

# Q1

## D&I Quarterly 2008

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## MERGERS &amp; ACQUISITIONS

## > FIRST STATEMENT BY THE TAKEOVER PANEL REGARDING A SPECIFIC CASE

by Anders Carlberg and Johanna Ijäs

### ***First statement of the Takeover Panel concerned the principle of equal treatment of shareholders***

### ***Arrangement between Kasola and John Nurminen***

The Finnish Takeover Panel issues recommendations and opinions to promote compliance with good securities market practice as well as case specific statements upon application.

The Takeover Panel was established in September 2006. On 4 December 2007 the Takeover Panel rendered its first case specific statement on whether the actions relating to a mandatory public tender offer made on Kasola Plc's ("Kasola") shares by John Nurminen Ltd ("JN") and the majority owners of Kasola ("the Majority Owners") have been in compliance with the requirement of equal treatment of shareholders under the Finnish Companies Act. The statement was rendered upon request of the Financial Supervision Authority ("FSA") and not any of the parties involved.

The arrangement involved a reverse IPO whereby

- the business of JN was transferred to Kasola;
- the business of Kasola was transferred to the Majority Owners; and
- the Kasola A shares of the Majority Owners were transferred to JN for a price of EUR 5 per share.

In connection with the arrangement, the Kasola K-class shares (*i.e.* voting shares) were converted into A-class shares. As a compensation for the loss of voting rights four new A-class shares were issued for each five K-class shares. As a consequence of the transaction JN owned 80% and the Majority Owners 10% of the shares in Kasola.

The arrangement further included an obligation for JN to offer to buy from all remaining Kasola shareholders 60% of their Kasola shares at EUR 6.80 on three dates, the last date being 30 June 2010 in a tender offer.

According to the Finnish Companies Act a body of a company may not take decisions conferring an undue benefit to a shareholder at the expense of the company or another shareholder. In practice, the main purpose of the principle of equal treatment is to protect the minority shareholders.

***Compliance with the requirement of equal treatment must be resolved by assessing***

According to the statement, when determining whether there has been a breach of the principle of equal treatment, special attention has to be given to the conversion premium for the holders of the K-shares as well as the consideration paid for the transfer of the businesses of Kasola and JN.

Pursuant to the statement of the Takeover Panel, the conversion compensation was considered to be in compliance with the principle of equal treatment when assessing the arrangement as a whole and in particular when taking into account:

- earlier price development of Kasola shares (last three months' trading volume weighted average price preceding the tender offer obligation was EUR 3.63 per share);
- the price offered in the tender offer;
- the possibility for the shareholders to remain shareholders also in the new listed Nurminen Logistics with the same conditions as the Majority Owners; and
- expectations relating to future price development and liquidity of the Kasola's shares.

The Takeover Panel had no possibilities to evaluate the consideration paid in connection with the transfer of the businesses of Kasola and JN as it would require evaluation of the fair market value of the businesses.

## DISPUTE RESOLUTION

## > COURT OF APPEAL CONVICTS JOUHKI OF INSIDER TRADING

by Eeva Pohja

On 31 December 2007, the Court of Appeal of Helsinki gave its decision in a case followed closely by the media on the subject of abuse of inside information. The District Court of Helsinki had sentenced Mr. Timo Jouhki and the defendant companies Thominvest Oy and Inter Masters Oy, in which Mr. Jouhki was a member of the board and which were controlled by him, to fines for abuse of inside information in 2006. Both the prosecutor and the defendants had appealed to the Court of Appeal. The prosecutor had claimed for more severe penalties and the defendants for dismissal of the charges.

### *Decision of Court of Appeal*

The judgment of the Court of Appeal was more severe than in the District Court: Mr. Jouhki was found guilty of aggravated abuse of inside information. The District Court had sentenced Mr. Jouhki to a fine of EUR 29,260 but the Court of Appeal imposed a conditional prison sentence of six months. The corporate fines for the companies Thominvest Oy (EUR 60,000) and Inter Masters Oy (EUR 6,000) were not increased.

### *Facts*

The course of events dates back to the spring of 2001. At that time, Mr. Jouhki was deputy chairman of the board of directors of Conventum Oyj ("Conventum"), a company which later that year merged with Pohjola Group Insurance Corporation ("Pohjola"). Between March and May 2001 Mr. Jouhki purchased over 200,000 shares in Conventum through his companies by which he made considerable profit, but denied having been aware of any merger negotiations between Conventum and Pohjola.

The prosecutor, however, took the view that as a member of the board of Conventum, Mr. Jouhki must have been aware of the sales plans of Conventum as well as of the preliminary negotiations. Furthermore, he must have comprehended that the information in question was inside information as it was not public and was likely to have a material effect on the value of the share.

