section 24(3) of the SMA).

If, after the disclosure of a voluntary takeover bid or the arising of an obligation to launch a bid, and prior to the close of the offer period, the offeror or a person acting in concert with the offeror acquires securities of the target company on terms that are more favourable than those of the bid, the offeror shall amend the bid to correspond to said acquisition on more favourable terms (obligation to raise). Similarly, if, within nine months from the close of the offer period, the offeror in a takeover bid or a person acting in concert with the offeror acquires securities of the target company on terms that are more favourable than those of the bid, the holders of securities who accepted the takeover bid shall be compensated the difference between the acquisition on more favourable terms and the consideration offered in the bid (obligation to compensate) (Chapter 11, Section 25(1)–(2) of the SMA).

Terms of the bid

According to the SMA, the offeror of a voluntary takeover bid may set terms on the completion of the bid. A mandatory takeover bid may be conditional only with respect to obtaining the necessary official decisions (Chapter 11, Section 15 of the SMA). With the exception of a mandatory takeover bid, the law does not specifically regulate the content of any terms imposed on the completion of a takeover bid or the conditions of implementation permissible in voluntary takeover bids.

However, there are limitations on the content of terms that can be imposed on voluntary takeover bids. The terms of voluntary takeover bids are limited by the provisions of the SMA on equivalent treatment (Chapter 11, Section 7), prohibition to act contrary to good securities market practice (Chapter 1, Section 2), and the offeror's duty to promote the successful outcome of a bid (Chapter 11, Section 8(1)).

Disclosure obligations

The decision on a takeover bid must be made public by the offeror without delay and communicated to the target company (Chapter 11, Section 9(1) of the SMA). The same applies to amending the terms of the takeover bid (Chapter 11, Section 15(2) of the SMA). The offeror must also publish the offer document before the takeover bid takes effect. The offer document may be published after it has been approved by the Financial Supervisory Authority (Chapter 11, Section 11 of the SMA).

Right of squeeze-out and sell-out

A shareholder with more than nine-tenths (9/10) of the shares and votes in a company (redeemer) has the right to redeem the shares of the other shareholders at a fair price. A shareholder whose shares may be redeemed (minority shareholder) has the right to demand that their shares be redeemed. The redeemer must notify the target company without delay when the right of squeeze-out or sell-out arises or ceases.

The procedures for squeeze-out and sell-out are specified in Chapter 18 of the Limited Liability Companies Act. Disputes concerning the right to squeeze-out and the redemption price are resolved in arbitration. The arbitrators are appointed by the Redemption Committee of the Finland Chamber of Commerce. Based on an application by the Redemption Committee of the Finland Chamber of Commerce, the court appoints a trustee to supervise the interests of minority shareholders in arbitration. The redeemer is liable for the costs of the arbitration, unless the arbitrators do not find it reasonable to rule otherwise for a special reason.

The redemption price of shares is determined based on the fair price at the time before the arbitration was initiated. If the squeeze-out is preceded by a mandatory takeover bid, the price quoted in the mandatory bid is the fair price, unless there is a special reason to determine otherwise. If the rights of squeeze-out and sell-out have arisen out of a voluntary takeover bid and the redeemer has, on the basis of that bid, obtained at least nine tenths (9/10) of the shares targeted in the bid, the price quoted in the takeover bid is the fair price, unless there is a special reason to determine otherwise.

Duties of the Board of Directors of the Target Company

General principles of the Limited Liability Companies Act

The board of directors has general competence to to act for the company (Chapter 6, Section 2 of the CA). The board of directors shall act with due care and promote the interests of the company and its shareholders (duty of care and loyalty, Chapter 1, Section 8 of the CA). Acting in the interests of the company includes the duty to act in accordance with the purpose of the company. Unless otherwise stated in the articles of association, the purpose of a company is to generate profits for the shareholders (Chapter 1, Section 5 of the CA). The board of directors of the target company also has a duty to treat all shareholders of the company equally, and no measure may be taken by the target company that is likely to confer an undue benefit to a shareholder or other party at the expense of the company or another shareholder (Chapter 1, Section 7 of the CA).

» *See Recommendation 2 – Duty of the Board of Directors to Act Following a Proposal Relating to a Bid.*

In Finnish takeover and merger practice, the offeror and the target company often sign a combination or transaction agreement before making the bid public. However, there is no obligation to enter into such an agreement. The board of directors of the target company must assess on a case-by-case basis whether it is necessary to enter into a combination or transaction agreement and what terms should be included in the agreement. The combination or transaction agreement is usually a procedural document in which the offeror and the target company agree, for example, on the terms and conditions of the bid to be made to the shareholders and on the procedures to be followed in connection with the bid. The combination or transaction agreement does not obligate the shareholders of the target company who are not parties to the agreement.

» *See Recommendation 3 Contractual Arrangements with the Offeror.*

Measures that prevent or materially impede the completion of a takeover bid or its terms

If, after a takeover bid has been brought to its attention, the board of directors of the target company intends to use a share issue authorisation or decide on actions and arrangements within its general competence to render decisions in such a way that they prevent or may prevent or materially impede the completion of the takeover bid or its essential terms, the law requires that the matter be transferred to the general meeting for a decision. However, the matter need not be transferred to the general meeting for a decision if the procedure complies with Chapter 1 of the Limited Liability Companies Act and the general principles of Article 3 of the Takeover Directive, and the board of directors of the target company immediately discloses the reason for the non-transfer (Chapter 11, Section 14 of the SMA).

Statement on the takeover bid

The board of directors of the target company is obligated to publish a statement on the takeover bid. The statement must be supplemented if the terms of the takeover bid are amended or a competing takeover bid for the target company is published (Chapter 11, Sections 13, 15(3) and 17(1) of the SMA).

» *See Recommendation 5 Statement by the Board of Directors of the Target Company Regarding a Bid.*

Rights of Holders of Securities Subject to a Takeover Bid

Right of withdrawal

As a general rule, accepting a takeover bid is binding on the shareholder, unless otherwise specified in the terms and conditions of the takeover bid. However, acceptance of the bid may be withdrawn if the offeror who issued the conditional bid has reserved the right to waive or amend any of the terms for the execution of the bid. The right of withdrawal remains in force during the term of the takeover bid until the offeror has announced that all the terms of the bid have been fulfilled or has waived the requirement that they be fulfilled.

A shareholder who has accepted the takeover bid may also withdraw acceptance if the bid has been valid for more than ten weeks and no transactions have been carried out to execute the takeover bid, or if a competing bid has been announced and no transactions to execute the takeover bid have yet been made. In either case, the right of withdrawal is valid during the period of validity of the takeover bid.

Right of sell-out

A shareholder with more than nine-tenths (9/10) of the shares and votes in a company (redeemer) has the right to redeem the shares of the other shareholders at a fair price. A shareholder whose shares may be redeemed (minority shareholder) has the right to demand that their shares be redeemed. The rights of squeeze-out and sell-out are described in more detail previously in this document in connection with the obligations of the offeror.

Merger

In a merger, the merging company is merged with an acquiring company, whereby the assets and liabilities of the merging company are transferred to the acquiring company in exchange for a merger consideration payable to the shareholders of the target company. The merger consideration typically consists of shares in the acquiring company, but it can also be cash, other assets, and commitments.

» *See the explanatory notes to Recommendation 15 Integration Measures.*

The decision on a merger is always based on the draft terms of merger signed by the boards of directors of the acquiring and merging companies. In the merging company, the decision on the merger is always made by the general meeting. The decision is made by a qualified majority, as referred to in Chapter 5, Section 27 of the Limited Liability Companies Act. In the acquiring company, the decision on the merger may, under certain conditions, also be made by the board of directors. However, in the case of mergers of listed companies, it is common for the decision to be made at the general meeting of shareholders even in the acquiring company.

Once the decision on the merger has been made and the completion of the merger has been registered, the shareholders of the merging company receive the merger consideration without further action. However, a shareholder of the merging company may, at the general meeting deciding on the merger, request the sell-out of their shares and must be given an opportunity to do so before the decision on the merger is made. Only those shares that have been registered in the shareholders' register by the general meeting or the last registration date or, if the shares belong to the book-entry system, to the book-entry account of the shareholder demanding redemption by the record date of the general meeting, can be requested for sell-out. The shareholder demanding sell-out must vote against the merger decision.

If the right to sell out shares or the terms of sell-out cannot be agreed with the acquiring company, the matter will be settled through arbitration. The arbitrators are appointed by the Redemption Committee of the Finland Chamber of Commerce. The shareholder demanding sell-out must initiate the matter no later than one month after the general meeting. The procedures for squeeze-out and sell-out are specified in Chapter 18, Sections 3–5 and 8–10 of the Limited Liability Companies Act.

I. PREPARATION OF A BID

A takeover bid and its disclosure may have a substantial impact on the share price of the target company. Disclosure of a takeover bid may also affect the business operations of the target company.

Prior to announcing a bid, the offeror shall ensure that it can fulfil in full any cash consideration, if such is offered, and take all reasonable measures to secure the implementation of any other type of consideration (Chapter 11 Section 9(4) of the SMA). It is essential for the functioning of the markets that the offeror ensure the feasibility of the bid also in other respects. The offeror of a takeover bid may not take measures that prevent or materially impede the completion of the bid or the conditions for its completion (Chapter 11, Section 8(1) of the SMA).

In practice, information regarding the takeover bid of a target company is always inside information with respect to the shares or other financial instruments of the target company. Depending on the situation, the information may also constitute inside information with respect to the offeror's financial instruments. It is important for the functioning of the markets that the offeror manages inside information on the target company properly, even in situations in which the offeror is not required to draw up an insider list under the MAR.

» *See Recommendation 10 Preparing for Information Leaks and Notes on insider regulations in different stages of the takeover bid process.*

RECOMMENDATIONS
I. PREPARATION OF A BID

RECOMMENDATION 1 – ENSURING PREREQUISITES TO COMPLETE A BID

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

Explanatory notes

(a) Ensuring financing

According to a mandatory provision of the SMA, the offeror must ensure the availability of financing (Chapter 11, Section 9(4) of the SMA) prior to the disclosure of the takeover bid. As such, no derogations from this requirement are possible under the 'comply or explain' principle. The availability of financing must also be ensured in the event of a change in the terms of the published bid, such as when the consideration is increased or the minimum acceptance limit of the takeover bid is lowered. According to the Financial Supervisory Authority, ensuring financing means that the offeror has sufficient cash funds at its disposal or has agreed on financing arrangements for completing the bid with sufficient certainty. However, the cash amount agreed in the financing arrangement need not be in the offeror's possession at the time the bid is made public. According to the Financial Supervisory Authority, the financing arrangement for the cash consideration may also be conditional. According to the Financial Supervisory Authority, ensuring payment of a share consideration requires that, if necessary, the offeror convenes a general meeting to decide on a directed issue of shares, or commits to doing so at the time of the disclosure of the bid. Any terms and conditions and uncertainty factors related to financing arrangements that are essential for the evaluation of the bid shall be made public when the bid is disclosed. The offeror must describe the essential terms and conditions regarding the availability of financing at the time of disclosure of the bid and in the offer document. These explanatory notes describe how the availability of financing can be ensured in practice, in accordance with good securities market practice.

» *See Recommendation 11 Disclosure of a Bid and Section 5.2.2 (20)–(22) of FIN-FSA RAG on Takeover Bids.*

The financing arrangement of a cash consideration may consist of, for example, existing cash reserves, a financial commitment available to the offeror under an existing or new financing arrangement, or equity commitment letters commonly used in private equity activities to finance the offeror. If external loan financing is required to finance the bid, insofar as ensuring financing is concerned, it may, as a rule, be considered sufficient that a decision regarding the availability of the financing has been made (such as approval for granting financing of the relevant body of the finance provider) and the amount of financing and the main terms and conditions have been agreed with sufficient certainty between the credit institution, the finance provider or the party arranging funding, and the offeror in such a way that the finance provider cannot unilaterally withdraw from the financing without a reason. A unilateral letter of interest or a letter of strong interest on behalf of an individual finance provider does not, on its own, constitute sufficient proof of the availability of the financing having been ensured, nor does sufficient ensuring of financing always require that all parties involved have signed the final financing agreement by the time the bid is made public. The documentation necessary to ensure sufficient certainty of the financing arrangement may vary depending on the legal nature, background and financial position of the offeror and potential finance provider. The assessment of the availability of financing may also be influenced by factors and limitations affecting the implementation of the commitment, such as the conditionality of financing, restrictions arising from foreign exchange regulations, or other restrictions on the transfer of funds. If the bid is funded by a party other than a credit institution (such as a debt fund, venture capital fund or other investment entity), factors with significance in assessing availability of financing include, among others, the financial capacity, legal structure and line of business of the finance provider, regulations applicable to the finance provider, and factors affecting the implementation and enforcement of the commitment.

The offeror should ensure that the purpose of the financing defined in the financing commitment of the takeover bid covers not only the cash consideration to be paid in the bid, but also the squeeze-out remuneration corresponding to the takeover bid price for any minority shares.

» *See also the explanatory notes to Recommendation 16 Merger, section (b) on securing financing in connection with a merger.*

The availability of the financing may be agreed on a conditional basis, for example, upon the takeover bid being completed in accordance with its terms, or provided that no material adverse change takes place on the financing markets or in the target company. In market practice, external financing is often conditional on such terms. Invoking the availability of financing requires that it has been explicitly stated as a condition for the completion of the bid. Conditions related to the availability of financing that are not otherwise included in the terms of the bid and whose realisation the offeror has no control over must be described in sufficient detail in the conditions related to the availability of financing to enable investors to assess the probability that the condition will be realised. A general reference stating that the availability of financing is subject to conditions normally used on the financial markets is not sufficient. Any conditions of the financing must be sufficiently unambiguous to prevent the assessment of their realisation from being effectively left to the discretion of the offeror. If, after the disclosure of the takeover bid, it emerges that the financing is no longer available due to a material adverse change or other reason, the offeror's obligation under Chapter 11, Section 8 of the Securities Markets Act to promote the succesful outcome of the takeover bid may, in practice, require the offeror to take all reasonable steps to raise new financing. However, in such a situation, the offeror is not, in principle, obligated to raise new financing on conditions that are substantially less favourable than those of the original financing. If the availability of financing is not made a condition for the completion of the bid, the offeror is responsible for ensuring that it can pay the full consideration.

» *See also Recommendation 11 Disclosure of a Bid, Recommendation 13 Invoking a Condition Set for the Completion of the Bid and Sections 5.4 (44)–(45) of FIN-FSA RAG on Takeover Bids.*

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

If the offeror is a limited liability company, the issue of shares or some other consideration in equity securities usually requires a decision by the general meeting. An exception may be made in situations in which the board of directors has been granted authorisation to execute the issue in advance. According to the Financial Supervisory Authority, ensuring payment of a share consideration requires that, if necessary, a general meeting is convened to approve a directed share issue. In other situations where approval of the offeror's general meeting or some other similar body is required for the payment of the consideration offered or the completion of the bid, ensuring fulfilment of the prerequisites to complete the bid usually also requires that the offeror convene or commit to convene said body for a meeting to decide on the matter when the takeover bid is made public at the latest. The offeror is not, however, usually required to investigate in advance the stance of the offeror's shareholders on the decisions needed for the bid, unless the offeror has reason to assume that a necessary decision will not have sufficient support among its shareholders. In such situations, prior to making the bid public, it is often justified to investigate, prior to disclosing the bid and within the limits of insider regulations, the stances of such shareholders whose support is needed for the decisions in question.

» *See also Recommendation 10 Preparing for Information Leaks, Recommendation 11 Disclosure of a Bid and, with respect to share consideration, Section 5.2.2 (22) of FIN-FSA RAG on Takeover Bids.*

If any other securities than equity securities (such as bonds) are offered as consideration, the offeror must, in connection with the bid, provide sufficient information on the securities necessary to assess the consideration.

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

(b) Official approvals and regulations

Good securities market practice requires that the offeror shall, by the means at its disposal, strive to determine the official approvals needed for the completion and execution of the bid. These may include approvals granted by the competition authorities, official authorisations referred to in the Act on the Screening of Foreign Corporate Acquisitions, and approvals required in different lines of business, such as insurance or banking. The offeror shall also, by the means at its disposal, strive to ensure that it fulfils or is able to fulfil all the requirements or any other operating conditions imposed by the authorities within the line of business in question.

Applying for official approvals may be a lengthy process and may impact the schedule for completing the bid. The length of the processes may affect the standing of the target company and its shareholders, and information related to these is important for shareholders. The offeror should, when disclosing the bid, provide an account of the official approvals required and, whenever possible, an estimate of the length of the process.

» *See Recommendation 11 Disclosure of a Bid.*

If the offeror is unable to provide an account of the necessary official approvals and the requirements for attaining them, this must be stated when disclosing the bid.

In this context, it should also be noted that a mandatory provision of Chapter 11, Section 8(1) of the SMA states that the offeror of a takeover bid may not take measures that prevent or materially impede the completion of the bid or the conditions for its completion, These provisions cannot be derogated from on the basis of the 'comply or explain' principle.

» *See Recommendation 13 Invoking a Condition Set for the Completion of the Bid and Section 5.4 (45) of FIN-FSA RAG on Takeover Bids.*

(c) Discussions with Major Shareholders of the Target Company

In certain situations, it may be justified for the offeror to contact certain shareholders of the target company before disclosing the bid. If the completion of the bid is, for example, conditional upon the offeror acquiring a certain share of ownership, and the target company has one or a few major shareholders who could alone or together prevent the completion of the bid, it may be justified for the offeror to investigate the stance of such shareholders with respect to the bid.

In connection with possible shareholder discussions, the provisions of the MAR on the unlawful disclosure of inside information and market soundings must be taken into account. Article 11(2) of the MAR permits the offeror to approach major shareholders of the target company by means of market sounding to gauge the opinion of the shareholders on the takeover bid (such as in order to acquire irrevocable commitments to accept the takeover bid) if the conditions of the paragraph are met.

» *See Notes on Insider Regulations at Different Stages of the Takeover Bid Process, section (b).*

If a shareholder or person representing a shareholder is also a member of the board of directors of the target company, it is, in practice often advisable that the offeror first attempt to contact persons other than members of the board of directors of the target company. If the offeror contacts a member of the board of directors of the target company with the intent to gauge the prerequisites for the member or their employer or associated entity to dispose of ownership, the communication should clearly indicate if the offeror had the intent to contact that person in their capacity as a shareholder.

