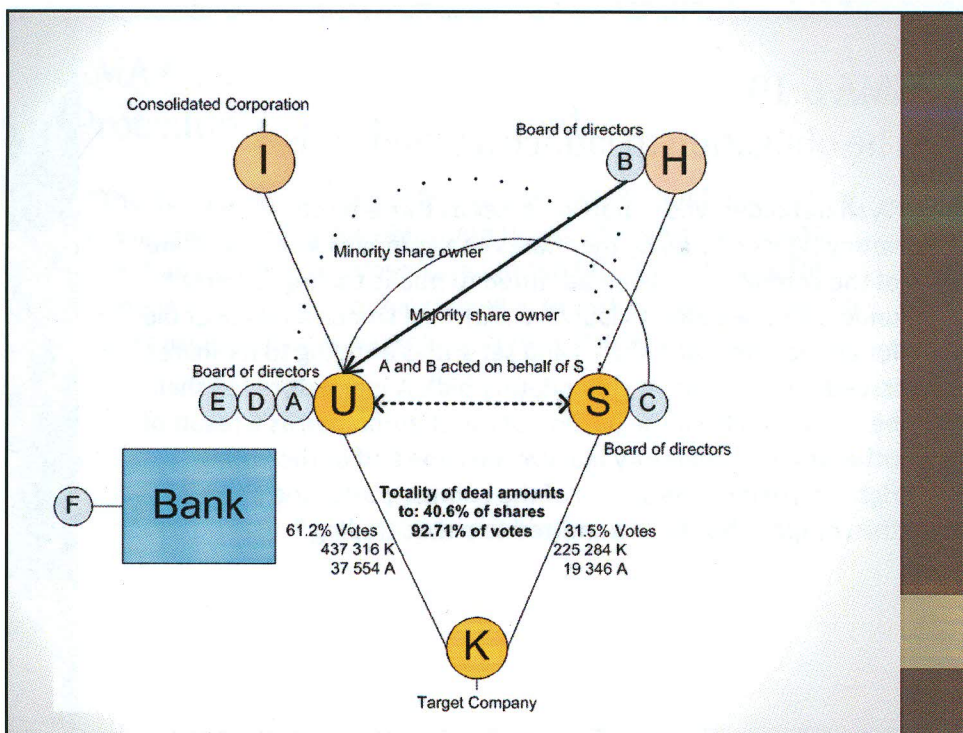


# Case 5

Public Bid, Damages Liability  
Anni Nikunlassi, Victor Morales



## Applicable provisions

- Applicable provisions in this case are
  - 6:10 of SMA "Obligation to launch a takeover bid"
  - 6:14 of SMA "Procedure in a mandatory bid"
  - 6:6 of SMA "Opinion of the offeree company of the take over bid"
  - 9:2 of SMA "Damages"
  - 1:8 of CA "Duty of the management"
  - 22:1 of CA "Liability of the manager"

### SMA 6:10

#### The obligation to launch a takeover bid

"A shareholder whose portion exceeds three-tenths of the voting rights carried by the shares of a company after the share of the company has been admitted to public trading (a party under the obligation to launch a bid) shall launch a takeover bid for all the remaining shares and securities entitling to its shares issued by the company (mandatory bid). A mandatory bid shall be launched also if the portion of the shareholder, as a result of other than a mandatory bid, exceeds one half of the voting rights carried by the shares of the company after the share of the company has been admitted to public trading."



## SMA 6:10

### The obligation to launch a takeover bid

The portion of voting rights of the shareholder referred to in subsection 1 shall include:

1) the shares held by the shareholder and by organisations and foundations controlled by him as

well as shares held by their pension foundations and pension funds;

2) the shares held by the shareholder or other organisation or foundation referred to in subsection 1 together with another; as well as

3) The shares held by other natural persons, organisations and foundations that act in concert with the shareholder to exercise control in the company.