Mr. Jouhki argued that as a member of the board he did not participate in any operative actions of the company and thus could not have been aware of any such plans. According to Mr. Jouhki, the merger plans with Pohjola were first discussed in August 2000 but rejected shortly after that.

In January 2001, Mr. Peter Fagernäs, chairman of the board of directors of Conventum, informed Mr. Jouhki over lunch that the merger of the two companies was not possible. According to Mr. Jouhki, he did not find out about the merger plans again until 9 May 2001.

The Court of Appeal found that the actual negotiations had been carried out between Mr. Eero Heliövaara of Pohjola and Mr. Fagernäs of Conventum. The testimonies of the witnesses were not consistent as to the length of the negotiations but the Court of Appeal considered that the negotiations had begun in January 2001 and continued until the agreement on merger of the companies in June 2001.

### **Definition of insider information**

At the relevant time, inside information was defined in the Penal Code to be information pertaining to a listed security or to a security that is subjected to other trading practices used by a community organised professionally in order to bring together buyers and sellers of securities, said information not having been made public or otherwise available to the market and that is conducive to essentially affecting the value or price of the said security.

The definition was slightly amended and moved to the Securities Market Act in 2005.

The Court of Appeal considered the information concerning the sales plans and the preliminary negotiations to be inside information in the meaning of the law at the time of the offence.

### **Insider position and knowledge of Mr. Jouhki**

According to the Court of Appeal, the fact that Mr. Jouhki was member of the board of directors of Conventum and owned 32.7% of the shares in Conventum through his companies, made him a permanent insider in relation to the company. This was supported further by the fact the he was chairman of the investment council of Conventum.

Mr. Jouhki claimed that he was unaware of any merger plans between January 2001 and May 2001. The Court of Appeal however disagreed referring, *inter alia*, to Mr. Jouhki's position in the company and his knowledge of the investment industry and role as a professional investor.

Considering moreover that Conventum was clearly unprofitable at the time and that Mr. Jouhki had earlier indicated his support to the merger with Pohjola, the Court of Appeal ruled out the possibility of Mr. Jouhki not having been aware of the merger plans.

### *Aggravated nature of abuse*

The Court of Appeal found Mr. Jouhki guilty of aggravated abuse of inside information on the following grounds: he had sought particularly great profit or considerable personal benefit with his trading, he had committed the offence by abusing his responsible position as a representative of the company, and the offence was aggravated also when assessed as a whole. The profit Mr. Jouhki made with his trading was EUR 140,078 in total.

Mr. Jouhki has applied for leave to appeal to the Supreme Court.

## CORPORATE &amp; COMMERCIAL

## > MARKET COURT CONFIRMS EXISTENCE OF ASPHALT CARTEL

by Juha-Pekka Mutanen

### *Significantly lower fines*

On 19 December 2007, the Market Court rendered its judgment in the asphalt cartel case and imposed fines on seven asphalt contractors for allocation of customers and markets, illegal exchange of information and bid rigging during 1996 – 2000 in respect of state projects and 1994 – 2001 in respect of municipal and private customers.

The Market Court broadly affirmed the views of the Finnish Competition Authority ("FCA") and found that the defendants had infringed both the Finnish Act on Competition Restrictions and Article 81 EC. However, the fines imposed by the Market Court were significantly lower than those proposed by the FCA. The Court imposed the highest fine of EUR 14 million on Lemminkäinen, regarded as the leader of the cartel, whereas the FCA had proposed a fine of EUR 68 million on Lemminkäinen. The other companies fined by the Market Court, *i.e.*, NCC Roads, Rudus Asfaltti, SA-Capital, Skanska Asfaltti, Super Asfaltti and Valtatie, received fines ranging from EUR 20,000 to EUR 2.5 million each. The Asphalt Association was found to have participated in illegal exchange of information in 1997 but was not ordered to pay a fine as such infringement was committed more than five years before the date of the FCA's proposal to the Market Court and had therefore become time-barred.

In addition to the finding of infringement, the Court ruled on important questions of law relating to (i) the privilege against self-incrimination; (ii) liability for fines in the case of corporate restructurings; and (iii) the relevant undertaking in determining the maximum fine of 10% of annual turnover.