» *See also the explanatory notes to Recommendation 2 Duty of the Board of Directors to Act Following a Proposal Relating to a Bid, section (a).*

II. POSITION AND DUTIES OF THE BOARD OF DIRECTORS OF THE TARGET COMPANY

The Securities Markets Act imposes certain obligations on the board of directors of the target company related to takeover bids (Chapter 11, Sections 10–11, 13–15 and 17 of the SMA).

According to the Act, the board of directors of the target company must draw up and publish a statement on a takeover bid (Chapter 11, Section 13 of the SMA). The board of directors' statement often has a significant impact on the completion of the bid. The board of directors' opinion on the merits of the bid is valuable information to the target company's shareholders. The board of directors is also often in the best position to issue a statement on the bid with respect to the company's business operations.

On the other hand, the Limited Liability Companies Act does not contain provisions that relate specifically to the position and duties of the board of directors of the target company in a takeover bid situation.[4] *As such, the role of the board is evaluated in light of the general principles of company law by prioritising the interests of the company and its shareholders.*

The board of directors has general competence to to act for the company (Chapter 6, Section 2 of the CA). The board of directors shall act with due care and promote the interests of the company and its shareholders (duty of care and loyalty, Chapter 1, Section 8 of the CA). Acting in the interests of the company includes the duty to act in accordance with the purpose of the company. Unless otherwise stated in the articles of association, the purpose of a company is to generate profits for the shareholders (Chapter 1, Section 5 of the CA). According to the preliminary work on the Limited Liability Companies Act (Government Proposal 109/2005, p. 41), situations may arise during a company's operations in which the management's duty of care and duty to act in the interests of the company and ultimately in the interests of all shareholders directly concerns the value of the shareholders' ownership instead of the company. For example, in a merger or a takeover bid for a company's shares, the company's management has an obligation to achieve the best outcome for shareholders. In merger negotiations, this means attaining the most beneficial merger consideration possible and, in the case of a takeover bid, taking the actions necessary to achieve the best possible offer. The board of directors of the target company has a duty to treat all shareholders of the company equally, and no measure may be taken by the target company that is likely to confer an undue benefit to a shareholder or other party at the expense of the company or another shareholder (Chapter 1, Section 7 of the CA).

In Finnish takeover and merger practice, the offeror and the target company often sign a combination or transaction agreement before making the bid public. A combination or transaction agreement is not necessary in all situations, nor is there any obligation to enter into such an agreement. The combination or transaction agreement is usually a procedural document in which the offeror and the target company agree, for example, on the terms and conditions of the bid to be made to the shareholders and on the procedures to be followed in connection with the bid. The combination or transaction agreement does not obligate the shareholders of the target company who are not parties to the agreement. The combination or transaction agreement may serve the interests of both the offeror and the target company and its shareholders. The board of directors of the target company must assess on a case-by-case basis whether it is necessary to enter into a combination or transaction agreement and what terms should be included in the agreement.

4 See, however, the reference provision in Chapter 6, Section 7(3) of the CA.

RECOMMENDATIONS
II. POSITION AND DUTIES OF THE BOARD OF DIRECTORS OF THE TARGET COMPANY

RECOMMENDATION 2 – DUTY OF THE BOARD OF DIRECTORS TO ACT FOLLOWING A PROPOSAL RELATING TO A BID

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

Explanatory notes

(a) Duty of the Board of Directors to Consider a Proposal Relating to a Bid

A takeover bid is made to the shareholders of a company, not to the company itself. In a takeover bid, the interests of the company usually align with the interests of the shareholder collective, in which event the duty of care and loyalty of the board of directors may be considered to directly concern the value of the securities held by the shareholders. However, the interests of the company may also be considered to require that the board of directors of the target company ensure that secrecy and confidentiality matters are appropriately attended to in the bid process and that any disclosures of information are carried out appropriately, for example. This recommendation cannot be derogated from on the basis of the 'comply or explain' principle to the extent that the obligations of the board of directors arise from the principles of the Limited Liability Companies Act or other mandatory provisions.

When the board of directors of the target company is approached with a proposal relating to a takeover bid, the chair of the board is generally the first to be contacted. If an individual person (a member of the board of directors or the managing director) is contacted, that person should, as a rule, immediately present the matter to the board of the company for consideration, unless there are justified reasons to presume that the proposal is not of a serious nature or the matter does not need to be considered by the board due to the nature of the proposal or for another reason. Even in cases when the person contacted is of the view that the matter does not need to be considered by the board, it is generally advisable to inform the entire board that such a contact has been made.

If a member of the board of directors is also a shareholder of the company or a representative of a shareholder, and the potential offeror contacts the board member in their capacity as a shareholder or a representative of a shareholder in relation to a potential bid, the board member should assess whether the duty of care and loyalty requires that such contact be brought to the attention of the entire board of directors. The duty of care and loyalty does not necessarily require that a contact be brought to the attention of the entire board of directors if, for example, the matter does not concern a concrete potential bid but relates to questions of ownership more generally, or if the board member has no reason to believe that the party instigating contact will proceed with the matter. The provisions of Article 10 of the MAR on the unlawful disclosure of inside information may also prohibit a planned bid from being brought to the attention of the entire board of directors of the target company. This may be the case, for example, in a situation in which a potential offeror engages in the market sounding of a board member or a company represented by the member in accordance with the MAR in order to gauge the shareholder's willingness to sell their shares as part of a possible takeover bid.

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

When considering whether a contact relating to a takeover bid is of a serious nature, the board of directors of the target company must take into account the following factors, among others:

- the concreteness and credibility of the contact (for example, the form and means of the contact, the party who made the contact, and whether preparations have been made for the contact and bid);

- the amount and form of the consideration offered;

- the feasibility of the bid (for example, financing of the bid, official approvals needed, and the conditions set on the bid); and

- other factors related each individual situation.

If the board of directors considers the contact to be of a serious nature, it shall investigate the matter, assess the proposed bid, and obtain sufficient and appropriate information to support its assessment. The board must seek the best outcome for the shareholders. To the extent possible, this requires careful assessment of both the bid and other options available to the company.

The availability and sufficiency of the financing of the bid may be assessed at different stages of the bid process. In assessing whether a contact is of a serious nature, it is often justified for the board of directors of the target company to evaluate the plans concerning the financing of the bid. As such, the assessment may also affect whether it is justified to give the offeror the right to carry out a due diligence review of the target company. Careful action by the board of directors of the target company usually requires that the board investigate, in a manner sufficient for the circumstances and at the latest before the signing of any combination or transaction agreement, that the offeror has ensured the availability and sufficiency of financing, as required by the Securities Markets Act and **RECOMMENDATION 1.** Ensuring Prerequisites to Complete a Bid.

» *See Recommendation 6 Due Diligence Review of the Target Company.*

If the board of directors decides to take measures in the matter, it must treat all shareholders equally and may not give preference to an individual shareholder or group of shareholders at the expense of the company or another shareholder. The board must also ensure that any conflicts of interest of individual members or other undue influence do not affect the functioning of the board.

» *On disqualification, see Chapter 6, Sections 4 and 4(a) of the CA and Recommendation 4 Disqualification Issues and Other Connections of the Members of the Board of Directors to a Bid.*

(b) Evaluation of the Company's Options

After the board of directors of the target company has assessed the contact concerning a takeover bid to be of a serious nature, the board of directors shall strive to attain the best possible outcome for the shareholders. According to the preliminary work on the Limited Liability Companies Act, in a takeover bid situation, striving for the best possible result for the shareholders refers to activities that are necessary to achieve the best possible bid (Government Proposal 109/2005, p. 41). However, the proposed takeover bid may not be the best option for shareholders. Investigating and assessing the options available to the company is part of the evaluation of the bid.

In the event of a takeover bid, the interests of shareholders require that the board of directors assess the bid and its consequences and, if possible, compare the bid with other options available to the company, such as continuing as an independent company in accordance with a predetermined strategy or implementing some form of restructuring. The assessment of the bid may also be influenced by the form of consideration: in a cash offer, shareholders liquidate their holdings once the bid is completed, whereas in a securities exchange bid, shareholders receive securities as consideration, the appraisal of which can also be assessed more broadly.

The board of directors of the target company may also seek out competing bids, taking into account the limitations of insider regulations and, in particular, the ban on the disclosure of inside information. However, there is no obligation to seek out competing bids. If the board is aware of a potential alternative offeror, it is justified for the board to consider whether it would be in the interests of the shareholders to approach such other party. The assessment of the various alternative arrangements may be influenced, for example, by the likelihood of their realisation and their expected schedule.

During the takeover bid process, the board of directors of the target company may be contacted by a competing offeror unprompted. Issues related to competing bids are discussed in **RECOMMENDATION 8** Actions by the Target Company in the Event of a Competing Bid.

RECOMMENDATIONS
II. POSITION AND DUTIES OF THE BOARD OF DIRECTORS OF THE TARGET COMPANY

The board of directors should acquire sufficient and appropriate information as the basis for its assessment. This usually means information on the value of the target company, based on different appraisal methods, and information on factors affecting the value of the target company. This may also include requesting additional information and engaging in discussions with the offeror. Identifying the best option for the shareholders may also require that the board enters simultaneously into discussions with parties other than the offeror.

The shareholder and the offeror may agree on prior transactions or a commitment by which the shareholder agrees to sell their shares in a future bid. If the board of directors of the target company becomes aware of such arrangements, the board must take steps to assess the matter and take the arrangements into account when evaluating the takeover bid and other options available to the company. Pre-bid transactions or commitments by major shareholders in the company to accept a forthcoming bid may improve the bid's chances of success and reduce the likelihood of competing bids, thereby influencing the board's assessment of the bid.

In certain situations, the board of directors of the target company may also be justified in investigating the stance of individual major shareholders before the board gives its opinion on the bid. However, the board of directors of the target company is not obligated to discuss a bid in advance with shareholders. From the point of view of the board of directors of the target company, it can generally be considered that it is in the interests of both the company and all its shareholders to investigate the feasibility of the bid. If it is found in the discussions that the bid is not feasible because it is opposed by major shareholders, the board of directors must assess whether it is justified to use the company's resources to facilitate the bid.

When assessing the bid and the company's other options, the board of directors should consider whether it is necessary to consult third-party experts.

If the board of directors finds in its assessment that the bid is in the interests of the shareholders, the board shall take such measures as are necessary to achieve the most beneficial bid possible. In principle, the board of directors must seek the highest possible value for the company's securities and, by the means at its disposal, determine whether the offeror is in a position to execute the bid. In practice, this may mean initiating negotiations with the offeror.

If the board of directors decides to initiate negotiations with the offeror, the board usually also decides who will represent the company in the negotiations. The board may also set up an ad hoc committee to prepare board decisions related to the takeover bid. Potential disqualification issues for board members must be taken into account in the decision-making process.

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

To ensure that the shareholders have sufficient information, the board of directors must usually describe in its statement the extent to which the board has investigated the company's options and assessed the bid in relation to them.

» *See Recommendation 5 Statement by the Board of Directors of the Target Company Regarding a Bid.*

The board of directors is not obligated to enter into negotiations with the offeror concerning the bid if the board finds that the offer is not in the best interests of the shareholders. Under Chapter 11, Section 9(5) of the Securities Markets Act, in certain situations, the board of directors of the target company can request the Financial Supervisory Authority to set a deadline for the party planning the bid, by which date it must either disclose the takeover bid or announce that it will not launch a bid.

(c) Possible Measures to Frustrate a Bid and Need to Convene a General Meeting

When assessing the company's options in the event of a takeover bid, the board of directors of the target company may conclude that the disclosed or planned bid is not beneficial for the shareholders. The board of directors may seek to obtain a competing bid or other alternative transaction that the board considers to be more beneficial to the company and its shareholders. The board of directors may also conclude that the most beneficial option for the company's shareholders is that the company continues its business in accordance with its previous strategy.

As a rule, the board of directors is not obligated to cooperate with the offeror if it does not consider the proposed bid to be of a serious nature and in the best interests of the shareholders. However, after it has been informed of a potential future takeover bid, the board of directors should not, without the approval of the general meeting, take any action that may frustrate the making or execution of a bid that is beneficial to shareholders.

Actions that prevent or may prevent or materially impede the execution of a takeover bid or its essential terms include a directed share issue, distribution of assets, modification of the class of shares, and the selling of significant business operations. The target company's articles of association may also be proposed to be amended in order to frustrate a takeover bid. With the exception of sales of business operations, the authority to decide on the above measures rests with the general meeting. However, the board of directors may have been granted the authority to decide on matters such as share issues or the distribution of assets. As a rule, decisions concerning the selling of business operations also fall within the general competence of the board of directors.

If, after a takeover bid has been brought to its attention, the board of directors intends to use a share issue authorisation or decide on actions and arrangements within its general competence in such a way that they prevent or may prevent or materially impede the completion of the takeover bid or its essential terms, the law requires that the matter be transferred to the general meeting for a decision (Chapter 11, Section 14 of the SMA). If the matter is transferred to the general meeting, it should be noted that the provision of Chapter 5, Section 14(a) of the Limited Liability Companies Act on the disqualification of a shareholder at a general meeting may apply, especially when a matter falling within the board of directors' general competence is transferred to the general meeting for a decision in the event of a takeover bid. After the disclosure of the takeover bid, the board of directors may refrain from transferring the measures referred to in Chapter 11, Section 14 of the Securities Markets Act to be decided by the general meeting only on condition that the procedure complies with both Chapter 1 of the Limited Liability Companies Act and the general principles of Article 3 of the Takeover Directive. The general principles of the Finnish Limited Liability Companies Act that are particularly relevant in this context likely include the purpose of the company's operations (Chapter 1, Section 5), the principle of equal treatment (Chapter 1, Section 7), and the duty of care and loyalty of the company's management (Chapter 1, Section 8). With respect to the general principles of the Takeover Directive, in particular, the principle according to which the board of the target (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 fairness of the bid must be observed (Article 3(1)(c) of the Takeover Directive). The board must also disclose the reason for the non-transfer, and the disclosure must be made without delay once it has decided on the non-transfer.

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

Potential reasons not to transfer a matter to the general meeting include, for example, that the board of directors considers that the bid is manifestly inadequate or otherwise contrary to the interests of shareholders, or if consideration at the general meeting is not appropriate for any other reason related to the takeover bid or due to the nature of a measure or arrangement planned by the board of directors. Even in these cases, the procedure as a whole must comply with Chapter 1 of the Limited Liability Companies Act and the general principles of Article 3 of the Takeover Directive. According to the preliminary work on the Securities Markets Act, publishing a takeover bid does not, in itself, prevent the board of directors of the target company from conducting a merger or acquisition or other similar transactions, or continuing the planning and execution of transactions that are already pending, if this is deemed to be in the interest of the company and all its shareholders (Government Proposal 32/2012, p. 145). As such, situations may arise in which the board of directors, having assessed the situation as a whole in the light of the general principles of the Limited Liability Companies Act and the Takeover Directive, considers that convening a general meeting is not necessary for the shareholders' interests. Such situations must be assessed on a case-by-case basis. The Financial Supervisory Authority recommends that if the board of directors of the target company decides not to refer a matter concerning a directed share issue or other measure or arrangement referred to in Chapter 11, Section 14 of the Securities Markets Act to the general meeting, it should consult the Takeover Board for an opinion on the matter. It is also possible to request the opinion of the Takeover Board if the board of directors, after being informed of a potential takeover bid of a serious nature, intends to carry out any measure or arrangement that may prevent or materially impede the completion of the takeover bid or its essential terms.

» *On transferring a matter to the general meeting for consideration in situations where a takeover bid has been made public, see also the preliminary work on the Securities Markets Act (Government Proposal 32/2012, p. 143–146).*

The board of directors may also decide that it is justified to convene a general meeting in situations other than those referred to in Chapter 11, Section 14 of the SMA. In certain situations, the terms of the takeover bid require a decision by the general meeting. The offeror may, for example, require an amendment of the articles of association before executing the bid (for example, by removing a voting restriction or a redemption clause). According to the rationale for the Limited Liability Companies Act, in a takeover bid situation, the duty of care and loyalty of the company's management under said Act to strive for the best possible result for the shareholders refers to activities that are necessary to achieve the best possible bid. This duty may also include convening the general meeting.

At the request of the target company, the Financial Supervisory Authority may extend the offer period and the period of restriction on the execution of transactions to complete the bid, so that the target company can convene a general meeting to consider the bid (Chapter 11, Section 12(3) of the SMA). The offeror has the right to withdraw the bid as a result of such an extension. According to the Financial Supervisory Authority, a decision to extend the validity period of a bid may be necessary if, for example, convening a general meeting is justified due to circumstances that arise during the offer period, such as a competing takeover bid or a takeover bid concerning an individual business of the target company.

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

RECOMMENDATION 3 – CONTRACTUAL ARRANGEMENTS WITH THE OFFEROR

In the event of a takeover bid, the board of directors of the target company shall not, without a justified reason, commit to contractual arrangements that limit the scope for action of the company and the board. If the board of the target company commits to such contractual arrangements, the commitment must be in the best interests of the shareholders. In its statement, the board of the target company must give reasons for any material commitments that limit the company's or the board's scope of action.

Explanatory notes

(a) Arrangements Limiting the Company's and Board's Scope of Action

In the event of a takeover bid, the board of directors of the target company must carefully strive for the best outcome for the shareholders. The interests of shareholders usually require that the board also investigate other options available to the company as far as possible and the board is, as a rule, free to act if it receives a competing bid. The board of directors must also be able to fulfil its statutory duty of care and loyalty in all situations and comply with the principle of equal treatment of shareholders, which cannot be derogated from under the principle of 'comply or explain'. As such, exclusivity arrangements are problematic with respect to the board's duties. Such exclusivity arrangements may not be entered into without a justifiable reason.

In its statement, the board of the target company must give reasons for any material commitments that limit the company's or the board's scope of action. Material commitments are all commitments in force at the time of or after the disclosure of the bid, including any combination or transaction agreement. Based on this recommendation, material exclusivity arrangements that have expired prior to the disclosure of the bid may also need to be made public. However, short-term commitments made during the negotiation process or, for example, during a due diligence review are generally not considered to be material commitments that must be justified in the board's statement if the board of directors of the target company has, before entering into the commitment, investigated the company's options and the board of directors is not aware of a competing bid at the time of the commitment.

(b) Committing to a negotiation prohibition

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

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

In such cases, the board of directors of the target company must assess whether it is able to accept the negotiation prohibition and to what extent.

In certain situations, it may be justified for the board to agree to a limited negotiation prohibition in the form of a non-solicitation commitment. The commitment should only be for a fixed term and in the interests of the shareholders. Committing to a limited negotiation prohibition may be in the interests of the shareholders in, for example, a situation in which the offeror imposes a prohibition on negotiations as a condition for issuing and publishing a bid that is favourable to shareholders. However, a negotiation prohibition may not prevent the board from investigating a potential competing bid and thus complying with its duty of care and loyalty in a situation in which the board has been contacted by a competing offeror without the board having initiated the matter, or if the circumstances otherwise substantially change.