## SMA 6:14

### Procedure in a mandatory bid

“The party under the obligation to bid shall, without delay, make public the arising of the obligation to bid. The information shall simultaneously be communicated to the offeree company, the party in charge of the public trading in question and the Financial Supervision Authority as well as, in the offeree company”

## SMA 6:6

### Opinion of the offeree company of the takeover bid

“The Board of Directors of the offeree company shall make its opinion of the bid public and communicate it to the offeror and the Financial Supervision Authority. The opinion shall be made public and communicated as soon as possible after the offer document has been communicated to the offeree company in accordance with section 4, however, at the latest five banking days prior to the earliest possible close of the time allowed for the acceptance of the bid.”

## SMA 9:2 Damages

- “Anyone who causes damage through procedure that is against this Act or against provisions issued thereunder shall be liable to compensate the damage he has caused. “



## Duty of redemption

- In this case the threshold of 3/10s was surpassed by both Ultd and Sltd, therefore they had the obligation to inform FSA, Helsinki Stock Exchange and K of their duty of a mandatory bid. According to SMA 6:10 and 6:14
- If Ultd and Sltd would have informed Kltd of their duty then Kltd would have had a duty to make its opinion about the takeover bid public according to SMA 6:6

## CA 1:8 *Duty of the management*

- The management of the company shall act with due care and promote the interests of the company.

## CA 22:1

- (1) A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall be liable in damages for the loss that he or she, in violation of the duty of care referred to in chapter 1, section 8, has in office deliberately or negligently caused to the company.
- (2) A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall likewise be liable in damages for the loss that he or she, in violation of other provisions of this Act or the Articles of Association, has in office deliberately or negligently caused to the company, a shareholder or a third party.
- (3) If the loss has been caused by a violation of this Act other than a violation merely of the principles referred to in chapter 1, or if the loss has been caused by a breach of the provisions of the Articles of Association, it shall be deemed to have been caused negligently, in so far as the person liable does not prove that he or she has acted with due care. The same provision applies to loss that has been caused by an act to the benefit of a related party, as referred to in chapter 8, section 6(2).

## Liability of damages

- Management can be liable only when it acted in breach of CA or articles of association, according to CA 22:1
- General rule is that management is not liable it has been argued that SMA 9:2 could provide base for personal liability of the management.



## Liability of damages cont.

- Parties charged with the redemption and publishing duties: I Ltd, U Ltd, A, D and E.
  - SMA 6:10 is only applicable to shareholders. Shareholders in case are U Ltd and S Ltd. U Ltd is liable for damages.
  - A acted on behalf of S and is a member of board of directors of U Ltd.
    - As management is not liable unless there is a breach of CA or articles of association. In this case there has not been a breach of CA.
    - On the other hand, SMA 9:2 could make A personally liable even though the general rule is that management is not liable.
    - For D and E to be liable, it would have to be proven that they knew about the bid because they were not personally in the buying procedure.
    - E, having an investment company, must have known about the obligation to bid.

## Liability of damages cont.

- The claims were directed also against B who had acted on behalf of S Ltd under formation and who was the founder, shareholder and the only member of the board of directors of H Ltd, as well as against the bank financing the purchase and F, the MD of the bank, representing it in the transaction.
  - B can be liable according to SMA 9:2 because he knew about the obligation to bid because he acted on behalf of S and as a major shareholder of U he might not have known about U Ltd's duty. He has voting right and therefore he can affect the decision of the purchase.
  - F is not liable under SMA or CA.

## Calculation of damages

- If the stock price of K shares goes down, the minority shareholders of K can claim that the losses are the difference between the market value of the stock at the time of the bid and the market value of the stock after the takeover.
- Calculation of the loss 59,4% multiplied by the share price at the time of the calculation minus 59,4% multiplied by the shareprice at the time of the bid. The calculation day is the day of the ruling.
- The risk and the prospect of profit should remain with the offeror. Because of this, the damages are restricted to the possible difference between the offered price and the market value of the stock at the time when the offer should have been made.
- Rise of the stock price?