### PRIVILEGE AGAINST SELF-INCRIMINATION

### *Restrictive approach to privilege against self-incrimination*

The Court rejected a request to allow two witnesses, called to testify in court proceedings, to refrain from answering questions which may involve an admission that their employer had participated in cartel activities. The Court considered that a right to remain silent did in this case not exist since the witnesses could not in their personal capacity be indicted on account of the matters to which they were asked to testify. The Court further observed that the witnesses' employer, the State Road Authority, was not a defendant in the current proceedings but instead the FCA had in its proposal stated that sufficient proof of the Road Authority's involvement in the cartel

had not been obtained. The ruling appears to indicate a restrictive approach to the possible right of defendant companies to invoke the principle against self-incrimination. However, since the relevant witnesses' employer was not a defendant in the proceedings, the ruling does not provide clear guidance on the issue.

#### CORPORATE RESTRUCTURINGS

##### ***Seller of assets usually remains liable***

Two of the defendants had carried out group-internal corporate restructurings as a result of which the legal entities which had engaged in the cartel activities had been liquidated and their assets transferred to their respective parent companies. The Market Court considered that, as main rule, in the case of a transfer of assets the seller of the assets remains liable for competition law infringements carried out before the transfer. However, according to the Court, a distinction must be made between such transfers of assets where the seller is a functioning legal entity and transfers where the transferor ceases to exist after the transfer. In the present case, the Court held that the recipient of the assets of a liquidated company was liable for the competition law infringements committed in the course of the conduct of the transferred business. According to the Court, imputation of liability was in this case justified considering, *inter alia*, that the legal person which had committed the infringements had ceased to exist as a result of a decision by a group company controlling such entity and that the restructuring measures had been commenced shortly after inspections carried out by the FCA.

##### ***Liquidation of subsidiary***

#### RELEVANT ENTITY

##### ***Subsidiary's turnover relevant***

Under the Act on Competition Restrictions, the fine may not exceed 10% of the relevant undertaking's annual turnover during the preceding year. In case law, the turnover has been interpreted to mean the turnover of the group in cases where the fine is proposed to be levied on the parent company. In the present case, the Market Court held that, where the fine has been proposed to be levied on a subsidiary, the maximum fine is calculated on the basis of the turnover of the subsidiary.

CORPORATE &amp; COMMERCIAL

## > DEADLINE FOR PRE-REGISTRATION OF CHEMICALS

by Hannele von Hertzen and Mikko Koivula

EU's new regulation for Registration, Evaluation, Authorisation and Restriction of Chemicals ("REACH") entered into force on 1 June 2007, and applies in principle to all chemicals.

### **Object of REACH**

The object of REACH is to improve protection of human health and environment as well as to maintain the competitiveness and enhancing the innovative capability of EU's chemical industry. Companies manufacturing and importing chemicals are obliged to evaluate the risks incurred by the use of substances and to provide guidance on the safe use of the substances. With REACH, the responsibility for the safety of the chemicals is transferred from the authorities to the industry.

### **European Chemicals Agency**

The European Chemicals Agency ("Agency") was created by virtue of REACH and began its operation on 1 June 2007 in Helsinki. The Agency will be fully operational as of 1 June 2008, and it has a central coordination and implementation role in the overall process.

The Agency's main tasks are to manage the registration process and carry out dossier evaluations. The Agency is also responsible for providing technical guidance and tools for the operation of REACH, especially to industry and Member States Competent Authorities. Furthermore, it supports the national helpdesk system that is to provide assistance to industry.

### **Registration obligation**

All companies manufacturing or importing substances into the EU in quantities of one tonne or more per year must register such substances at the Agency. Unregistered substances may not be imported, manufactured or marketed in the EU.

There are approximately 30,000 existing substances in use in the EU that are to be registered in order to comply with the requirements of REACH. Additionally, approximately 300 new substances are estimated to enter the European market every year.

### *Pre-registration of Substances during June – December 2008*

For registration the manufacturer or importer has to submit a dossier to the Agency containing among other things information on the intrinsic properties of the substance and a chemical safety report including details of risk management measures, which often requires time-consuming and costly studies.

All companies manufacturing or importing substances into the EU are allowed to pre-register the chemicals at the Agency between 1 June 2008 and 1 December 2008. With this pre-registration, companies can take advantage of a transition period before the ordinary registration. The deadline for ordinary registration of pre-registered substances varies between 1 December 2010 and 1 June 2018, depending on the amount and harmfulness of the substance.

Should a company choose not to pre-register the substance, it is obliged to register the substance immediately after the pre-registration period ends.

The pre-registration also enables manufacturers and importers of the same substance to cooperate with the responsibilities relating to the registration procedure in order to reduce the burden for individual companies.

### *National Helpdesk system*

The Competent Authorities concerning the implementation of REACH in Finland are the Finnish Environment Institute (SYKE) and National Product Control Agency for Welfare and Health (STTV). They have opened a joint national helpdesk system that provides the industry with assistance in questions regarding REACH, registration and pre-registration of substances.

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