» *See Recommendation 8 Actions by the Target Company in the Event of a Competing Bid.*

In most cases, agreeing to a limited negotiation prohibition is justified only after the board of directors has explored the alternatives available to the company and found that the proposed bid is, in the opinion of the board, beneficial for the shareholders.

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

In turn, the target company may consider the need to restrict the offeror's trading by contractually signing an agreement with the offeror in which the offeror agrees not to trade the target company's shares for a certain period of time (stand-still agreement). Such a commitment may also be combined with a non-disclosure agreement.

In its statement, the board of the target company must give the reasons for any commitments that limit the company's and the board's scope of action.

» *See Recommendation 5 Statement by the Board of Directors of the Target Company Regarding a Bid.*

(c) Entering into a Combination or Transaction Agreement with the Offeror

The assessment of whether a combination or transaction agreement is appropriate usually closely involves the interests of the company and its shareholders. By negotiating a combination or transaction agreement, the board of directors may be able to influence the price offered to shareholders for the company's securities and other terms of the bid in a manner that is favourable to shareholders. A combination or transaction agreement may also increase the likelihood that the bid is completed. It may also be in the interest of the company and its shareholders to agree in advance on the procedures to be followed in connection with a bid.

The board of directors must ensure that the combination or transaction agreement does not prevent the board from acting in the best interests of the shareholders in the event of a competing bid or other material changes to the circumstances, for example. The board may, for example agree to issue a possible endorsement of the bid on the condition that the board has the option to investigate potential competing bids and, if necessary, amend or withdraw its endorsement. The combination or transaction agreement must also not prevent the board of directors from committing to endorsing a competing bid that it deems superior. The combination or transaction agreement may specify for the procedures to be followed in such situations and the disclosure obligations to the first offeror and related deadlines. The board of directors should also ensure that the combination or transaction agreement does not unreasonably restrict the target company's business operations during the term of the agreement.

The board of directors of the target company may not, without justifiable cause, enter into commitments on behalf of the company that limit the ability of shareholders to either freely consider whether they wish to accept the bid or to decide on possible measures to counteract the bid at a general meeting convened for that purpose.

» *See the explanatory notes to Recommendation 2 Duty of the Board of Directors to Act Following a Proposal Relating to a Bid, section (c).*

For this reason, the board of directors of the target company should also carefully consider the possibility of paying a so-called break-up fee. A break-up fee is an arrangement by which the target company and/or the offeror promises to pay the offeror and/or the target company certain pre-agreed compensation in case the bid is not completed due to certain pre-defined reasons. The break-up fee may be agreed in the combination or transaction agreement between the parties or otherwise.

If the offeror imposes a condition for issuing a bid that would be favourable to shareholders that the target company agrees to pay a break-up fee under certain circumstances, it may be justified to accept such an arrangement provided that:

- 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 account, among other things, the costs incurred by the offeror in preparing the bid.

The assessment of the reasonableness of the amount of the break-up fee may not be influenced by the amount of the break-up fee to which the offeror may have agreed. The target company should carefully define the situations in which a break-up fee may be payable. It is not justified for the target company to pay a break-up fee in a situation in which the bid is not completed due to a reason arising from the offeror. It may often be justified for the board of directors of the target company to ensure that the offeror's financial commitment also covers the offeror's contractual obligations regarding the bid, such as the payment of a break-up fee, if necessary.

The target company must announce the signing of the combination or transaction agreement and disclose the material terms and conditions of the agreement by means of the company's own stock exchange release immediately after signing the agreement. Terms and conditions that may generally be deemed material include terms concerning the consideration offered, schedule, possible break-up fee, and negotiation prohibitions, as well as all terms relevant for the assessment of the bid itself. Material terms of the agreement also include the procedural requirements to be followed in the event of a competing bid, such as a possible right afforded to the first offeror to consider competing bids and increase its own bid as a condition for changing the endorsement made by the board of directors (including the related waiting periods). This makes it easier for potential parties considering issuing a competing bid to assess the potential impact of the combination or transaction agreement on the issuing and execution schedule of the competing bid. The reasons for committing to a contractual arrangement that restricts the company's and the board's scope of action must also be disclosed in connection with the publication of the combination or transaction agreement or, at the latest, in the board's statement on the bid.

» *See also Recommendation 11 Disclosure of a Bid.*

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

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

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

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

Explanatory notes

(a) Disqualification and Material Connections

Board members must comply with the disqualification provisions of the Limited Liability Companies Act (Chapter 6, Sections 4 and 4(a)) and, according to said Act, a disqualified board member may not participate in decision-making concerning a bid. Because a bid is not part of the normal operations of the target company, in addition to the general disqualification provision of the Limited Liability Companies Act (Chapter 6, Section 4), a special provision on the disqualification of members of the board of directors of a listed company (Chapter 6, Section 4a) may also apply in the event of a bid. The special provision prohibits a board member from participating in a decision-making process on an agreement or legal transaction involving a party who is a related party of the listed company on the basis of an association with the board member (Government Proposal 305/2018, p. 166). The disqualification rules of the Limited Liability Companies Act cannot be derogated from on the basis of the 'comply or explain' principle.

The duty of care and loyalty of the board of directors (Chapter 1, Section 8 of the CA) requires that in the decision-making process, board members act unconstrained by undue influences. The board or its members may also have such connections to the offeror or to the major shareholders of the company or to the bid that do not, as such, render the member of the board disqualified under the Limited Liability Companies Act but that may affect the evaluation of the bid by the respective board member and the fulfilment of the duty of loyalty in accordance with the Limited Liability Companies Act. In these situations, it is important that the board member in question assesses whether they are able to participate, unconstrained by undue influences, in the decision-making relating to the bid. On the other hand, board members should not refrain from the consideration of a matter without a justified reason. Examples of situations in which disqualification and connection issues often occur are discussed in section (c) below. In individual cases, it is possible to request the opinion of the Takeover Board on the interpretation of disqualification issues referred to in this Recommendation.

It is important that board members of the target company disclose to the board all their connections relating to the offeror and the completion of the bid that are of significance when the board member evaluates their disqualification or possibilities to participate in the review of the bid unconstrained by undue influences. The assessment of connections is carried out separately in the event of a bid, and a general independence assessment in accordance with Recommendation 10 of the Finnish Corporate Governance Code is not sufficient in this regard. Shareholders and other investors of the target company must be informed of such connections and affiliations when assessing the bid, which is why they must be disclosed. The disclosure can be done in connection with the release of the statement by the board of directors of the target company on the bid. Connections related to the takeover bid must always be disclosed in the statement on the takeover bid, even when information on the independence assessment of the board member of the target company in relation to a major shareholder has been previously published in accordance with the Finnish Corporate Governance Code. The assessment of connections must be redone following a competing bid or other similar substantial change in circumstances that has come to the attention of the board of directors.

Particular attention must be given to the position of the board of directors of the target company in relation to the shareholders of the company in situations in which persons who are members of the board or of the management of the company, either alone or together with others, make a public takeover bid for the target company, or where a member of the target board is a major shareholder of the offeror. A board member of the target company, or a person who is a member of its management, can be considered to participate in the making of the bid if they have at least had the opportunity to influence the terms and conditions of the bid or the amount of the consideration offered. A person who is a board member of the offeror or part of its management can usually be considered to have the opportunity to influence the terms and conditions of the bid and the amount of the consideration offered. On the other hand, merely the fact that the person in question owns securities issued by the offeror does not imply that they would participate in the making of the bid.

In situations in which a board member or member of the management of the company participates in the making of the bid, the use of an external adviser in connection with the consideration of the bid may increase the ability of the board to be certain that the procedures followed and the assessment of the bid have been appropriately carried out.

(b) Preparation of Measures and Decision-making by the Board of Directors of the Target Company

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

If any of the board members of the target company have connections referred to in this recommendation, the board of directors of the target company may, if necessary, appoint those of its members who do not have such connections to prepare the measures to be taken by the board relating to the bid, in which case the board members who do have such connections may not participate in the assessment of the bid. Third-party advisers may be used to provide assistance to such members, for example, in order to evaluate the fairness of the consideration offered. The appointed members of the board may collectively negotiate with the offeror in order to obtain the most beneficial bid possible for the holders of securities. In a takeover bid situation, if all the members of the board have connections as referred to above, the board may consider appointing a third party who is not a member of the board, and who is free from connections, to prepare measures relating to the bid. Appointing such a third party does not, however, reduce the liabilities and obligations of the board.

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

(c) Example Scenarios

The following are examples of situations in which the board members' connection to the offeror or bid may need to be assessed:

Ownership of shares. Board members, their employers, or other associated entities may own shares or other securities giving title to shares in the target company. Ownership of shares or other securities of the target company does not, in itself, prevent a member of the board from evaluating the bid unconstrained by undue influences. In some cases, the option schemes or other incentive programmes include terms and conditions relating to the completion of a public takeover bid, such as terms and conditions regarding the use of subscription rights or special bonuses. Such arrangements may generally be considered comparable to the ownership of shares and therefore do not, in themselves, affect the position of the board. However, it is important that shareholders are aware of such arrangements.

Connections to the offeror. A board member of the target company may have a special connection to the offeror, for example, as an employee, board member of the offeror or an entity controlling or controlled by the offeror, person closely associated with the offeror (such as an adviser to a private equity investor or a member of an investment committee), or a major shareholder. Such connections often create an assumption that the board member in question is not unconstrained by undue influences to participate in the assessment of the bid for the target company. To avoid a conflict of interest, under no circumstances shall a member of the board participate in decision-making regarding a bid simultaneously on the boards of the offeror and the target company. Because the aim of a public takeover bid is to transfer control to the offeror, a person with a connection to the offeror should not participate in the consideration of the bid at least on the board of the target company. As a member of the board of directors of the target company, such a person is, in any case, bound by the duty of loyalty under the Limited Liability Companies Act and is, for example, prohibited from disclosing confidential information about the target company to the offeror.

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

Acceptance of the bid. The offeror often seeks to obtain advance commitments from major shareholders to accept the bid. If a board member or their employer, or another associated entity that owns securities in the target company, has given such a commitment, the board member must evaluate whether the commitment affects the board member's ability to assess the bid unconstrained by undue influences. In such cases, the number of shares and votes covered by the commitment is not relevant to the evaluation. The ability of a board member to assess the bid unconstrained by undue influences may be endangered if the interests of the party that gave the commitment differ from those of the target company's other shareholders due to, for example, the unconditional nature of the commitment, a contribution condition included in the commitment, or a threshold related to the lapsing or termination of the commitment. The interests of the party that made the commitment do not necessarily differ from those of the target company's other shareholders in a situation in which the employer or other associated entity of the board member has given its commitment conditional on the board of directors recommending the acceptance of the bid, and in which no competing bids are known.

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 board member to act unconstrained by undue influences. A board member may hold a position that would be affected by the completion of the bid. For example, the managing director of the target company may be dependent on the target company in such a manner that they are not able to participate in the consideration of the bid on the board of the target company unconstrained by undue influences. The mere 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 board members when considering the bid.

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

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

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

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

Explanatory notes

(a) Preparation of the Statement

Issuing a statement on the bid is part of the board of directors' duties. In preparing the statement, the starting point should be due care in accordance with the principles of the Limited Liability Companies Act. To comply with the requirement of due care, the board must investigate the bid and its impact on the target company from the perspective of both the company and the holders of the securities subject to the bid to a sufficient extent. Shareholders' access to information is facilitated when the board of directors gives reasons for its statement as comprehensively as possible. As such, the board should aim not only to adopt a stance regarding the fairness 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, the board of directors shall usually describe in its statement on a general level the extent to which the board has investigated the company's options and assessed the bid in relation to other options. Such options may include continuing the business operations of the company in accordance with its own strategy as an independent company, potential competing bids, and other strategic arrangements. In its statement, the board of the target company must give the reasons for any material commitments that limit the company's and the board's scope of action.

» *See Recommendation 2 Duty of the Board of Directors to Act Following a Proposal Relating to a Bid and Recommendation 3 Contractual Arrangements with the Offeror.*

The duty to draft and release a statement derives from the Securities Markets Act and cannot be deviated from on the basis of the principle of 'comply or explain'. Under the Securities Markets Act, the board of directors of the target company must issue a well-founded assessment of the bid from the perspective of the target company and the holders of the securities subject to the bid.

The statement by the board does not constitute investment advice to shareholders, nor can the board be required to specifically evaluate general share price developments or the risks relating to investments. Accepting or rejecting the bid is always a matter that is decided by the shareholders themselves, and the starting point for the decision should be the information presented by the offeror in the offer document.

If the consideration offered consists of securities, the board of directors must strive to form a reasoned appraisal of the value of the securities offered as consideration in order to assess the bid.

» *See Recommendation 7 Due Diligence Review of the Offeror.*

According to the preliminary work on the Limited Liability Companies Act, in a takeover bid or merger, the target company's management's duty of care and duty to act in the interests of the company and ultimately in the interests of all shareholders directly concern the value of the shareholders' ownership instead of the company (Government Proposal 109/2005, p. 41). Under the Securities Markets Act, the board of directors must also provide an assessment regarding the strategic plans of the offeror presented in the offer document and their likely impact on the operations and employment of the target company. When the assessment is based on information provided by the offeror, it may be difficult for the board to comment on their consequences in detail. However, in this respect, the law or its preliminary works do not impose on the board of directors any duty to investigate the offeror's plans to a broader extent than what is described in the offer document. Despite this, the board must endeavour to evaluate the plans published by the offeror, especially in relation to the company's own strategy. At the same time as the board of directors gives its opinion on the likely impact of the offeror's strategic plans on the target company's operations and employment, as required by the Securities Markets Act, the board may, to facilitate the decision-making by shareholders, bring attention to, for example, how environmental, social and governance (ESG) factors have influenced the board's assessment of the bid. ESG factors may play a role in bids involving securities exchange, for example. However, the assessment of on the merits of the bid is always made in the interest of the shareholders.

In preparing the statement, the target company must take into account the terms and conditions of the bid set by the offeror and the possibility that the offeror may waive any of the terms it has set on the execution of the bid. In particular, the board of directors of the target company must assess the position of the target company and its shareholders in the event that the offeror carries out the bid with a share of ownership and voting rights of less than 90 per cent and thus cannot redeem the outstanding shares of the company. If the offeror amends the terms of the bid, the board of directors is legally obligated to supplement its statement as soon as possible after the amended terms and conditions have been submitted to the board. Similarly, the board must supplement its statement as soon as possible if a competing bid for the target company is published. The target company must also retain the freedom to revise its statement due to other changes in circumstances, if the target company's duty of care and loyalty so requires.

When provisions concerning the statement by the board of directors were included in the Securities Markets Act, it was stated in the preliminary work on the Act (Government Proposal 6/2006, p. 40) that it is not sufficient that the board describe the bid in a neutral manner, but it must adopt an opinion regarding the bid. This does not, however, mean that under the Act, the board of directors must always recommend the acceptance or rejection of a bid, even as the Takeover Code recommends that the board give a clear opinion on the matter. The assessment of the fairness 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 the acceptance or rejection of the bid. For example, it may be difficult to evaluate the fairness of partial bids. The nature of the consideration offered may also be such that appraising its value is not unambiguous. In such situations, the board may have reasonable grounds to derogate from the recommendation. If the board is unable to recommend accepting or rejecting the offer, the board must justify the derogation from the recommendation of the Takeover Code and explain in its statement the reasons for its opinion.

As the Securities Markets Act explicitly requires that the board of directors provide a statement on the bid, according to the preliminary works on the Act, in the event of a rule violation, board members are also liable for damages in accordance with the Act. On the other hand, according to the preliminary works, the Securities Markets Act does not rule out other liability for damages, such as a liability based on the Limited Liability Companies Act. However, such a liability can only come into question if the damage has been caused deliberately or through negligence (Government Proposal 32/2012, p. 160–173).

When assessing whether due care has been practised by the board of directors, it is natural to use the duty of care provisions of the Limited Liability Companies Act as the starting point. In assessing whether due care in accordance with the Limited Liability Companies Act has been practised, the standard is to apply the 'business judgment' rule. According to this rule, the duty of care is considered fulfilled if, in preparing the measure, the board of directors has obtained sufficient background information and, on the basis of this, rationally evaluated various alternatives for action and their impacts and, after careful consideration and without any conflicts of interests, conducted the action believing it to be in the interests of the company and its shareholders. For this reason, it is advisable that the board pay special attention to observing due care in the preparation process, and document the preparation process to ensure that due care may be later verified.

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

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

The statement must also indicate whether the target company has committed itself to complying with the recommendation on the procedures to be observed in takeover bid situations, as referred to in Chapter 11, Section 28 of the Securities Markets Act, and, if not, must provide an explanation for the non-commitment. As the purpose of the recommendations concerning the operations of the target company and its board of directors of this Takeover Code is to promote the development of good securities market practice and the legal protection of shareholders, the target company should, as a rule, commit to complying with the Takeover Code. If the target company deviates from any individual recommendation, it should provide the reasons for this in its statement.

» *See also Recommendation 3 Contractual Arrangements with the Offeror.*

(b) Expert Opinion

The board of directors of the target company may use advisers when evaluating a takeover bid or preparing the statement to be issued regarding a bid. Neither the law nor this recommendation requires that the board use the services of an expert when providing its statement, but doing so may help meet the board's the duty of care and loyalty. The use of an external adviser should especially be considered if board members or other members of the management of the target company or their associated entities participate in the making of the bid or have committed to accepting it for their part. See also Recommendation 4 Disqualification Issues and Other Connections of Members of the Board of Directors to a Bid.

Third-party advisers may, for example be used in order to assess the fairness of the consideration offered (fairness opinion). In such a situation, the financial adviser seeks to appraise the value of the company on business grounds and provides an opinion to the board of the target company regarding the sufficiency or fairness of the consideration offered from the point of view of the shareholders of the target company. It should be noted that the purpose of the opinion is only to support the assessment of the board of directors on the fairness of the bid, and therefore the board of directors should not base its statement on the fairness opinion alone. If a fairness opinion has been requested, it is usually justified to disclose the opinion. The fairness opinion should indicate possible interests and conflicts of interest of the expert in relation to the bid, or the absence of such conflicts of interest.

