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D&I EVENTS

MERGERS & ACQUISITIONS

> SUPREME COURT RULES ON DIVIDEND PAYMENTS IN A SQUEEZE-OUT PROCEDURE

by Anders Carlberg and Jonatan Hallvar

Dividend did not decrease squeeze-out price

The Supreme Court recently upheld a ruling by the Helsinki Court of Appeal that payment of a dividend to the remaining minority shareholders in the course of a squeeze-out procedure should not be considered a factor decreasing the squeeze-out price. The ruling (KKO 2009:19) dismisses an appeal brought by Phoenix International Beteiligungs GmbH ("Phoenix") against minority shareholders of Tamro Oyj ("Tamro").

Following block deals and a public offer, Phoenix reached an ownership of more than 90 per cent of the shares in Tamro in December 2003. Subsequently, Phoenix commenced a squeeze-out procedure to redeem the shares of the remaining minority shareholders. Under the Finnish Companies Act, a holding exceeding 90 per cent of the shares and votes of a company entitles the holder to redeem the rest of the shares in the company.

Dividend payment during procedure

The squeeze-out is effected through particular statutory arbitration proceedings in which the arbitral tribunal sets the price for the minority shareholders' shares. In the case at hand, the offered squeeze-out consideration was EUR 4.51 per share, which corresponded to the fair market value of the shares. The fair market value was not as such in dispute. However, in April 2004, during the squeeze-out proceedings, Tamro distributed a dividend amounting to EUR 0.30 per share for the year 2003.

The central question in the case was whether the dividend paid by Tamro should be taken into account when determining the compensation to which the minority shareholders would be entitled. Taking the dividend into account would reduce the squeeze-out price to EUR 4.21 per share.

Initially, the arbitral tribunal, and the Helsinki District Court on first level of appeal, held that the payment of a dividend constituted a factor to be taken into account in assessing the value of the minority shareholders' shares. The Court of Appeal however held on second level of appeal that the dividend should not be taken into account.

Phoenix argued that to disregard the dividend would be against the equal treatment of shareholders

On the final level of appeal in the Supreme Court, Phoenix contended that the payment of dividend could not be disregarded since such an assessment would conflict with the principle of equal treatment of shareholders. Phoenix argued that it would be wrong if the squeeze-out price to be paid would not be decreased as a result of the payment of the dividend because those shareholders who accepted the public offer would be worse off.

In rejecting Phoenix' appeal, the majority of the Supreme Court stated, *inter alia*, that Phoenix had not in its squeeze-out demand made any reservations with respect to the payment of a dividend. Therefore, the Supreme Court held that the minority shareholders had reason to believe that they would actually receive the fair market value presented in the squeeze-out demand net of any deductions. According to the Court, it may be possible to depart from this principle only if special grounds exist. The majority of the judges deemed that Phoenix had not presented any such grounds.

Circumstances relevant for the price were not comparable with the previous share purchases

In considering whether the principle of equal treatment of shareholders could be applied, the majority of the judges found that the circumstances relevant for the determination of the squeeze-out price were not comparable with the previous share purchases. Thus, the majority of the judges concluded that there was no reason to decrease the squeeze-out price on the basis of the said principle.

The dissenting minority of the Supreme Court did accept the conclusion but not the reasoning of the majority. The dissenting minority took a slightly different approach stating, *inter alia*, that Phoenix had used its controlling power in Tamro in a situation where the provisions on minority dividend would not have entitled the minority to receive a dividend. Accordingly under these circumstances the payment of a dividend and Phoenix' demand that such a dividend payment should be reflected in the squeeze-out price could be seen as an attempt to finance the acquisition with Tamro's funds (the squeeze-out price was to be paid by Phoenix whereas the dividend was paid by Tamro). In sum, the squeeze-out price should, according to the minority, as a general rule not reflect an action taken by Phoenix.



