Implementation of the Takeover Directive

in Finland

D&I Focus

June 2006

- Pricing of bids liberalised
- Increased possibilities for all share bids
- Lower thresholds for mandatory bids
- Explicit rules for competing bids introduced
- Increased importance of board's opinion
- Takeover Panel established

Flexibility and Enhanced Investor Protection

The Finnish Government presented on 9 February 2006 its proposal for the implementation of the Takeover Directive (Bill HE 6/2006). The bill received parliamentary approval on 8 June 2006 and enters into force on 1 July. In connection with the implementation, also other amendments to the existing regulations are made. The amendments are primarily incorporated into the Finnish Securities Market Act (the "Act").

Apart from the implementation of the Directive, the main purposes of the amendments are increased flexibility and enhanced investor protection.

The implementation increases the use of self regulation, which relates to, for example, the voluntary provisions found in Articles 9 and 11 of the Directive.

Thresholds for Mandatory Bids

Crucial amendments to the Act relate to the revised thresholds for mandatory bids and the removal of the obligation to launch a mandatory bid if the thresholds are exceeded in a voluntary bid concerning all securities of the target company.

The current threshold for a mandatory bid is two-thirds of the voting rights of the target company, which is considered to be exceptionally high in comparison with other EU countries. The new Act establishes a dual threshold of 30% and 50% of the voting rights in the target company.

Consideration in Voluntary Bids

Finland has not used the possibility set forth in the Directive according to which a member state may provide that a cash consideration is always offered as an alternative in a voluntary bid.

Hence, a bidder is not obliged to include cash as an alternative if the consideration offered consists of liquid securities admitted to trading on a regulated market within the EEA and the bidder, or an entity acting in concert with it, has not purchased securities carrying 5% or more of the voting rights in the target company for cash over a period of six months.

Pricing of Bids

Under the existing rules, the price in a mandatory bid is the fair price, defined as the historic 12 months' weighted average price or a possible higher price paid by the bidder, or an entity acting in concert with it, during the same period of time. The existing rules have been widely criticised, especially since they lead to high prices if stock prices have been in decline for a longer period.

Pricing of bids liberalised

Under the new Act, the fair price will be the highest price paid by the bidder, or an entity acting in concert with it, during the period of six months before the obligation to make a mandatory bid arose. Should a bidder not have acquired any securities during the six months preceding the bid, the fair price will be the historic three months weighted average price for the securities. The price may be adjusted on the basis of weighty reasons.

Voluntary all share bids allowed

The six months' rule would also apply to voluntary bids. However, if the bidder has not purchased any securities in the previous six months, the pricing in the voluntary bid would, as a rule, be at the bidder's discretion.

As a consequence of the new rules in the Act, it will be possible to make a voluntary bid for all the shares in the company with only shares as consideration, without any requirement for a minimum price and without the obligation to make a mandatory bid.

A top-up obligation would apply in cases where the bidder acquires target securities for a higher price than the initial offer price:

a) after the announcement of a voluntary offer and before the expiry of the offer period; or
b) after triggering the obligation to launch a mandatory offer and before the expiry of the offer period; or
c) during a period of nine months following the expiry of the offer period.

Competing Bids

Rules on competing bids and the effect such bids have on a pending original bid are proposed to be introduced in connection with the implementation of the Takeover Directive. Such explicit rules do not exist under the current regime.

It is proposed that a competing bid entitles the original bidder to react to it by amending the original bid. The original bidder is entitled to withdraw from the bid, extend the offer period for the original bid to equal the competing bid and adjust the terms of the bid.

In order to balance the increased possibilities of the original bidder, the new Act entitles a shareholder who has already accepted the original bid to revoke the acceptance in the case where a competing bid is launched. Should a competing bid be launched close to the end of the offer period of the original bid, the Finnish Financial Supervision Authority may order the original bidder to extend its offer period.

Opinion of the Board

Currently, the obligations of the board of a target company are regulated by general provisions included in the Companies Act relating to the duties of a board. In line with the Takeover Directive, the new Act includes an explicit obligation for the board to render its opinion on the offer.

Board to render its opinion on each offer

The opinion shall include an assessment of the bid for the security holders of the target as well as the effects of the implementation of the bid on the target's business and on its employees.

Prohibition on Defensive Actions

Article 9 of the Takeover Directive regulates the possibilities of the management of a target company to take defensive actions to frustrate a bid. The implementation of the article is at the discretion of each member state.

Under Finnish company law, the board of the target company has a general obligation to act in the interests of the target company, with particular regard to the interests of the shareholders. The preparatory works consider that the implementation of Article 9 regarding defensive actions does not require amendments to the Securities Market Act as such prohibition may be derived from the general principles of Finnish company law.

Breakthrough

Article 11 of the Takeover Directive sets forth rules on contractual arrangements adopted to control the target company. Pursuant to the article, any transfer or voting restrictions concerning securities of the target company shall not apply during the bid. The article also provides for the so-called breakthrough rule, according to which no transfer or voting restrictions or extraordinary rights concerning the appointment or removal of board members shall apply where the bidder, following the bid, holds more than 75% of the target's capital carrying voting rights. Moreover, multiple-vote securities shall carry only one vote at the first general meeting called after the bid to amend the articles of association or to remove or appoint board members.

Finland has opted out of Article 11 – no breakthrough

Finland has resolved to exercise the option conferred by the Takeover Directive not to require Finnish companies to comply with Article 11. It is, however, proposed that the rules may be voluntarily adopted by listed companies in their articles of association.

Takeover Panel

It is proposed that the need for more detailed rules implementing Articles 9 and 11 would be determined through self regulation. For that purpose, a new "Takeover Panel", which is to be operated in connection with the Finnish Central Chamber of Commerce, is proposed. The "Takeover Panel" would be vested with powers to issue recommendations of a general nature as well as, upon application, recommendations on a case-by-case basis on issues that may arise under Articles 9, 11 and 12(3).

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