(c) Statement Possibly Provided by the Representatives of Employees

Representatives of the target company's employees have the opportunity to issue a separate statement on the impacts of the bid on the employment at the company. If the target company receives a statement from the representatives of employees before disclosure of the statement by the board of directors, the statement of the representatives must be enclosed with the board's statement (Chapter 11, Section 13(5) of the SMA).

Although the law does not obligate the board of directors to request a statement from employees or inform employees of the possibility of providing a statement, it is desirable that the board advises the employees, in a manner it considers suitable, of the possibility after the bid has been made public. This may, for example, be done when the bid is communicated to employees in a manner required by Chapter 11, Section 10(2) of the Securities Markets Act.

(d) Contribution of the Target Company to the Drafting of an Offer Document

Under the Securities Markets Act, the offeror must present its strategic plans for the target company in the offer document and an assessment of their likely impact on the operations and employment of the target company. In addition to this, certain information about the target company must be provided in the offer document. However, the board of directors of the target company is under no obligation to contribute to the drafting of the offer document, such as by providing the offeror with information needed for the document. According to the preliminary work on the Securities Markets Act, the target company has no obligation to cooperate with the offeror in facilitating the bid (Government Proposal 32/2012, p. 140). The information about the target company in the offer document may therefore be entirely based on public sources. The offeror is not liable for the accuracy of information about the target company that the target company has made public. However, the offeror is responsible for ensuring that information made public by the target company is presented correctly in the offer document. The offeror must state in the offer document the sources of the information on the target company.

The above does not restrict the target company's board of directors' scope of action. The board may decide to provide the offeror with information needed for the offer document if this is in the interests of the shareholders. The board may also publish its own opinion on the offer document and the information provided therein in connection with board's statement regarding the bid, for example. If the board finds that an offer document that has already been made public does not provide sufficient and correct information to the holders of the securities, fulfilling the duty of care and loyalty of the board may require that the board makes its opinion on the matter public in connection with its statement regarding the bid. The duty of disclosure under the Securities Markets Act, the Market Abuse Regulation, or the rules of the stock exchange may also require making the information public.

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

III. DUE DILIGENCE REVIEW

In connection with the preparation of a takeover bid, the offeror often requests the possibility to conduct a 'due diligence review' of the target company to obtain more information about the company. A due diligence review may include a review of legal, financial, commercial, technical or environmental matters, for example. There is no regulation in the law about due diligence reviews or their permissibility; rather, the matter must be examined in light of the general principles of company law.

The board of directors of the target company shall set out a well-founded assessment of the bid in its statement regarding the bid (Chapter 11, Section 13 of the SMA). If the consideration offered consists of securities, the board of directors must strive to form a reasoned appraisal of the value of the securities offered as consideration in order to assess the bid. The offeror of a takeover bid may not take measures that prevent or materially impede the completion of the bid or the conditions for its completion (Chapter 11, Section 8 of the SMA).

RECOMMENDATION 6 – DUE DILIGENCE REVIEW OF THE TARGET COMPANY

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

Explanatory notes

(a) Allowing a Due Diligence Review

As a rule, disclosing information to a party outside the company requires a special reason. A due diligence review may usually be allowed in a situation in which the proposal on a takeover bid is deemed to be of a serious nature and the review is considered to be in the interests of the shareholders. In assessing whether a bid is of a serious nature, the factors listed in the explanatory notes to Recommendation 2 must be taken into account.

In a takeover bid, the board of directors must seek the best possible outcome for the shareholders. If conducting a due diligence review is a precondition for issuing a public takeover bid to the shareholders, and if the bid is, as a whole, considered beneficial to the shareholders, allowing the review may usually be considered to be in the interests of the shareholders. However, the scope and the schedule of the review must always be decided separately, taking into account the circumstances of each individual situation, possible factors of competition law that may apply, and the possibility that the bid may never be executed.

As a rule, the board of directors of the target company should not allow a due diligence review if the board deems the proposed bid not to be of a serious nature or not in the interests of the shareholders. If the board allows the review, it must ensure that confidentiality and insider issues are appropriately observed.

(b) Equality of the Shareholders

In a takeover bid, the purpose of allowing a due diligence review is to create prerequisites for a bid to be made to all shareholders, regardless of whether the offeror already owns shares in the target company. If the bid is beneficial from the point of view of the shareholders, provision of information is not usually considered to confer the kind of undue benefit to the offeror at the expense of the other shareholders (or the company) referred to in the Limited Liability Companies Act, even when the offeror is already a shareholder of the company. As such, the provisions of the Limited Liability Companies Act on equal treatment do not, as a rule, limit the possibility of the board of directors of the target company to allow a due diligence review or obligate the board to provide the information given in a due diligence review to other shareholders of the company.

(c) Confidentiality Issues

If the board of directors decides to allow a due diligence review, the offeror and the target company shall sign a non-disclosure agreement before starting the review, unless such an agreement has already been signed in an earlier stage of the process. The non-disclosure agreement should, among other things, limit the right of the offeror (and its advisers and any other 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 restrict the right to disclose such information to third parties. The possibility that the prospective bid may never be completed should also be taken into account in the non-disclosure agreement.

(d) Nature and Scope of Information to be Provided

With the exception of limitations on insider information and the general principles of the Limited Liability Companies Act, the Limited Liability Companies Act and Securities Markets Act do not impose limitations on the nature and amount of the information to be provided. However, the board of directors must strive to protect the interests and trade secrets of the company when making a decision regarding information to be provided to an offeror. If the offeror and the company are competitors, the provisions of competition law may impose restrictions on the information that may be provided.

The scope of the review must be defined separately in each individual situation. The nature of the offeror may also influence the evaluation, in other words whether the offeror is a competitor of the target company, or another strategic purchaser, or a private equity investor, for example. Information may also be disclosed in several stages and by different means. The sharing of commercially and competitively sensitive information can be carried out by means of a clean team arrangement, in which sensitive information is disclosed only between advisers or to a very limited number of representatives of the counterparty, who in turn agree not to pass on detailed information to the client or within their own organisation. A clean team arrangement is an established procedure, but the principles of information sharing and reporting should always be decided on a case-by-case basis, based on the nature of the offeror and competitor status, and it is not necessary to disclose all the information requested by the offeror.

It is typical and often in the interest of the target company that the due diligence review is conducted in its entirety before making the bid public. The withdrawal of the offeror from a published bid after a due diligence review has been conducted may lead to speculation and disruption in the market. If the offeror is not in contact with the board of directors of the target company and does not ask for permission to conduct 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 need to review the request for a due diligence review also after the bid has been made public. Even in such cases, invoking this condition of the takeover bid requires that the non-completion of the condition is of material significance to the offeror with a view to the planned takeover.

» *See Recommendation 13 "Invoking a Condition Set for the Completion of the Bid" and Section 5.3.3 (45) of FIN-FSA RAG on Takeover Bids.*

Allowing the due diligence review in the event of a competing bid is discussed separately in **RECOMMENDATION 8** Actions by the Target Company in the Event of a Competing Bid.

It is always advisable to document the due diligence process carefully so that the target company is able to verify at a later date what information was disclosed in the review, as well as the recipients and times of disclosure.

» *With respect to inside information that may be disclosed in a due diligence review, see "Notes on insider regulations in different stages of the takeover bid process".*

(e) Duty of Disclosure

In most cases, the decision to allow a due diligence review does not in itself need to be disclosed. A due diligence review may be considered to be part of the preparation of a potential takeover bid or other transaction. The same grounds for delayed disclosure apply to the decision to allow the review as to incomplete negotiations on the takeover bid. However, the special characteristics of individual situations and potential arrangements between the offeror and the target company may influence the evaluation as to whether or not to the duty of disclosure applies. For this reason, disclosure issues must be considered separately in each situation.

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

» *See Recommendation 10 Preparing for Information Leaks.*

As a rule, the target company is not required to disclose to the markets information disclosed to the offeror in the due diligence review. However, if the due diligence review reveals an essential fact not previously known to the target company, the board of directors of the target company must, without delay, evaluate whether the fact constitutes inside information that must therefore be made public under the company's continuous duty of disclosure.

With respect to inside information that may be disclosed to the offeror, see Notes on insider regulations in different stages of the takeover bid process. Even if the information provided to the offeror in the due diligence review is not inside information, the board of directors of the target company should assess whether the information may be relevant to the assessment of the merits of the bid and whether it therefore needs to be disclosed. For example, preliminary information about the contents of the target company's future financial report may influence the target company's shareholders' assessment of the takeover bid, even if the information is not inside information. On the other hand, if the financial report in question is published during the offer period the board of directors may also reasonably deem it not necessary to disclose the preliminary information.

RECOMMENDATION 7 – DUE DILIGENCE REVIEW OF THE OFFEROR

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

Explanatory notes

In assessing a bid, the board of directors of the target company must act with due care in the interests of the shareholders. In order for the board to be able to make a reasoned assessment of the securities consideration offered, the board shall acquire sufficient and appropriate information to support its assessment. The board of the target company must evaluate on a case-by-case basis whether the information that is publicly available is sufficient for a reasoned assessment or whether the assessment requires conducting a due diligence review of the offeror.

If the offeror receives a request from the target company regarding a due diligence review, it is recommended that the offeror shall allow a review to the extent required so that the board of directors of the target company is able to give a reasoned assessment of the consideration offered. The scope of the due diligence review must be defined separately in each individual situation, taking into account also the nature of the target company and the offeror (such as competitor status). Factors such as public trading on the security offered as consideration (such as on a stock exchange or MTF), information publicly available on the security, and the liquidity of the security may also influence the assessment.

If the security offered as consideration is listed, the board of directors of the target company should, in principle, in the context of the due diligence review seek information on the factors that materially affect the value of the security in question, including any insider projects of the offeror that are underway.

» *For more on inside issues, see also Notes on insider regulations in different stages of the takeover bid process.*

If the offeror does not cooperate with the board of directors of the target company, it may be impossible for the board to obtain the information listed above. In such situations, the board of directors of the target company may have grounds to deviate from the recommendation. In such a case, the offeror and the target company must, at the same time as they indicate whether they have committed to comply with the Takeover Code, explain why they have decided to deviate from an individual recommendation of the Takeover Code. If the matter has not become relevant at the time when the takeover bid or possible takeover bid is first made public, the offeror must disclose the reasons for deviating from the individual recommendation at the stage when the matter becomes relevant, or in other words when the target company has requested a due diligence review.

If the board of directors of the target company detects, based on the due diligence review it conducts or otherwise, that the offer document by the offeror does not provide the holders of the securities with sufficient and correct information regarding the consideration offered, where such information may be material for the assessment of the bid, and the offeror does not supplement the information, the board should, in principle, disclose its view on the matter in the statement of the board regarding the bid or, if necessary, in a separate release.

» *See also the explanatory notes to Recommendation 5 Statement by the Board of Directors of the Target Company Regarding a Bid, section (d).*

IV. COMPETING BIDS

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

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

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

RECOMMENDATION 8 – ACTIONS BY THE TARGET COMPANY IN THE EVENT OF A COMPETING BID

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

Explanatory notes

(a) General Duties of the Board of Directors of the Target Company

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

For the purposes of this Recommendation, a competing bid means both competing takeover bids and mergers referred to in Recommendation 16. In other types of corporate transactions, the role and duties of the board of directors of the target company are assessed in light of the general principles of company law. The obligation of the company's management to strive for the best possible outcome for the company and its shareholders based on the duty of care and loyalty under the Limited Liability Companies Act may require that factors related to the equal treatment of offerors be taken into account in such corporate transactions, too.

According to the general principles of the Limited Liability Companies Act, the board of directors of the target company must seek the best possible outcome for the shareholders in the event of a takeover bid. If the board receives a bid of a serious nature from a competing offeror, the board shall assess the matter, obtain sufficient and appropriate information on the competing proposal, and compare the proposal with the earlier bid.

» *See also the relevant parts of Recommendation 2 Duty of the Board of Directors to Act Following a Proposal Relating to a Bid.*

Upholding the interests of shareholders usually requires that the board of directors strives to achieve as high a value for the company's securities as possible, but on the other hand, the board shall also ensure that the competing bid is feasible. In practice, this may require entering into negotiations with the competing offeror. As a rule, a combination or transaction agreement or negotiation prohibition agreed between the board of the target company and the first offeror shall not impede the board's ability to evaluate a competing bid or to commence negotiations with a competing offeror if this is in the interests of the shareholders.

» *For details, see Recommendation 3 Contractual Arrangements with the Offeror.*

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

If, for example, the board of the target company has allowed the first offeror to conduct a due diligence review, the board should, as a rule, upon the request of the competing offeror, allow a 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 comparable. However, allowing a review and the scope of a possible review must be considered separately in each bid. The mere fact that a due diligence review by a competing offeror is carried out, where appropriate, by means of a clean team arrangement, is not considered a deviation from the recommendation.

» *For details, see the explanatory notes to Recommendation 6 Due Diligence Review of the Target Company, section (d).*

If the first bid has already been made public, allowing a due diligence review also requires that the proposed competing bid has, in the opinion of the board of the target company, realistic chances of success. This usually means that the competing bid must be more beneficial for the company's shareholders or, if different types of consideration are offered, at least as beneficial as the first bid, which has already been made public. The assessment may also take into account other factors affecting the bid's chances of success, such as issues related to official approvals and the timetable of the bid's execution. If the chances of success of the competing bid are clearly worse than those of the first bid, the board of directors of the target company may have reasonable grounds to consider that the interests of the shareholders do not require that a due diligence review be allowed.

If the board of directors of the target company is contacted about a potential competing bid and, in the opinion of the board, the contact is of a serious nature and has realistic chances of success, the board shall seek the best possible outcome for the shareholders, including complying with **RECOMMENDATION 2** Duty of the Board of Directors to Act Following a Proposal Relating to a Bid with respect to the competing bid. A possible combination or transaction agreement between the target company and the first offeror may also include provisions regarding the procedures to be followed in the event of a competing bid.

» *For details, see the explanatory notes to Recommendation 3 Contractual Arrangements with the Offeror, section (b).*

As the procedures for competing bids specified in the combination or transaction agreement must be disclosed when the takeover bid is made public and in the offer document, they are also known to other potential offerors planning competing bids.

(b) Statement by the Board of Directors of the Target Company and Its Amendment

In amending its statement following a competing bid, in accordance with Chapter 11, Section 17(1) of the Securities Markets Act, the board of directors shall compare the first bid with the competing bid and, in accordance with Chapter 11, Section 13 of the Securities Markets Act, give its opinion on the new competing bid. If, after an assessment, the board decides to recommend the acceptance of the competing bid to the holders of the securities of the company, the board must, in practice, withdraw the recommendation given to the first bid and release a new statement that recommends the acceptance of the competing bid. In amending its statement, the board must comply with the principles described above in **RECOMMENDATION 5** Statement by the Board of Directors of the Target Company Regarding a Bid, where applicable.

In the event of a competing bid, the board of directors of the target company shall also, in other respects, constantly consider whether it must inform the markets of the prospective competing bid or amend the statement of the board on the bid.

(c) Effects of a Competing Bid on the First Bid and the Target Company's Application for a Time Limit for Amending the Terms and Conditions of the Takeover Bid

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

In situations where the competing bid is other than a takeover bid, the provisions of the Securities Markets Act on competing takeover bids do not apply. Even in such situations, however, the first offeror is, in principle, entitled to improve the terms of its bid. A published competing bid may also constitute a special reason, under the Securities Markets Act, to extend the offer period by more than ten weeks (Chapter 11, Section 12(2) of the SMA). However, in these situations, the first offeror is not entitled to decide on the expiry of its bid, unless the offeror has expressly reserved the right to do so in the terms and conditions of the bid. The disclosure of a competing bid usually also requires supplementing the offer document, in which case the holders of the target company's securities who have accepted the bid may have the right to withdraw their acceptance.

In certain situations, competing bids can be considered to limit the business operations of the target company for an unreasonably long time. In the event that several competing bids have been made public, the Financial Supervisory Authority may, upon the request of the target company, impose a deadline on the competing offerors after which the terms and conditions of the bids may no longer be amended. The deadline can be set no earlier than ten weeks from the date the first bid was made public (Chapter 11, Section 17(3) of the SMA). When considering whether to request a deadline, it is appropriate to examine the situation in light of the general principles of the Limited Liability Companies Act, taking account of the interests of both the company and all its shareholders. If the competitive situation impedes the target company's business for an unreasonably long time in a situation in which the above provision of the Securities Markets Act does not apply (for example, in the case of undisclosed takeover bids or one of the bids is not a takeover bid), the target company has the right to request the opinion of the Takeover Board on compliance with good securities market practice.

V. THE BID AND ARRANGEMENTS RELATING TO A BID

An offeror may seek to acquire securities of the target company directly from the markets before it decides to launch a public takeover bid and makes its decision public in accordance with the Securities Markets Act (Chapter 11, Section 9 of the SMA). The purpose of purchasing securities prior to the announcement of a takeover bid is generally to improve the chances of success of a future bid. A prerequisite for purchasing securities is that the offeror does not have inside information concerning the target company or its securities. The party planning a takeover bid should also pay attention to the fact that the decision to launch a takeover bid must be disclosed immediately and communicated to the target company (Chapter 11, Section 9 of the SMA).

Acquisitions of securities of the target company prior to the bid being made public may affect the amount and form of the consideration offered. The FIN-FSA RAG on Takeover Bids 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. When certain thresholds are exceeded, prospective acquisitions of securities must also be disclosed under the flagging provisions under Chapter 9 of the Securities Markets Act.

After the announcement of a takeover bid, holders of securities in many cases sell their securities on the stock exchange. Often, larger quantities of the target company's securities are also offered directly to the offeror. For an offeror who strives to acquire full ownership in the target company, it is important to be able to acquire securities available for sale outside the takeover bid, too. Once a bid has been made public, acquisitions outside the takeover bid may be carried out within the rules concerning the use of inside information in public trading on the stock exchange or outside it either before, during or after the expiry of the offer period.

Preparations for a takeover bid are usually confidential, and no information regarding a 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 a potential bid or preparations for it is not leaked to the markets before the bid is made public.

The disclosure of information regarding a takeover bid may have a significant impact on the share price of the target company's securities. Disclosure of a takeover bid may also affect the business operations of the target company. It is important for the reliable functioning of the markets that the offeror discloses the factors affecting the assessment of the bid in a timely manner and to a sufficient extent.

RECOMMENDATIONS V. THE BID AND ARRANGEMENTS RELATING TO A BID

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

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

Explanatory notes

After a bid has been made public, the offeror may, before and during the offer period, acquire the securities subject to the bid even outside the public takeover bid, for example, in continuous public trading on the stock exchange. The offeror may decide when to make such acquisitions and may, at its discretion, suspend or discontinue the acquisitions. Acquisitions may not, however, be executed, nor can previously issued purchase orders be modified or cancelled, if the offeror possesses insider information.