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MERGERS & ACQUISITIONS

> STATEMENTS BY THE TAKEOVER PANEL ON DISPOSAL OF TARGET SHARES AND CASH MERGERS

by Anders Carlberg and Wilhelm Eklund

Background

Based on the report published in September 2008 concerning the need to amend the Takeover Code recommendations, the Finnish Takeover Panel published in February 2009 draft statements concerning the interpretation of the recommendations on mergers and sale of securities that are subject to a tender offer. Subsequent to specific stakeholder consultation on the draft statements the Takeover Panel has issued final recommendations in May 2009.

Disposal of target shares

In its final recommendations, the Takeover Panel interprets the recommendation concerning the obligation of the offeror to insofar possible seek to ensure that the conditions set for the completion of the offer are satisfied, as prohibiting the offeror from selling securities that are subject to the offer, unless special reasons for such transactions exist. In addition, the Takeover Panel interprets the recommendation as meaning that the offeror may not execute such transactions without prior disclosure to the market and recommends that the Takeover Panel be consulted in advance.

Cash Mergers

In its final recommendations, the Takeover Panel notes that the offeror may consider and include in the offer document a merger as an alternative, should the offeror fail to acquire 9/10 of the shares and votes in the target company through the offer, *i.e.*, fail to achieve sufficient ownership in order to initiate a squeeze-out. As a starting point, the shareholders of the target (merging) company should be allowed to remain shareholders of the acquiring company in such merger, consequently limiting the possibility of cash mergers. Offering other merger consideration than shares in the acquiring company would require a special reason, and the Takeover Panel should be consulted in advance.



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FINANCE & CAPITAL MARKETS

> DISCIPLINARY COMMITTEE OF NASDAQ OMX HELSINKI OY FINES NORDEA BANK

by Juha-Pekka Mutanen and Eeva Pohja

Requirement of genuine trade

The Disciplinary Committee of NASDAQ OMX Helsinki Oy has issued a disciplinary fine of EUR 25,000 to Nordea Bank Finland Plc and a warning to one of its traders for breaching the trading rules of NASDAQ OMX Helsinki Oy. The Disciplinary Committee investigated whether a contract transaction reported by Nordea's trader was a genuine trade and could be reported as a contract transaction under the Exchange Trading Rules. Nordea's client acted both as the buyer and the seller in the trade in which the own shares of a listed company were traded.

According to the Exchange Trading Rules, contract transactions have to correspond to the fair market value of the instrument in question. Furthermore, contract transactions have to be genuine orders and trades as well as have an acceptable commercial purpose.

The Disciplinary Committee considered that when executing the trade worth EUR 2.8 million the trader was aware that the sole purpose of the trade was to realize losses. Furthermore, the Disciplinary Committee stated that the trader was undoubtedly aware that the buyer and the seller were the same client. Transfer of ownership of the shares was never intended to take place and there was not even a theoretical market risk or possibility that the trade parties would be different legal persons.

The Disciplinary Committee considered that the contract transaction reported by Nordea was not a genuine trade with an acceptable commercial purpose. Furthermore, the Exchange Trading Rules specifically prohibit the execution of trades where the same legal person acts as the buyer and the seller. Nordea's trader had clearly acted against the wording of the Exchange Trading Rules.

The Disciplinary Committee noted that the value of the trade was relatively large and the Exchange Trading Rules were breached by both the member of the stock exchange (Nordea) and the trader. Consequently, the offence was considered serious, even though there did not appear to be any intention to affect the price formation of the share on the day of the trade.

Sanctions imposed

Since the members of the stock exchange are responsible for the actions of their traders and for the breach of rules, Nordea was imposed a disciplinary fine of EUR 25,000. In addition, the Disciplinary Committee gave the trader a warning.



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FINANCE & CAPITAL MARKETS

> COURT OF APPEAL RELEASES NORDEA BANK FROM LIABILITY FOR INVESTMENT ADVICE

by Juha-Pekka Mutanen

In its recent judgment of 18 June 2009, the Helsinki Court of Appeal has overturned the earlier Helsinki District Court's ruling and released Nordea Bank Finland from liability for alleged failure to properly inform two private customers of the risks attached to investments in Nordea Bank's Selecta life insurance product.