» *For more on inside issues, see also Notes on insider regulations in different stages of the takeover bid process.*

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 intent to acquire securities outside the public takeover bid must be disclosed. The disclosure can be given in other announcements relating to the bid, such as the release that concerns making the bid public and/or the release relating to the result of the bid, depending on which phase of the bid the acquisitions are planned to be made in.

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

RECOMMENDATION 10 – PREPARING FOR INFORMATION LEAKS

To prevent information leaks, both the offeror and the board of directors of the target company must observe confidentiality at each stage of the bid process. The offeror and the board of the target company shall, however, prepare in advance for the possibility that information about the proposed takeover bid may leak to the markets prior to the disclosure of the bid, and shall ensure sufficient ability to communicate information in the event of a leak.

The offeror must maintain a project list of persons with access to information about the project. The project list must be drawn up at the latest when the information about the project constitutes inside information concerning the target company.

Explanatory notes

(a) Preparing for Information Leaks

It is advisable for both the offeror and the board of directors of the target company to be prepared for the possibility that information about a forthcoming bid may leak to the markets prior to its disclosure. For this reason, it is important to establish sufficient readiness to attend to the provision of information in a controlled and appropriate manner in the event of potential leaks during the process. In practice, it is often necessary for the offeror and the target company to agree on the procedures to be followed in the event of an information leak in the form of a leak plan, in order to ensure that communication in the event of a leak can be done in a timely, prompt and coordinated manner.

If information regarding a forthcoming bid of a serious nature that the board of directors of the target company has knowledge of is leaked to the markets, the board shall release a statement regarding the matter without undue delay. In other respects, too, the board must monitor publicly available information regarding the company and the development of the company's share price. In the event of abnormalities related to these, the board shall consider whether the company should release a statement regarding the matter.

» *For more on disclosure of information, see Article 17 of the MAR, Nasdaq Helsinki Rules, Section 5.2.1 of FIN-FSA RAG on Takeover Bids, and Notes on the duty of disclosure at different stages of the bid process.*

To avoid information leaks, the target company and the offeror should sign a non-disclosure agreement at the earliest possible stage of the process. To safeguard the confidentiality of inside information in the manner referred to in the delay of disclosure of information under the MAR, it is generally sufficient that the parties agree, typically in the form of a non-disclosure agreement, to keep discussions between the parties confidential and only known to persons who need the information to facilitate the takeover bid project, and that the parties agree to provide the competent authorities with information on the recipients of inside information, if necessary. However, a non-disclosure agreement cannot be used to avoid or circumvent the duty to disclose information if other conditions of the MAR on delaying the disclosure of inside information are not met. If the preparation of the bid also requires the target company to engage in discussions with other parties, it is important that the board of directors of the target company ensure that each such party signs a non-disclosure agreement or is otherwise obligated to keep the information secret. Otherwise, the target company may be obligated to disclose the information to the markets due to the fact that the grounds for delaying disclosure under the MAR are no longer met if confidentiality of the information is not ensured.

» *See also Notes on insider regulations in different stages of the takeover bid process.*

Naturally, the offeror must also take care of confidentiality in a manner similar to the target company. If the offeror is a listed company and information regarding the preparation of a bid is also likely to have a material effect on the value of the securities of the offeror, the offeror may also be required to disclose the information to the markets as described above, in accordance with applicable duty of disclosure regulations.

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

(b) Maintaining a Project List

A project list, as referred to in the recommendation, must be drawn up when the offeror is not required, on the basis of applicable law, to draw up an insider list within the meaning of Article 18 of the MAR.[5] Depending on the nature of the takeover bid process, the target company and the offeror may also mutually agree to maintain the appropriate lists.

» *See Notes on insider regulations at different stages of the takeover bid process, section (c).*

The offeror is obligated to draw up a project list, as referred to in the recommendation, when the information about the takeover bid project constitutes inside information concerning the target company, or in other words, when the offeror considers that the requirements of the MAR on the significance and non-public and precise nature of the information are met. Even if information about the offeror's intention to launch a takeover bid constitutes inside information and thus gives rise to the obligation to draw up a project list within the meaning of the recommendation, under Article 9(5) of the MAR, inside information relating solely to one's own intention does not, in itself, prevent the offeror from acquiring the target company's securities before the intention is made public (stake-building).

5 The obligation to draw up an insider list under Article 18 of the MAR applies to issuers who have requested or approved admission of their financial instruments to trading on a regulated market or an MTF or an OTF in the EEA, or who have approved trading of their financial instruments on an OTF in the EEA.

However, the option of acquiring securities of the target company during the preparatory stage should be assessed carefully on a case-by-case basis.

» *For details, see Notes on insider regulations in different stages of the takeover bid process.*

In situations where the offeror's obligation to draw up an insider list is based on the MAR, the requirements on the content of the insider list are specified in the Commission Implementing Regulation. In situations where the offeror is not subject to Article 18 of the MAR, the project list must contain at least the following information:

- Name and organisation of the person
- Date and time when the person became aware of the project
- Contact information, such as email and/or phone number

The offeror may agree separately with the persons acting on its behalf whether they will maintain their own project list or whether the offeror will list such persons in its own list. Those entered in the project list must be notified of the ban on disclosure and trading related to inside information. According to good securities market practice, the offeror must manage inside information with confidentiality and must be able to verify the recipients and times of disclosure of inside information.

RECOMMENDATION 11 – DISCLOSURE OF A BID

In the release announcing a public takeover bid, the offeror shall disclose factors relevant to the evaluation of the bid and its merits of which it is aware. In addition to the information required by the Securities Markets Act, these factors include information about:

- *the offeror;*
- *the securities owned or otherwise controlled by the offeror that are issued by the target company and subject to the bid;*
- *the proportion of share capital and voting rights in the target company held by the offeror;*
- *the securities subject to the bid;*
- *the material terms and conditions of the bid, including the premium offered in relation to the market value of the target company and the principles used to calculate the premium;*
- *the financing required or other necessary arrangements related to the consideration, as well as any material terms and uncertainty factors related to these;*
- *the shareholders of the offeror who have announced their support of possible measures relating to the completion of the bid at the general meeting of the offeror;*
- *the share of ownership and voting rights held by shareholders of the target company who have committed, conditionally or unconditionally, to accept the bid, and the material terms and conditions of such commitments;*

- *the share of ownership and voting rights held by shareholders of the target company who have otherwise announced their support of the bid;*
- *other arrangements relating to the bid between the offeror and holders of the securities subject to the bid;*
- *the reasons for the bid;*
- *if securities of the offeror are being offered as consideration, information on the effects of the bid and of the consideration paid on the business operations, profit and financial position of the offeror (including impact calculated per share, if possible);*
- *the estimated date when the offer document will be made public;*
- *the necessary official approvals; and*
- *the estimated duration of the takeover bid process and the execution of related arrangements, or the reasons why the offeror is unable to give such an estimate.*

If the offeror and the target company have signed a combination or transaction agreement, the offeror must also describe the material terms and conditions of that agreement.

The offeror must also indicate how it has ensured that it has the prerequisites necessary to complete the bid. In particular, it must be mentioned if there are special uncertainties related to the completion of the bid.

Explanatory notes

(a) Disclosure of factors relevant for the assessment of the bid and its merits

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

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

To avoid disrupting the price formation of the securities subject to the bid, it is essential that all matters known to the offeror that impact the value of the securities and that are essential in relation to the assessment of the bid and its merits are disclosed when the bid is made public. The duty to disclose information under the Securities Markets Act cannot be deviated from on the basis of the 'comply or explain' principle.

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

Information about the proportion of the target company's shareholders who have given advance commitment to accept the bid may help the parties assess the bid's chances of success or the prerequisites for a possible competing bid. For this reason, it is important that, in addition to the share of ownership and voting rights held by such shareholders, the material terms and conditions of the commitments are also disclosed. Such material terms and conditions generally include terms under which shareholders who have given commitments may withdraw from the commitments, and which may affect the ability of shareholders who have given a commitment to accept a competing bid, including the possible threshold value contained in the commitments and the period of validity of the commitments.

The material terms and conditions of a possible combination or transaction agreement disclosed in connection with the disclosure of the bid are described in **RECOMMENDATION 3** Contractual Arrangements with the Offeror.

If the offeror has made a decision to potentially acquire securities subject to the bid outside the public takeover bid after the bid has been made public, the offeror must disclose its intentions in the announcement disclosing the bid.

» *See Recommendation 9 Acquisition of Securities of the Target Company from the Market.*

(b) Disclosure of Information about a Potential Bid

In certain situations, for example due to potential or realised leaks of information about a takeover bid project, there may also arise the need to disclose a planned takeover bid that has not yet been decided. Even if there is no certainty that a bid will be launched, the mere knowledge that a takeover bid is planned can influence the target company's share price and business operations. In particular, the offeror should ensure that the market for the target company's securities is not distorted in such a way that the price of the securities rises or falls artificially, disrupting the normal functioning of the markets.

If a party planning to launch a takeover bid must disclose its plans concerning the potential bid due to, for example, information leaks, then when disclosing the information, attention must be given to ensuring that, on the basis of the disclosed information, the parties are able to assess the likelihood that the takeover bid will be published at a later date and what the potential timing of the bid will be. According to the Financial Supervisory Authority's interpretation, a party planning to launch a takeover bid must disclose the aspects that it is aware of and that are essential for the assessment of the merits of the bid at that time, and must disclose any information on any uncertainty factors concerning the completion of the bid.

» *On the disclosure of planned bids, see Section 5.2.1 (13)–(15) of FIN-FSA RAG on Takeover Bids.*

The duty to disclose a decision to launch a takeover bid may not be circumvented by, for example, artificially postponing the adoption of a formal decision on the bid. In any case, in the event of such leaks as described above, the target company must comply with the disclosure obligations of the Securities Markets Act, MAR, and the rules of the stock exchange.

» *See also Recommendation 10 Preparing for Information Leaks.*

(c) International Aspects of Disclosing a Bid

As a general rule, a bid should be extended to all holders of a particular class of securities in accordance with the principle of equivalent treatment. However, the provision of takeover bid announcements or offer documents to holders of securities whose domicile or address is located outside Finland may be subject to compliance with the laws of that country (in particular, local securities market regulations) or other special regulations. This may result in significant additional costs for the offeror and, in some situations, may require disproportionate investigative work or measures. From the point of view of the requirement of equivalent treatment, it is sufficient that the announcements and offer documents concerning the takeover bid are kept available in the manner required by the Securities Markets Act. However, in special cases, equivalent treatment may require that disclosure of the takeover bid be extended to such countries. Such a special situation may arise if, for example, the company has organised public offerings in certain countries, or a large number of holders of the target company's securities are located in a particular country. Such special situations must be assessed on a case-by-case basis.

RECOMMENDATION 12 – BINDING NATURE OF THE INTENTIONS AND PLANS OF THE BID PROCESS

The offeror is bound to comply with any intention or plan related to the bid process that the offeror discloses in connection with the bid, if such an intention or plan is likely to impact the assessment of the takeover bid.

Explanatory notes

The prohibition to give misleading information stated in the general principles of the Securities Markets Act (Chapter 1, Section 3) applies to all exchanges of securities and thus also to takeover bids, and it cannot be deviated from on the basis of the 'comply or explain' principle. The general principles of the Takeover Directive, in particular the prohibition on causing false markets in the securities of the target company, the offeror, or any other company affected by the bid, can also be interpreted to require that the holders of the target company's securities and other investors are able to rely on the intentions or plans disclosed by the offeror in connection with the bid.

The recommendation covers any kind of information disclosed by the offeror about its intentions or plans to do or refrain from doing something in relation to the bid process. A prerequisite is that the information is likely to influence the assessment of the takeover bid by the target company, holders of the target company's securities, or other investors. The information can be likely to influence the assessment of the takeover bid, even if it does not directly impact the value of the target company's securities. Information likely to influence the assessment of the takeover bid includes, among other things, information that the bid will not be increased, that the validity of the bid will not be extended, or that the offeror will not waive a certain condition on the execution of the offer.

The offeror may include conditions on its intentions or plans, or may limit the period of validity of the intention or commitment. For example, the offeror may indicate that it does not intend to increase the bid unless a competing bid for the target company is disclosed. Such conditions or limitations on the period of validity must be clearly and precisely expressed and indicated when the intention or plan is disclosed. If no conditions or limitations on the period of validity are indicated, the disclosed intention or plan is binding on the offeror even if the circumstances change. However, the Takeover Board may, for a justified reason, decide that, due to a change in circumstances, good securities market practice no longer requires the offeror to adhere to an intention or plan that it has previously disclosed.

The recommendation also covers situations in which a party intending to launch a takeover bid declares that it is planning a bid or does not intend to launch a bid. As a rule, the disclosure of a planned bid also includes situations in which plans are disclosed due to an information leak. In such situations, the party planning the bid should clearly state that the decision on the bid has not yet been made and that it is not yet certain whether the party in question will launch a bid. In cases where a party planning a bid publicly announces that it does not intend to launch a bid, the announcement is binding on the party for a period of six months, corresponding to the period stipulated in Chapter 11, Section 9(5) of the SMA, unless a longer period is expressly stated in the announcement. The restriction lapses if a person other than the party planning a takeover bid or acting in concert with such a party launches a bid for the securities of the target company. In situations where the provisions of Chapter 11, Section 9(5) of the SMA do not apply due to the nature of the plans (for example, in the case of a planned merger), it is possible for the target company to request an opinion from the Takeover Board on compliance with good securities market practice.

The conditions imposed on the execution of a bid are not regarded as intentions or plans within the meaning of this recommendation when the terms of the bid allow the offeror to waive the conditions. Neither does the recommendation apply to any strategic plans disclosed by the offeror regarding the target company and its employees. Such plans shall be assessed on the basis of the prohibition to provide false and misleading information of the general principles of the Securities Markets Act.

RECOMMENDATIONS
V. THE BID AND ARRANGEMENTS RELATING TO A BID

RECOMMENDATION 13 – INVOKING A CONDITION SET FOR THE COMPLETION OF 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 must be disclosed in the announcement of the decision.

Explanatory notes

If the offeror has set conditions for the completion of the bid and it is evident that any of the conditions will not be met, the offeror should carefully evaluate whether the condition left unsatisfied has such material significance for the offeror regarding the planned takeover that it is justified not to follow through with the bid. According to the Financial Supervisory Authority, the offeror should not invoke a condition set for the completion of the bid unless the non-fulfilment of the condition is of material significance to the offeror with respect to the planned takeover. The Financial Supervisory Authority recommends that the offeror, as far as possible, seek to ensure that the conditions set for the completion of the bid are met.

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

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

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

Completion of a takeover bid may require the approval of competition authorities in more than one jurisdiction. This may create a situation in which the authorities in certain countries have significantly longer processing times for the approval than the market areas that are significant for the completion of the takeover. In such situations, to avoid endangering the completion of the takeover bid or extending its completion unreasonably due to the length of the administrative processes in jurisdictions of lesser importance, the offeror may consider waiving the requirement for approval by competition authorities in a country that is not a significant market area with respect to the takeover. As a rule, the offeror should not invoke a condition related to the requirement of an official approval if this is not, as a whole, essential for that stage of the bidding process and if waiving the condition is possible.

Often, it is important for the offeror to acquire complete control of the target company. For this reason, reaching the squeeze-out threshold of 90 per cent, for example, is often a condition to completing the bid. The offeror may withdraw the bid if, for example, the offeror has set the completion of the bid as conditional on reaching a certain share of ownership in the target company or the general meeting of the target company adopting a given decision, and it is evident that such a condition will not be met. Furthermore, when a bid is made on the basis of information available to the offeror, the offeror may require that no such material change has taken place in the target company of which the offeror was unaware, or which otherwise has a material impact on the bid.

If conducting a due diligence review in the target company is set as a condition for completing the bid, the offeror should not invoke the due diligence condition over factors that were clearly known to the offeror at the time when the bid was launched.

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

As a rule, invoking such a condition requires that information that was not known to the offeror at the time when the terms and conditions of the bid were drafted and that is of material significance to the offeror with respect to the planned takeover is revealed in the due diligence review conducted after the launch of the bid or otherwise.

If the takeover bid is launched in agreement with the board of directors of the target company, it is possible for the offeror and the target company to sign a special combination or transaction agreement. It may be significant to the parties that the bid is completed in compliance with such an agreement and only on the condition that the parties remain in agreement on the completion date of the bid. In other words, the validity of the combination or transaction agreement is set as a condition for the completion of the bid. In the combination or transaction agreement, the target company often provides customary assurances about the company and its business operations. Insignificant or non-essential breaches of such assurances are not usually considered a factor that would entitle the offeror to withdraw from the bid on account of the possible termination or expiry of the combination or transaction agreement.

Invoking a condition related to financing requires that the availability of financing has been explicitly stated as a condition for the completion of the bid. The offeror cannot invoke a condition related to the availability of financing that is under the control of the offeror (Chapter 11, Section 8 of the SMA).

VI. MEASURES AFTER THE BID

After the expiry of the offer period, the offeror shall, without delay, disclose the result of the bid, pursuant to the provisions of the Securities Markets Act. If the bid is conditional, the offeror must also disclose whether it will complete the bid (Chapter 11, Section 18 of the SMA). The offeror is also entitled to extend the offer period after the offeror confirms that it will complete the bid and the bid becomes unconditional. This makes it possible for the offeror to acquire additional shares on the market and gives remaining shareholders the opportunity to accept the bid even after the completion of the bid has been confirmed and the first trades to execute the takeover have been made.

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

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

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

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

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

In a situation where the offeror fails to acquire more than nine-tenths (9/10) of the shares and votes in the target company through a public takeover bid, the offeror may consider a merger as a possible alternative course of action. A limited liability company may merge with another limited liability company, whereby the assets and liabilities of the target company are transferred to the acquiring company in exchange for a merger consideration in the form of shares in the acquiring company paid to the shareholders of the target company. The merger consideration may also be in the form of cash, other assets, and commitments (Chapter 16, Section 1 of the CA). As a rule, the starting point in a merger is the principle of equal treatment, taking into account that the shareholders of the target company may, if they so wish, continue as shareholders of the acquiring company. If, in a merger following a takeover bid, the consideration offered is other than shares in the acquiring company, there must be a justified reason for this.

RECOMMENDATION 14 – INTENTION TO ACQUIRE THE REMAINING SECURITIES OF THE TARGET COMPANY

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

Explanatory notes

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

Both a minority shareholder and an offeror may demand a squeeze-out or sell-out of the minority shares under the Limited Liability Companies Act and initiate squeeze-out or sell-out proceedings. By the same procedure, the offeror may demand the squeeze-out of all shares owned by minority shareholders. It is generally in the interests of expediency that the offeror initiates the squeeze-out and that the squeeze-out of all the remaining minority shares is carried out in the same procedure.

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

If the offeror has decided to purchase more securities of the target company on the market after the close of the offer period, such as by launching a retroactive offer period, acquiring securities on the market or launching other arrangements to acquire the securities of the target company, such an intention must be announced in the release disclosing the result of the bid.

RECOMMENDATION 15 – INTEGRATION MEASURES

If the offeror intends to combine the target company with the offeror through a merger or carry out other similar transactions regarding the target company in connection with the bid, this shall be stated when the offeror discloses its plans regarding the continuance of operations of the target company in the offer document.

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

Explanatory notes

Integration measures and other measures aimed at acquiring control are often executed after the completion of a public takeover bid, when the offeror has ensured its acquisition of the entire share capital of the target company. However, it is possible for transactions to be executed between the offeror and the target company before the offeror has acquired the entire share capital of the target company. The target company is, however, a separate company from the offeror, and its activities must continue to comply with the provisions of the Limited Liability Companies Act and, as long as the company's shares are publicly traded, the requirements of securities market legislation. After the offeror has gained control of the target company, the board of directors of the target company must ensure that no business transactions confer an undue benefit to the offeror at the expense of the target company or its other shareholders. In a takeover bid, particular attention must be given to ensuring that transactions carried out between the offeror and the target company meet the requirements of the general principles of the Limited Liability Companies Act and the requirements of the Limited Liability Companies Act and the Securities Markets Act on related party transactions.

The recommendation applies in situations in which the offeror does not own the entire share capital of the target company. In alignment with the compensation obligation specified in the Securities Markets Act (Chapter 11, Section 25), the recommendation covers integration measures that are planned to be carried out within nine months of the close of the takeover bid. Even after this, it is particularly important to ensure the equal treatment of shareholders as long as the offeror does not own the entire share capital of the company.

The completion of a bid is often conditional on the offeror gaining title to more than nine-tenths (9/10) of the shares and of the voting rights carried by the shares in the target company, so that the offeror may redeem the shares of the minority shareholders and control the target company as the sole shareholder. However, it may be possible to merge the target company with the offeror even if the offeror has not gained title to the entire share capital of the target company. If, for example, the offeror has acquired more than two-thirds (2/3) of the voting rights carried by the shares in the target company, the offeror usually controls a sufficient majority to decide on a merger of the target company with the offeror. In a situation in which the offeror fails to acquire more than nine-tenths (9/10) of the shares and votes in the target company through a public takeover bid, the offeror may consider a merger as a possible alternative course of action. If the offeror intends to merge the target company into the offeror in such a case, the intention must be disclosed in the offer document. The offer document should also specify the amount and type of merger consideration if possible.

If, in a merger following a takeover bid, the consideration offered is other than shares in the acquiring company, there must be a specific reason for this. It is generally justified to request the opinion of the Takeover Board on the existence of such a special reason. Such a special reason may be based on, for example, the company's business conditions or synergies achieved through the ownership structure. If the purpose of offering some other form of consideration is, for example, to prevent certain shareholders from becoming shareholders in the acquiring company, such a decision may violate the principle of equal treatment. As specified in the preliminary works of the Limited Liability Companies Act (Government Proposal 109/2005, p. 146), the use of a cash consideration may be necessary insofar as the conversion ratio would otherwise lead to the payment of fractional shares. Without a justified reason, the conversion ratio of shares may not be set as such that in a merger, minor shareholders would only receive a cash consideration while major shareholders mainly receive a consideration in the form of shares.

VII. MERGER

There are often several alternative ways to carry out a corporate transaction. In particular, from the point of view of shareholders of the merging company, the merger may lead to the same financial outcome as a takeover bid, in which shares of the offeror are offered as consideration.

Mergers and takeover bids are mainly subject to different regulations and procedures. Unlike in a takeover bid, a merger always requires the contribution of the board of directors of the merging company. As in a takeover, the role of the board in a merger is evaluated in light of the general principles of company law by prioritising the interests of the company and its shareholders.

The interests of shareholders of the merging company are protected by, for example, the general principles of Chapter 1 of the Limited Liability Companies Act and the provisions of Chapter 16 concerning the merger process, as well as the right of a shareholder voting against the merger to demand the redemption of their shares. Under the Limited Liability Companies Act, the acquiring company has no obligation corresponding to Chapter 11, Section 7 of the Securities Markets Act to afford the shareholders of the merging company equivalent treatment. For example, the principle of equal treatment of shareholders of the general principles of the Limited Liability Companies Act does not, as a rule, extend to acquisitions of shares in the merging company made by the acquiring company before the disclosure of the draft terms of merger.

The Limited Liability Companies Act also does not regulate the merger consideration in as much detail as is stated in Chapter 11 of the Securities Markets Act concerning the offer consideration in a takeover bid. The board of directors of the merging company has a duty to ensure that the merger consideration is in the best interests of the company and its shareholders.

RECOMMENDATIONS
VII. MERGER

RECOMMENDATION 16 – MERGER

Where applicable, recommendations 1-4 and 6-13 of the Takeover Code also apply to mergers in which the merging company is a Finnish limited liability company whose shares are traded on a regulated market or, with the company's consent, on an MTF. In such a case, recommendations concerning the offeror and the target company apply to the acquiring and merging companies, respectively.

In disclosing the draft terms of merger, the acquiring company and merging company shall state whether they have undertaken to comply with the Takeover Code and, if not, the reasons for the non-compliance.

The acquiring company shall afford equivalent treatment to all holders of shares or securities entitling to shares in the merging company.

In connection with the disclosure of the draft terms of merger, the acquiring company shall disclose information on shares of the target company and securities entitling to them issued by the target company that have been acquired by the acquiring company or by a person acting in concert with the acquiring company within the meaning of Chapter 11, Section 5 of the Securities Markets Act during the six months preceding the signing of the draft terms of merger, and the consideration paid for them. The acquiring company shall also disclose the corresponding information on securities acquired by the acquiring company or by a person acting in concert with the acquiring company within the meaning of Chapter 11, Section 5 of the Securities Markets Act after the disclosure of the draft terms of merger and before the general meeting of the merging company deciding on the merger.

In connection with the disclosure of the draft terms of merger, the board of directors of the merging company shall provide a reasoned assessment of any strategic plans relating to the merger disclosed by the acquiring company. In addition, the board of directors of the merging company shall disclose all disqualifications and material interests of board members in the acquiring company or merger which are known to the board, how these are taken into account in the assessment of the merger by the board of directors, which board members have participated in the deliberations on the merger, and whether only those board members who do not have such interests referred to above have prepared the board's measures related to the merger. If the opinion of the board of directors of the merging company on the draft terms of merger is not unanimous, this must be stated when disclosing the draft terms of merger.

Explanatory notes

(a) Application of the Takeover Code in Mergers

The recommendations of the Takeover Code extensively discuss the obligations of the target company's board of directors and good securities market practice. To safeguard the position of the shareholders of the merging company and to promote good securities market practice, it has been considered necessary to extend the recommendations of the Takeover Code to apply to mergers. The recommendations apply as described below, with necessary differences. Due to differences between the merger and takeover bid processes, **RECOMMENDATION 5** on the opinion of the board of directors of the target company and **RECOMMENDATIONS 14 AND 15** on integration measures do not apply to mergers.

The recommendation applies to mergers and cross-border mergers referred to in Chapter 16 of the Limited Liability Companies Act when the merging company is a Finnish limited liability company. For the purposes of the Code's recommendations, the acquiring company is treated as the offeror, the merging company as the target company, and the disclosure of the bid as the disclosure of the draft terms of merger.

From the point of view of the board's duty of care and loyalty, action in accordance with **RECOMMENDATIONS 2–4 AND 6–8** is often necessary in the acquiring company, too. For example, the prohibition of **RECOMMENDATION 3** on committing to contractual arrangements that limit the scope of action of the company and board of directors and issues related to disqualification and other interests described in **RECOMMENDATION 4** are often also relevant for a Finnish limited liability company acting as the acquiring company. Applying the above recommendations to both parties in the merger may also be necessary because it may not always be known at the initial stage of merger negotiations which of the two companies is ultimately the merging and which the acquiring company. The decision as to which of the companies is the merging company and which the acquiring company may depend on accounting and taxation issues, for example. For the same reason, it may also be justified for the merging company to ensure the feasibility of the merger for its part.

The recommendations are not fully applicable to combination mergers due to the nature of such mergers. As a rule, in a combination merger, the Takeover Code applies only to the merging companies. In a merging company, the disqualification and interests of board members are assessed in relation to the other merging company.

Compliance with the Takeover Code is based on the 'comply or explain' principle. For this reason, when the draft terms of merger are disclosed, the acquiring and merging companies must state if they intend to comply with the Code or explain the non-compliance. In general, the acquiring company and the merging company sign a combination or transaction agreement at the same time as the draft terms of merger are signed. In practice, the essential terms of the merger are also agreed in the combination or transaction agreement if the agreement is signed before the actual draft terms of merger. In situations where the combination or transaction agreement is signed prior to the signing of the draft terms of merger, the disclosure of the draft terms refers to the disclosure of the essential terms of the merger at the time of signing the combination or transaction agreement.

In order not to disrupt the price formation of the securities of the merging companies, it is important that, when the draft terms of merger or the combination or transaction agreement are disclosed, any factors affecting the value of the securities relevant to the merger and the assessment of the merger's merits are disclosed. However, it is not necessary to include the information required to be disclosed by the recommendations of the Takeover Code in the draft terms of merger themselves, the content of which is specified in the Limited Liability Companies Act.

(b) Recommendations Concerning the Acquiring Company

In the merging company, the requirement of the Limited Liability Companies Act on the equal treatment of shareholders (Chapter 1, Section 7) applies only to the decisions and actions of the general meeting, the board of directors, and the managing director, as well as the supervisory board, if one exists. On the other hand, the requirement of equal treatment does not, in principle, apply to contracts and legal transactions between the shareholders of the acquiring company and the merging company. For this reason, the recommendation requires the acquiring company to afford equivalent treatment to the holders of the securities of the merging company. The content of the recommendation corresponds to the provisions of the Securities Markets Act on the equivalent treatment of holders of the target company's securities (Chapter 11, Section 7) and can be applied in accordance with the established interpretations of that Section.

When assessing whether equivalent treatment is achieved, agreements and arrangements between the acquiring company and the shareholders of the merging company outside the merger process are also taken into account if they are connected to the merger. In practice, the principle of equivalent treatment requires that the acquiring company does not acquire securities of the merging company from individual holders of securities outside the merger process on terms that are better than the merger consideration. The acquisition of shares of shareholders who voted against the merger through a squeeze-out procedure in accordance with Chapter 16, Section 13 of the CA or otherwise is not deemed an acquisition on better terms than the merger consideration, provided that the acquiring company has not offered to buy the shares on terms that are better than the merger consideration. Furthermore, the acquiring company may not circumvent the principle of equivalent treatment by carrying out acquisitions through a company under its control or another person acting in concert with it within the meaning of Chapter 11, Section 5 of the SMA. It is also possible to request a statement from the Takeover Board on whether the principle of equivalent treatment is enforced in accordance with the recommendation.

The importance of the principle of equivalent treatment is emphasised partly because mergers are not subject to the provisions of the Securities Markets Act on the pricing of the takeover bid (Chapter 11, Sections 23–25 of the SMA); rather, the merger consideration is defined in the draft terms of merger signed by the boards of directors of the acquiring and merging companies. In order to provide the shareholders of the merging company with sufficient information to assess the merger consideration, the acquiring company shall, according to the recommendation, disclose information on any securities of the merging company acquired by it or by persons acting in concert with it and on the consideration paid for them. The disclosure obligation applies to acquisitions made during the six months before the disclosure of the draft terms of merger and between the disclosure of the draft terms of merger and the general meeting deciding on the merger. Acquisitions made prior to the disclosure of the draft terms of merger must be announced in connection with the disclosure of the draft terms of merger. Acquisitions made after the disclosure of the draft terms of merger should be announced before the end of the registration period and possible advance voting at the general meeting deciding on the merger, or immediately if the acquisition is made after this date.

Although the disclosure obligation for transactions outside the merger ends at the general meeting of the merging company deciding on the merger, the requirement of equivalent treatment continues to apply to the acquiring company even after the general meeting, until the merger has been completed and any shares of shareholders who have requested sell-out have been redeemed by the acquiring company. It is also possible to limit or prohibit acquisitions outside the merger process in the draft terms of merger or in the combination or transaction agreement between the acquiring and the merging company. This is also justified by the fact that the recommendation does not give rise to an obligation to raise or compensate, similar to the provisions of the Securities Markets Act, in situations in which the acquiring company has purchased securities of the merging company on better terms than the merger consideration.

On the basis of **RECOMMENDATION 1**, the acquiring company is obliged to verify the feasibility of the merger before disclosing the draft terms of merger. Ensuring feasibility concerns, in particular, ensuring the merger consideration, even though the Securities Markets Act does not specify such a requirement for mergers. The explanatory notes to the recommendation describe in more detail what is required to ensure the payment of consideration in the form of securities. Ensuring the merger consideration also includes the requirement that the acquiring company assures with reasonable certainty the financing of a possible squeeze-out of shareholders who voted against the merger. As part of this assurance, the companies party to the merger may also agree on a condition that the parties are not obligated to carry out the merger if the merger would result in minority shares having to be redeemed for a larger sum or in larger quantities than that for which the parties are prepared. In connection with the disclosure of the draft terms of merger, the acquiring company should disclose, where applicable, the information listed in **RECOMMENDATION 11**. However, a merger may involve various agreements on, for example, capital arrangements in the merging or acquiring company, or matters related to the management of the acquiring company after the merger, such as the seats on the board of directors, the appointment of senior management members, the name of the newly formed company, or the location of the head office. Therefore, instead of the calculated premium reflected in the merger consideration, it may be more appropriate to disclose the exchange ratio reflecting the relative valuation of the merging companies and the share of the merged company acquired by shareholders of the companies. It is also generally justified to disclose information on matters related to the management of the acquiring company following the merger.

In a merger, the right of the parties to invoke a condition imposed on the execution of the merger is defined in the draft terms of merger and any combination or transaction agreement signed by the parties at the time of signing the draft terms. As such, the terms for the execution of the merger are not subject to the recommendation by the Financial Supervisory Authority that the offeror should not invoke a condition imposed on the execution of the bid unless the non-performance of the condition is of material significance to the offeror. If the acquiring company invokes a condition for the execution of the merger and fails to carry out the merger, the grounds for such a decision must be disclosed in accordance with **RECOMMENDATION 13**.

(c) Recommendations Concerning the Merging Company

Unlike a takeover bid, a merger always requires the contribution of the board of directors of the merging company. The role and duties of the merging company in a merger are evaluated in light of the general principles of company law by prioritising the interests of the company and its shareholders.

In accordance with **RECOMMENDATION 2**, the board of directors of the merging company is obligated to consider propositions for mergers and, if the board considers the proposition to be of a serious nature, assess what measures are necessary to safeguard the interests of the shareholders and the company. If the board of directors finds in its assessment that the merger is in the interests of the shareholders, the board shall take such measures as are necessary to achieve the most beneficial merger possible. The board of directors' assessment of the shareholders' interest may also be influenced by whether the securities offered as consideration are traded on a regulated market or an MTF, or whether they are intended to be listed for trading in the event of a merger. As a rule, the board of directors is not obligated to cooperate with the acquiring company if it does not consider the proposed merger to be of a serious nature and in the best interests of the shareholders. Mergers are not subject to Chapter 11, Section 14 of the Securities Markets Act on the obligation of the board of directors to transfer to the general meeting measures and arrangements that may prevent or materially impede the completion of a bid or its essential terms and conditions.

RECOMMENDATIONS 6 AND 7 apply to allowing and conducting due diligence reviews in the acquiring company.

RECOMMENDATION 3 applies to negotiations on the draft terms of merger and to any combination or transaction agreement signed in connection with the draft terms of merger. The interests of shareholders usually require that, before signing the draft terms of merger, the board of the merging company also investigate other options available to the company as far as possible and that, as a rule, the board is free to act if it is contacted by a party with a competing offer. The signing of the draft terms of merger is itself a statutory part of the merger process. The board of directors must ensure that the draft terms of merger or the combination or transaction agreement signed in connection with them do not prevent the board from acting in the best interests of the shareholders in the event of a competing bid or a relevant proposal or other material changes to the circumstances, for example. The board of directors of the merging company may not, without justifiable cause, enter into commitments on behalf of the company that limit the ability of shareholders to decide on the merger at a general meeting. Commitments by the board of directors of the merging company to pay a break-up fee are governed by what is stated in the explanatory notes to Recommendation 3.

The board of directors of the merging company is not obligated to publish a statement on the offered merger in the manner required for takeover bids. However, the board of directors of the merging company should, in connection with the disclosure of the draft terms of merger, address the issues described in the explanatory notes to **RECOMMENDATION 5**. If the acquiring company publishes strategic plans relating to the merger, the board of directors should give its assessment of the plans from the perspective of the merging company and its shareholders and in relation to the merging company's own strategy. The board should also give its assessment of the likely impact of the plans on the operations and employment of the merging company. The board may also highlight, for example, how ESG factors influence the board's assessment of the merger. In cross-border mergers, the assessment may be presented as part of the board of directors' report on the likely consequences of the merger. If the board of the merging company has requested an external adviser's opinion on the merger consideration (fairness opinion), such an opinion shall also be subject to what is stated in the explanatory notes to Recommendation 5.

In connection with the disclosure of the draft terms of merger, the disqualifications and other interests of board members, and information on which members of the board have participated in the deliberations on the merger must also be disclosed. The disqualifications and other interests related to the merger of board members of the merging company are governed by the provisions of **RECOMMENDATION 4** and its explanatory notes. A commitment given by a board member or their employer or other associated entity to vote in favour of the merger at the general meeting of the merging company is comparable to a commitment made to accept a takeover bid. In situations in which the commitment has been given by the employer or other associated entity of the board member, the commitment does not, as a rule, impact the ability of the board member of the merging company to participate in the deliberation of the merger free from undue influences, provided that there is no information about competing offers. If the board's decision to sign the draft terms of merger is not unanimous, this must also be stated in connection with the disclosure of the draft terms of merger. The board of directors may assess on a case-by-case basis whether it should make the dissenting opinion of board members public, including the reasons for the opinion.

NOTES ON THE APPLICATION OF THE REGULATIONS

NOTES ON PROVISIONS BASED ON THE TARGET COMPANY'S ARTICLES OF ASSOCIATION

(a) Introduction

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

The articles of association of some Finnish listed companies impose an obligation to redeem the remaining shares in the company on shareholders who acquire a given share of ownership 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 followed in the redemption. Such provisions concerning the redemption price and procedures often differ from those of the Securities Markets Act and Limited Liability Companies Act. This results in various practical problems and leads to an additional offer process that is separate from the statutory takeover bid and squeeze-out procedures. The articles of association of some Finnish companies traded on an MTF, on the other hand, contain provisions that comply with those of Chapter 11 of the Securities Markets Act on the obligation to launch a takeover bid.

A listed company may include provisions based on the 'optional articles' of the Takeover Directive in its articles of association. According to the Takeover Directive, the enforcement of the provisions in Article 9 (Obligations of the board of the target company) and Article 11 (Breakthrough) is at the discretion of each Member State. If a Member State has not implemented said articles on the basis of the Directive, however, the target company always has the independent option of adopting these provisions if the general meeting so decides (Article 12(2) of the Takeover Directive). The provisions of Chapter 11, Section 14 of the Securities Markets Act and of the Limited Liability Companies Act must be considered to meet the requirements of Article 9. Finland has not implemented the provisions of Article 11. Section b), below, describes the procedures in accordance with the applicable laws and recommendations whereby a Finnish company could adopt the more detailed provisions of Article 11 of the Takeover Directive pursuant to Article 12(2), if it so wishes.

(b) Redemption Obligation Based on the Articles of Association

Pursuant to the previous version of the Securities Markets Act, the threshold triggering the obligation to launch a bid was two-thirds (2/3) of the voting rights in the target company. As control of a listed company could, in fact, be acquired with a significantly smaller share of voting rights, a redemption obligation based on the articles of association was seen as a way to protect minority shareholders in a situation in which control of the company is concentrated in a single party.

Under 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 all the securities giving title to shares when the portion of the shareholder in the company exceeds three-tenths (3/10) or one-half (1/2) of the voting rights carried by the shares in the company (see Chapter 11, Section 19 of the SMA). The voting rights threshold triggering the obligation to launch a bid thus corresponds, to a large extent, to the threshold traditionally defined in the articles of association. This has reduced the need to retain separate provisions for redemption obligations in companies' articles of association.

The Securities Markets Act contains an exemption from the obligation to launch a bid in situations in which the redemption threshold is reached by means of acquiring securities through a takeover bid made for all the shares issued by the target company and for all the securities giving title to shares (see Chapter 11, Section 21 of the SMA). This principle corresponds to the provisions of the Takeover Directive. The redemption provisions typically included in listed companies' articles of association do not contain such exceptions. The articles of association may therefore give rise to a redemption obligation even after a voluntary bid is launched for all the securities of the target company.

Such a process resulting from the articles of association, which may be either separate from or parallel to the statutory process, results in practical difficulties and confusion, not least because the provisions of the articles of association on the redemption price and procedures usually differ from those of the Securities Markets Act and the Limited Liability Companies Act. A redemption clause contained in the articles of association may also cause speculative trading on the market. The provisions of the articles of association of a company traded on an MTF may become irrelevant if the company's shares are admitted to trading on a regulated market.

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

If, despite the provisions of the Securities Markets Act on mandatory bids, a provision on a redemption obligation is considered necessary to be included in the articles of association, it is recommended that the price determination and the procedures prescribed by the articles of association correspond to the provisions of the Securities Markets Act. Consistency in the provisions on price determination and procedures helps reduce the practical problems described above. In the case of redemption clauses already contained in the articles of association, achieving such consistency requires amending the articles themselves. However, it may prove difficult in practice to amend or remove an existing redemption clause from the articles of association if, for example, a particularly large majority is required by the articles of association for decisions to amend or remove such a clause.

If a redemption clause in the articles of association does not correspond to 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 should launch two separate and potentially simultaneously valid bids, one in compliance with the Securities Markets Act and the other in compliance with the articles of association. The offeror must clearly indicate the differences between the two bids, either in each of the two offer documents or in other documentation related to the bid. The provisions of the Securities Markets Act on the obligation to raise the price or pay compensation may also become applicable in such situations (see Chapter 11, Section 25 of the SMA).

If the offeror is subject to a redemption obligation based on the articles of association of the target company, the redemption offer based on the articles of association must comply with the provisions on takeover bids, as applicable, and must also take into account the provisions of the articles of association.

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

(c) Breakthrough Clause of Article 11 of the Takeover Directive

According to the optional Article 11 of the Takeover Directive, Member States should ensure that certain restrictions on the redemption and voting rights of shares do not apply to the offeror during the offer period or after the offeror has acquired, on the basis of the bid, at least three-quarters (3/4) of the company's capital carrying voting rights. According to Article 11 of the Takeover Directive, restrictions on the transfer of securities that prevent the offeror from acquiring the securities of the target company cannot be invoked during the offer period. Similarly, the effects of voting rights restrictions that prevent holders of the target company's securities from exercising their rights in relation to the securities when the general meeting of shareholders decides on defensive measures following the announcement of a takeover bid should be removed in certain circumstances. Such restrictions include, for example, restrictions on the right to exercise voting rights attached to shares at a general meeting, and agreements between holders of securities that restrict the exercise of voting rights or the transfer of shares or other securities. These provisions of the Takeover Directive have not been implemented in Finnish law.

Furthermore, articles of association such as those referred to in Article 11 of the Takeover Directive have not been enforced by Finnish listed companies.

The preparatory works of the Securities Markets Act on the implementation of the Takeover Directive (Government Proposal 6/2006) state that a company has the option of applying the provisions of Article 11 as required by the Directive pursuant to the Limited Liability Companies Act. Based on the provisions of the Limited Liability Companies Act on amending the articles of association, the articles of association may require that the different number of votes afforded by shares based on the articles or a voting restriction limiting the number of votes of shareholders may not be applied in a takeover bid. Chapter 5, Sections 28 and 29 of the Limited Liability Companies Act must be taken into account when deciding on the provisions of the articles of association. Under Chapter 5, Section 28 of the Limited Liability Companies Act, when deciding on amending the articles of association to reduce the rights of an entire share class, both the consent of the shareholders holding the majority of the relevant share class and the support of shareholders holding at least two-thirds (2/3) of the shares of the relevant class represented at the meeting are required.

The equal treatment of shareholders may not be violated even by decisions taken by a qualified majority. Even in such cases, the effect of decision-making on the fair price of the shares held by different shareholders must be taken into account. If rights are removed due to decisions taken on the basis of Article 11, pursuant to the Takeover Directive, equitable compensation shall be provided for any loss suffered by the holders of those rights. The Limited Liability Companies Act does not specifically provide for the possibility to pay such compensation. Examples exist in Finnish corporate practice in which, in connection with the combination of share classes, the voting rights lost by 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 in which no compensation has been paid following the combination of share classes. A directed share issue without payment, provided for in the Limited Liability Companies Act, could be provided as such compensation. In such situations, requirements relating to the decision-making process in the combination of classes of shares may still apply.

Under Article 11 of the Takeover Directive, restrictions on voting rights based on agreements between holders of the target company's securities, or restrictions on the transfer of securities, could also be subject to intervention in the event of a takeover bid. It could therefore be required on a per-company basis that the voting rights restrictions or restrictions on the transfer of securities arising from agreements between holders of the company's securities do not apply in relation to the offeror in the event of a bid. However, it is not clear that the provision is intended for or could be used to interfere with a contractual legal relationship between two parties. The provision can therefore be interpreted as referring to those legal structures of Member States in which the above contractual arrangements are binding on the target company or the offeror in various ways, such as through registration or provisions corresponding to the articles of association of the target company. It is noted in the aforementioned preliminary works on the Securities Markets Act (Government Proposal 6/2006, p. 12) that, in Finland, the provisions of shareholder agreements on the exercise of voting rights or the transfer of shares are binding primarily only on the contracting parties and not, for example, on the target company or the offeror. As such, the Takeover Directive may be interpreted as not preventing arrangements that comply with Finnish law currently in force, according to which, for example, a party that breaches a shareholder agreement by exercising voting rights or transferring shares is contractually liable to the other contracting parties.

NOTES ON THE DUTY OF DISCLOSURE AT DIFFERENT STAGES OF THE BID PROCESS

According to the continuous duty of disclosure, the target company is obligated to inform the public as soon as possible of inside information that directly concerns it (Article 17 of the MAR). The issuer may, at its own risk, delay the disclosure of inside information if all the conditions for such a delay specified in Article 17(4) of the MAR are met. One of these conditions is that immediate disclosure is likely to prejudice the legitimate interests of the issuer. According to ESMA's guidelines, an example of a situation in which the immediate disclosure of inside information would likely prejudice the legitimate interests of the issuer is one in which the issuer is engaged in negotiations, the outcome of which would be likely to be jeopardised by immediate disclosure. A takeover bid or merger negotiation typically constitutes such a situation.

» *See ESMA's Guidelines on the Market Abuse Regulation – Delay in the disclosure of inside information, ESMA/2016/1478.*

The guidelines for insiders of listed companies on Nasdaq Helsinki marketplaces (Nasdaq Helsinki, Nasdaq First North Growth Market Finland and Nasdaq First North Bond Market) provide instructions on situations in which the target company should, as a rule, treat a takeover bid as an insider project.

» *See the Nasdaq Helsinki guidelines for insiders.*

When the offeror is an issuer within the meaning of Article 3(1)(21) of the MAR, the disclosure obligation under Article 17 of the MAR also applies to the offeror with respect to information that directly concerns the offeror as an issuer. However, the intention to launch a takeover bid for the target company does not necessarily constitute inside information to be disclosed under Article 17 of the MAR with respect to the offeror and its financial instruments, but this must be assessed on a case-by-case basis.

(a) Duty of Disclosure on a Regulated Market

When an offeror decides to launch a takeover bid, the offeror must immediately disclose its decision under the Securities Markets Act (Chapter 11, Section 9(1);

» *See Recommendation 11 Disclosure of the Bid.*

The disclosure must comply with the provisions of Chapter 10 of the Securities Markets Act on the disclosure of regulated information. The decision on the takeover bid announced by the offeror must also be communicated to the stock exchange (Chapter 10, Section 3(2) of the SMA). If the offeror does not have a distribution channel that ensures fast access to regulated information on a non-discriminatory basis in Finland and the European Economic Area, it is recommended that the takeover bid be published through Nasdaq Helsinki as a market notice so that the distribution of the information meets the requirements of the Securities Markets Act (see Chapter 11, Section 10 and Chapter 10, Section 3 of the SMA).

In accordance with its continuous duty of disclosure, the target company must also disclose the offeror's decision in its own stock exchange release. If the target company and the offeror have entered into a combination or transaction agreement, the target company must disclose the agreement and its essential terms and conditions without delay after the signing of the agreement.

» *See the explanatory notes to Recommendation 3 Contractual Arrangements with the Offeror, section (b) for the terms and conditions deemed material.*

Usually, the signing of a combination or transaction agreement and the final decision of the offeror to launch the bid take place simultaneously and are also disclosed at the same time. The signing of a combination or transaction agreement and the disclosure of the bid are usually preceded by the bid preparation stage between the parties.

The preparation phase of the bid often includes, for example, the negotiation and signing of a non-disclosure agreement, possible due diligence reviews, and negotiations concerning the bid. During the preparation phase, the target company and the offeror may also make various procedural agreements. In general, such agreements and, for example, the target company's decision to conduct a due diligence review can be considered to be part of the preparation of the bid, in which case they do not, in principle, need to be disclosed if the conditions of the MAR on a delay of disclosure are met. However, issues related to disclosure must be assessed on a case-by-case basis.

The board of directors of the target company must also ensure that the company's duty of disclosure is met in later stages of the offer process. It may be considered good practice facilitating investors' access to information if the target company repeats, in its own stock exchange release or as an attachment to it, all announcements concerning the takeover bid issued by the offeror and the essential information contained therein. Typically, the target company may need to disclose, among other information:

- the statement by the board regarding the bid, including an indication as to whether the target company is committed to complying with the Takeover Code and, if not, an explanation for the non-compliance, and potential later amendments to the statement;
- the statement by employees of the target company regarding the bid, if applicable;
- information regarding the acceptance of the offer document and the start of the offer period;
- information regarding the general meeting to be convened as a result of the bid, if applicable;
- pursuant to Chapter 11, Section 14 of the Securities Markets Act, the reason for the decision not to transfer the matter to the general meeting;
- information regarding possible competing bids;
- information that any essential condition for the success of the bid has been met;
- information about the preliminary result of the bid, the final result, the start of a possible retroactive offer period, and the preliminary and final results of the retroactive offer period.

As a result of the completion of the takeover bid, the following information may also need to be disclosed by the target company, depending on the situation:

- 'flagging notifications' regarding the share of ownership and votes held by the offeror and shareholders;
- notifications of managers' transactions pursuant to Article 19 of the MAR on the acceptance of of the bid by persons discharging managerial responsibilities;
- information about the convening of an extraordinary general meeting to change the board of directors of the target company and to address other possible changes;
- information regarding a possible squeeze-out under the Limited Liability Companies Act;
- information on the initiation of a squeeze-out and the appointment of a trustee;
- information regarding the appointment of an arbitral tribunal;
- information regarding the confirmation of a right of squeeze-out;
- information regarding the transfer of ownership, as well as the delisting of the company's securities.

Depending on the offer process, other aspects of the bid may also be disclosed by the target company. As such, the above lists are not exhaustive. For example, inside information provided to the offeror in connection with a due diligence review and flagging notices on transactions executed outside the takeover bid with shares or other financial instruments may need to be disclosed by the target company.

» *See Notes on insider regulations in different stages of the takeover bid process.*

In addition to disclosing the bid, offer document, start of the offer period, and results of the actual and extended offer period, the offeror's duty of disclosure includes flagging notifications concerning the share of ownership and voting rights, among other information. The decisive time triggering a flagging obligation is the timing of the transactions to execute the bid and, with respect to notification of managers' transactions by managers who have accepted the takeover bid, the timing of the announcement of the results of the actual offer period when the offeror confirms that it will execute the offer and the transaction becomes binding on both parties. If the offeror purchases the target company's securities outside the takeover bid, any flagging obligations related to these shall be assessed separately. Irrevocable commitments between the offeror and the shareholders of the target company to accept the bid do not usually trigger a flagging obligation, and information about these must be disclosed in connection with the disclosure of the bid pursuant to **RECOMMENDATION 11**. The same applies to the irrevocable commitments given by shareholders of the target company to vote in favour of a merger at the general meeting of the target company. However, whether or not a flagging obligation is triggered is ultimately assessed on the basis of Chapter 9 of the Securities Markets Act.

During the offer period, a need may arise for the offeror to disclose the fulfilment of an essential condition for the completion of the bid, such as that the offeror has received all necessary official approvals for the completion of the takeover bid. On the other hand, the offeror may also have a duty to disclose if it becomes apparent that a material condition for the completion of the bid will not be fulfilled within the publicly estimated timeframe or at all. In such a case, the offeror must also comment, as far as possible, on whether it intends to waive the requirement to fulfil the condition in question or whether the failure to fulfil the condition will lead to the expiry of the bid, or, if such information is not available, an estimate of when the offeror expects to decide on the matter. The fulfilment or non-fulfilment of a material condition of the bid may constitute inside information.

» *See Notes on insider regulations in different stages of the takeover bid process, section (f).*

The offeror also has a duty to disclose if it extends the offer period of the bid, changes the terms of the bid, or supplements the offer document for other reasons. In the event of material changes to the information presented by the offeror in the disclosure of the bid or other information made public by the offeror, the offeror shall assess the obligation to correct the information disclosed to the markets in view of the general principles of the Securities Markets Act, such as the prohibition to provide false and misleading information.

If the offeror intends to release announcements about the progress of the takeover bid during the offer period, the Financial Supervisory Authority recommends that the offeror state this in the offer document. According to the regulations and guidelines of the Financial Supervisory Authority, announcements about the progress of the takeover bid should be consistent and based either on disclosures with pre-announced deadlines (such as on a weekly basis) or based on reaching, exceeding, or falling short of pre-announced shares of the ownership or voting rights.

» *See Section 5.7 (58) – (61) of FIN-FSA RAG on Takeover Bids for more on public statements related to the bid.*

When the offeror initiates a squeeze-out in accordance with the Limited Liability Companies Act, the offeror is subject to disclosure obligations related to the squeeze-out process under the said Act. The shareholders' access to information is promoted if, where possible, an estimate of the schedule of the squeeze-out process and essential information on the progress of the squeeze-out is published on the company's website, including information about:

- a squeeze-out notice issued by the offeror to the target company,
- the appointment of a trustee and initiation of the proceedings (notice in the Official Journal),
- the appointment of an arbitral tribunal,
- the submission of a statement of claims and the deadline for a response,
- the confirmation of a right of squeeze-out

- the lodging of collateral, transfer of ownership, and delisting, and

- the issue of an arbitration award and squeeze-out price determined by an arbitral tribunal.

In the event of a mandatory takeover bid, the offeror is obliged to disclose the emergence of the obligation to make a mandatory bid, in accordance with Chapter 11, Section 22 of the SMA, and to issue a flagging notification on exceeding the mandatory bid threshold, typically before the announcement of the decision to launch a takeover bid. It is also recommended that the target company repeat the offeror's announcement about the emergence of the obligation to make a mandatory bid or the essential information contained therein in its own stock exchange release or as an attachment to it.

Before the decision to launch a takeover bid, the offeror may also disclose its intention to launch a bid, or information about plans or negotiations for a takeover bid may leak to the market prematurely.

The offeror's announcement of intent is generally not considered a decision to launch a takeover bid within the meaning of Chapter 11 of the Securities Markets Act and thus does not constitute regulated information within the meaning of Chapter 10 of the same Act, and it is not subject to the requirement to disclose the release in Finnish or Swedish or through specific distribution channels. However, the general principles of Chapter 1 of the Securities Markets Act also apply to the disclosure of information regarding intent. If the offeror discloses its intention to launch a bid on a voluntary basis, the disclosure of such information should, where possible, be made outside the trading hours of markets on which the target company's financial instruments are traded in order to ensure the smooth functioning of the market. Such a release must be communicated simultaneously to the target company so that the target company has the opportunity to comment on the matter without undue delay by means of its own press release. It is recommended that the offeror's notice of intent is also communicated to the stock exchange and, if possible, the stock exchange should be informed in advance in confidence.

In the event of an information leak, the target company must comply with the relevant provisions of the MAR and the rules of the stock exchange. For example, if information on negotiations between the offeror and the target company is made public on the market due to an information leak or for another reason, the requirement of consistency of communication requires the target company to also announce the end of such negotiations.

» *See Recommendation 12 Binding Nature of the Intentions and Plans of the Bid Process. On the disclosure of announcements of intent and requirements on their content, see Section 5.2.1 (13) – (15) of FIN-FSA RAG on Takeover Bids.*

(b) Duty of Disclosure on a Multilateral Trading Facility (First North Finland)

By law, takeover bids on an MTF must be made public, and the offeror must provide the holders of the target company's securities with essential and sufficient information to enable the holders of the securities to make an informed assessment of the takeover bid (Chapter 11, Section 27 of the SMA).

The continuous duty of disclosure also applies to issuers of financial instruments traded on an MTF at the request of or with the approval of the issuer (see Article 17 of the MAR and the rules of Nasdaq First North Growth Market). On an MTF, issuers disclose inside information by means of company releases. Thus, the above notes on the duty of disclosure on a regulated market and on facilitating shareholders' access to information in a squeeze-out procedure under the Limited Liability Companies Act also apply, where applicable, to the offeror and the target company on an MTF. However, while statutory flagging obligations do not apply on an MTF, target companies may have voluntarily included provisions similar to the flagging obligation in their articles of association.

NOTES ON INSIDER REGULATIONS IN DIFFERENT STAGES OF THE TAKEOVER BID PROCESS

Information about preparations for a takeover bid is usually likely to have a significant impact on the value of the target company's share and thus easily constitutes inside information from the target company's point of view. However, in order to be considered inside information, the information must meet the requirements of the MAR on inside information with respect to the precise nature, among other requirements. When the offeror's intention meets the MAR's criteria for insider information, **RECOMMENDATION 10** requires that the offeror maintain a list of persons who have received inside information.

(a) Unilateral Intention of the Offeror

The offeror's unilateral intention to launch a takeover bid does not, in itself, prevent the offeror from acquiring the target company's financial instruments on the market prior to the disclosure of the takeover bid (Article 9(5) of the MAR; see also Article 9(6) of the MAR).

The situation can be assessed differently if the offeror has initiated discussions concerning the bid with the board of directors or major shareholders of the company and received a favourable response. If, for example, major shareholders of the target company have expressed an initial interest in accepting a potential bid at the price proposed by the offeror, or if the board of directors of the target company has indicated that it is willing to consider endorsing the bid, information about such discussions is likely to increase the likelihood of the bid being successful. The more certain the offeror is of the stance of the prospective target company's major shareholders or the board of directors on the proposed bid, the more likely it is that the information is such that it prevents the offeror from acquiring the target company's securities before the disclosure of the bid. If the offeror otherwise has inside information concerning the target company or its securities (such as information obtained through due diligence on an insider project pending in the company), the offeror cannot acquire securities of the target company until said information has been disclosed, unless an exception to the use of inside information applies.

In this context, it should also be noted that natural persons employed by the offeror or otherwise aware of the preparations for the bid cannot, in principle, acquire securities of the target company on their own behalf or on behalf of someone other than the offeror without engaging in insider dealing prohibited by the MAR or the abuse of insider information prohibited by the Criminal Code.

(b) Discussions with Shareholders of the Target Company

During the preparation of the bid, both the offeror and the target company may deem it necessary to approach major shareholders of the target company in order to gauge their opinion of the bid. The offeror may seek to obtain irrevocable commitments from shareholders of the target company to accept the takeover bid or acquire shares through private transactions, or even approach major shareholders with the purpose of acquiring a number of shares exceeding the mandatory bid threshold. The target company, on the other hand, may be justified in investigating the position of its major shareholders before proceeding with the takeover bid.

In connection with possible shareholder discussions, the provisions of the MAR on the unlawful disclosure of inside information and market soundings must be taken into account.

Disclosure of inside information to the company's major shareholders may, subject to Articles 10 and 11 of the MAR, also be considered permissible in connection with a takeover bid being prepared. However, the MAR specifies how inside information should be managed in such situations.

As such, the ban on disclosure of inside information does not, in principle, restrict the possibility for the offeror or the board of directors of the target company to discuss the proposed bid with major shareholders, provided that such discussion is justified and that the management of inside information and confidentiality are properly ensured. Disclosure of inside information as part of the normal exercise of an employment, profession, or duties is permitted, but it is part of good securities market practice to request the consent of the recipient to become an insider before disclosing the inside information. Even if the initial contacts made for the purpose of gauging interest are not yet considered inside information, caution should be observed in disclosing information about such contacts and trading in the securities of the target company and, if the offeror is a listed company, also in the securities of the offeror. For example, knowledge of the readiness of the target company's major shareholders to sell may impact the assessment of the nature of the information.

Article 11(2) of the MAR permits the offeror to approach major shareholders of the target company by means of market sounding to gauge the opinion of the shareholders on the takeover bid or merger (such as to obtain irrevocable commitments to accept the takeover bid or vote in favour of the merger) if the conditions of the paragraph are met. In practice, however, the article limits the right to approach to only those shareholders whose favourable stance can reasonably be considered necessary to launch the takeover bid or make a decision on the merger.

Article 11 of the MAR restricts the use of market sounding to situations referred to in the Article. In other general soundings or ownership issues related to the industry or company, the general principles on the disclosure of inside information apply. Based on the MAR, it is open to interpretation whether the provisions on market sounding apply in different circumstances, for example, in the acquisition of the target company's securities prior to the announcement of a takeover bid (stake-building), the acquisition of a share of the voting rights exceeding the mandatory bid threshold, or the formation of a takeover bid consortium. However, non-compliance with the provisions on market sounding does not, in itself, establish a presumption of unlawful disclosure of inside information (35th preamble to the MAR). Instead, the disclosure of inside information is assessed based on whether it has taken place in the normal course of the performance of employment, profession, or duties. In any event, it is part of good securities market practice to request the consent of the recipient to become an insider before disclosing the inside information.

Article 11(2) of the MAR does not apply to the target company when it approaches its own shareholders, nor does the market sounding procedure, as a rule, apply to communications by the target company with its shareholders. However, the target company has a duty to ensure the confidentiality of the information and, in the case of inside information, must, if necessary, be able to prove afterwards to whom and when inside information has been disclosed. Because shareholders who have been informed of a proposed takeover bid in the course of potential discussions tend to become insiders, the timing of shareholder discussions should be carefully considered.

(c) Insider Nature of the Takeover Bid Project from the Target Company's Perspective

The board of directors, its individual members or the managing director may continuously receive various contacts and proposals for the purchase of the company's share capital or other structural arrangements. Such contacts or proposals, which are preliminary in nature, are usually not to be regarded as inside information. As a rule, only contacts of a serious nature may constitute inside information. For example, knowledge of the readiness of the target company's major shareholders to sell may impact the assessment of the nature of the information regarding the initial proposal. Discussions on a bid proceed in stages, and the assessment of the stage at which information about preparations for a potential bid constitutes inside information must be carried out separately in each individual case.

If the target company is approached with the intention of launching a takeover bid, the target company must assess whether this constitutes an insider project (at this stage of the bid). A contact intended for the target company is deemed to have come to the attention of the target company when it has come to the attention of even one member of the board of directors or the managing director. With respect to contacting a shareholder or the representative of a shareholder, see the explanatory notes to **RECOMMENDATION 2**. Nasdaq Helsinki's guidelines for insiders of listed companies include criteria that can be used to help assess whether a particular arrangement should be classified as an insider project.

» *See the Nasdaq Helsinki guidelines for insiders, section 1.3.3.*

In the event of a takeover bid, preparations for the bid should usually be defined as an insider project if the target company has received a proposal that the board of directors considers to be of a serious nature. As such, when assessing whether a proposal constitutes inside information, the same criteria can often be used as when assessing the board's obligation to take action in the matter, in particular the concreteness and credibility of the bid, the amount of consideration offered, and the bid's chances of success. Information about a contact concerning a bid may constitute inside information for persons who are aware of the contact, even before the target company has had time to make a decision on the establishment of a project-specific insider list.

As a rule, the board of directors should define the matter as an insider project in at least the following situations:

- the board deems the contact regarding a bid to be serious enough that it considers it appropriate to take action in the matter (even if it has not yet responded favourably to the offeror's contact);

- the board of directors of the target company has agreed to initiate negotiations on the bid with the offeror;

- the board of directors of the target company has otherwise decided to take concrete preparatory measures in the matter; or

- the board of directors of the target company, regardless of any contact regarding the bid, has decided to take concrete measures with a view to triggering a takeover bid for the company's securities.

In the event of a takeover bid, it is usually appropriate to agree that the party receiving inside information, in turn, maintains a list of persons to whom the relevant information is further disclosed (for example, within or outside the offeror's organisation, such as the counterparty's advisers, shareholders or financiers, or the authorities). Although **RECOMMENDATION 10** states that the offeror must maintain its own project list, it is also advisable for the target company to seek to ensure that this obligation is complied with (for the list of requirements of the counterparty's project list, see the explanatory notes to Recommendation 10). In addition, it is advisable for the target company to try to ensure that the counterparty understands that information about conversations between the parties may constitute inside information, and that the counterparty is aware of the restrictions and obligations concerning inside information, in particular the ban on unlawfully disclosing inside information and engaging in insider trading.

Under Article 18 of the MAR, the issuer and those acting on its behalf must each keep an insider list of persons who have access to inside information and who work for them under contract of employment, or who otherwise perform tasks through which they have access to inside information. The MAR does not require the issuer to include the counterparty on the insider list. In practice, however, the confidential management of inside information requires that the counterparty's representatives and third parties to whom inside information has been disclosed are also entered either on the insider list or on a separate list. Maintaining a separate list allows the target company not to indicate to the offeror at what stage the target company considers the bid to be of such a serious nature that the information constitutes inside information.

The board of directors of the target company must also ensure that the project-specific insider list is terminated without delay after the project concerning the bid has ended (upon publication of the bid or the lapse of the project). The assessment of the end date of the project must be made separately in each individual case, and it is also possible that some of the information about the project will be disclosed to the markets but that the project continues as an insider project in other respects.

In general, a project can be considered to have lapsed if:

- the parties have jointly decided to end discussions on this matter;

- the competent representative of the offeror (usually the chair of the board or the managing director or any other person with authorisation, such as an adviser) has indicated that the offeror no longer intends to continue the preparations for the bid; or

- the board of directors of the target company decides to end the discussions concerning the bid and informs the offeror of its decision.

Before the board of directors of the target company decides on the lapse of the project, it must assess whether, on the basis of the information available to the board, reasonable grounds exist to assume that the offeror would return to the matter in the near future or that the offeror would otherwise continue to prepare the matter.

» *On the termination of a project-specific insider list, see section 1.5.4 of Nasdaq Helsinki guidelines for insiders.*

(d) Inside information disclosed in connection with a due diligence review

In addition to the fact that information about a takeover bid project concerning the target company is likely to constitute inside information, other projects may also be pending in the target company during the takeover bid project that, in themselves, constitute inside information. In addition, information on the contents of future financial reports of the target company is of such a nature that it is considered necessary in legislation and in the insider guidelines of Nasdaq Helsinki to restrict the trading of the target company's securities by those involved in the preparation of such reports. However, the target company is not obligated to treat the preparation of the financial report as an insider project. In connection with the negotiations for a takeover bid, confidential information concerning the company's future financial report, as well as information on ongoing insider projects in the company, may be disclosed to the offeror and its advisers for a justified reason.

The target company must ensure the appropriate management of inside information during the due diligence process, particularly if the due diligence review is carried out at a time when, in addition to the takeover bid process, the target company has some other pending insider project or other inside information related to the company. In this context, it should be noted that not all undisclosed information held by the target company necessarily constitutes inside information. When disclosing confidential information relating to a future financial report, attention should be given to ensuring that the course of action taken supports investors' confidence in the smooth functioning of the market, for example by restricting the ability of recipients of confidential information to trade in the securities of the company that the information concerns.

In a takeover bid, conducting a due diligence review usually forms part of the negotiations between the offeror and the target company. If a due diligence review is a prerequisite for a fair offer to be presented to the shareholders, it is, in principle, also in the interest of the shareholders to allow such a review. As such, the prohibition to disclose inside information is not generally considered to prevent the target company from providing inside information to the offeror in connection with a due diligence review. However, the target company must inform the offeror of the insider nature of the information and the related legal obligations, and must ensure the confidentiality of the information and the appropriate maintenance of insider lists or a comparable list to ensure that the information remains confidential.

» *For more on insider issues and lists, see Article 18 of the MAR, Commission Implementing Regulation (EU) 2016/347 and Nasdaq Helsinki guidelines for insiders.*

If, in the course of the due diligence review, the offeror or its advisers receive inside information, the offeror cannot, in principle, trade in the target company's securities until the information in question has been made public. From the perspective of launching a takeover bid, Article 9 of the MAR can be interpreted as requiring that such inside information has been disclosed or ceased to be inside information at the latest by the beginning of the offer period or, in the case of a merger, by the general meeting of shareholders deciding on the merger of the target company. If the target company has inside information that cannot be disclosed within the timeframe desired by the offeror (such as ongoing merger negotiations, the disclosure of which would jeopardise the completion of the transaction), insider issues related to the matter and the possibility to provide such information to the offeror should be considered on a case-by-case basis. Although inside information about the target company is, of course, usually essential information from the offeror's point of view, it is often the case that the offeror does not want to receive such information without prior consent, as this may prevent the bid from being launched without cooperation by the target company. Correspondingly, the target company should not make a conscious effort to prevent a takeover bid from being launched by disclosing inside information to the offeror. Similarly, particularly in situations in which listed securities of the offeror are offered as consideration, inside information concerning the offeror may be disclosed to the target company in the course of the due diligence review of the offeror. It is advisable to agree on the principles applicable to the situation even before the due diligence review is begun and the reviewer receives potential inside information.

If, during the due diligence review, the offeror has received inside information about the target company that can be disclosed within the timeframe desired by the offeror, such inside information must be disclosed at the latest before the start of the offer period of the bid or the end of the registration period of the target company's general meeting deciding on the merger, unless the information has lapsed or must be disclosed earlier under the continuing disclosure obligation of the target company. If such inside information is disclosed, it must typically also be included in the offer document drawn up by the offeror or in a supplement to the offer document.

(e) Insider Issues in the Event of a Competing Bid

Depending on the degree of preparation of the bid, information about a potential competing bid may constitute inside information before the publication of the competing bid. Both the offeror and the board of directors of the target company are obligated to manage inside information and ensure that it remains confidential, as required by the takeover bid process. If the target company has contractually agreed to inform the first offeror of any competing bids, the prohibition on disclosing inside information does not prevent the target company from providing the agreed information on a competing bid to the first offeror, provided that the information remains confidential. If, prior to the announcement of a competing bid, the first offeror receives information about a potential future competing bid, the offeror becomes an insider. However, information about a future competing bid does not prevent the first offeror from executing what has already been announced in accordance with the terms of the bid. In such a case, when the terms of the bid have been drawn up and disclosed even before the first offeror received inside information (in other words, information about a future competing bid), such information does not limit the offeror's right to execute the takeover bid in accordance with its terms (Article 9(3) MAR) (see also section (f) Inside Information Concerning the Target Company During the Offer Period below). However, information about a competing bid prevents the acquisition of the target company's securities outside the takeover bid, unless an exception to the ban on the use of inside information applies.

(f) Inside Information Concerning the Target Company During the Offer Period

During a takeover bid, situations may arise in which the offeror receives inside information concerning the shares of the target company (as described above, in connection with a competing bid, for example). For example, the fulfilment or non-fulfilment of a material condition for the completion of a bid may constitute inside information, and the offeror must carefully assess the possible insider nature of such information. If the information is also disclosed to the target company, the same applies to the target company. In such cases, the target company must assess the need to disclose the information and the existence of possible grounds to delay disclosure.

As a rule, such information prevents the offeror from acquiring the target company's financial instruments outside the takeover bid before the inside information in question has been disclosed or has lapsed, unless an exception to the ban of the use of inside information applies. However, inside information received after the disclosure of the bid does not prevent the execution of the bid in accordance with the announced terms and conditions, including waiving the requirement to fulfil a material condition for the execution, if the offeror has reserved this right in the terms and conditions of the bid. Furthermore, such inside information does not prevent the offeror from improving the terms of the bid.

In order to ensure that the offeror's potential acquisitions of shares outside the bid are not interrupted due to inside information that has arisen during the offer period, the offeror may consider the use of a procurement programme. However, such a procurement programme cannot be interrupted or altered if the offeror receives inside information during the course of the programme.

» *See Article 8 of the MAR and the Financial Supervisory Authority's 10 trading guidelines for insiders.*

(g) Notes on the closed period

Managers of the target company referred to in the MAR often own shares in the target company and may be asked to give an irrevocable commitment to accept a takeover bid before the bid is disclosed. If the manager has not committed in advance to accept the takeover bid, they must decide during the offer period whether or not to offer the securities of the target company that they own to the offeror. Article 19(11) of the MAR restricts the right of managers to enter into transactions in the issuer's financial instruments during the closed period. It follows from Article 19 of the MAR that a manager cannot, in principle, give an irrevocable commitment to accept a takeover bid during a closed period. Furthermore, a manager should not accept a takeover bid during the closed period, but if the terms of the offer imply that the manager does not have the opportunity to accept the bid outside the closed period, it is, as an exception, possible to accept the bid during the closed period. In such a situation, the takeover bid can be considered exceptional circumstances within the meaning of Article 19(12)(a) of the MAR and Article 8 of Commission Delegated Regulation (EU) 2016/522.[6] Transactions during the closed period are subject to authorisation by the issuer (Article 19(12) of the MAR and Article 7 of the Commission Delegated Regulation). Article 7 and Articles 8(1) and (2) of the Commission Delegated Regulation apply to requests for and authorisations of such transactions. Furthermore, the withdrawal of acceptance of a previous takeover bid should, where possible, be made outside the closed period. The withdrawal of acceptance during a closed period can only take place under exceptional circumstances and requires a change of circumstances and authorisation by the issuer on the basis of the above provisions of the MAR and the Delegated Regulation.

6 According to Article 8(2) of the Commission Delegated Regulation, the circumstances are considered exceptional if they are extremely urgent, unforeseen, and compelling, and where their cause is external to the person discharging managerial responsibilities, and the person has no control over them.

SECURITIES MARKET ASSOCIATION
info@cgfinland.fi
www.cgfinland.fi