The private individuals, the Blomqvist couple, had in 1999 and 2000 invested around EUR 2 million into Nordea's Selecta product, a life insurance for a fixed period where the investor may choose the investment funds to which the value of the investment is tied. The Blomqvist couple selected various stock market funds into their Selecta investments, the value of which had been reduced to less than EUR 1 million by the expiry of the insurance in 2005.

The couple claimed that the risk of loss of capital had not been made clear to them at the time of the investment decision and that Nordea Bank should therefore compensate their losses.

Insurer's duty to inform

Under the Finnish Insurance Contracts Act, which applies to the investment product in question, the customer must before the conclusion of the contract be given the information that is necessary to assess the need for insurance and the selection of the appropriate insurance. According to the Act, particular attention must be paid to material limitations of insurance coverage. The Court of Appeal held, as did the District Court, that the possibility of loss of invested capital constituted a material limitation of insurance coverage and that the customer must accordingly be informed of such a possibility.

The bank had before the conclusion of the contracts given the Blomqvist couple the general terms of insurance according to which the insurance company is not liable for the development of the value of the invested funds or for the reduction of their value. In addition, the bank had given the couple an offer which showed the projected future development of the value of the investment using an estimated 10 per cent annual growth but did not include information about the possibility of loss of value.

General contract terms not sufficient information

In those circumstances, the Court of Appeal considered that it was not sufficient in order for the bank to discharge its statutory information obligation that the bank merely give the customer the general contract terms concerning the insurance product.

The parties had differing views on the discussions between the Blomqvist couple and the representatives of the bank prior to the conclusion of the agreements. In assessing witness testimonies, the Court of Appeal came to a different conclusion than the District Court finding it not plausible that the bank manager had given the Blomqvist couple false and misleading information about the nature of the insurance product. Considering also that Mr. Blomqvist had earlier invested in stocks and was therefore not unfamiliar with investment risks, the Court of Appeal held that the bank had fulfilled its information duty and was not liable for the loss of value of the investments.

The assessment of the information obligation in the context of insurance products is based on what an average customer can reasonably conclude on the basis of the information provided. In the light of the judgment, investment service providers are expected to verify that their marketing materials contain explicit statements concerning the possibility of loss in connection with the investment. In this regard, it may make sense for a service provider to consider also whether it is possible in some way to quantify the risk associated with the product rather than just to include a general warning concerning possibility of loss.

Explicit and investment risk warnings recommended



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CORPORATE & COMMERCIAL

> GENERAL MEETINGS OF PUBLIC COMPANIES MORE ACCESSIBLE

by Jan Ollila and Christian Langenskiöld

Access to general meetings and information

The Finnish Parliament has in June 2009 accepted a Government Bill by which the Shareholders' Rights Directive (2007/36/EC) will be implemented in Finland. The new rules are awaiting Presidential confirmation but are expected to enter into force as of 3 August 2009.

The Companies Act will be amended to provide better access for shareholders to general meetings of Finnish publicly listed companies. The main purpose of the amendment is to facilitate access of foreign shareholders to general meetings of Finnish listed companies.

In addition, the aim is to facilitate access to information regarding issues dealt with at general meetings as well as information concerning decisions taken during the meetings.

The rules also strive to clarify the shareholder's right to introduce issues to be dealt with at general meetings. Technically the amendment makes regulations regarding the discussed topics more precise.

Potential effects of the reform

By improving the position of investors, the amendments seek to make Finnish companies more attractive to international investors. According to the Bill, it is not possible to assess the effects of the amendments on the levels of cross-border participation at general meetings. Such development will depend on how standardization and pricing of voting services evolve.

Requirements of notice and availability of documentation

According to the new rules, notice of a general meeting, as well as documentation related thereto, shall be available on a listed company's website for at least three weeks before a general meeting is held. Notice shall also be delivered through a stock exchange release. For non-listed companies notice shall be delivered at least a week in advance of the general meeting.

Listed companies will have a fixed time limit of four weeks before the general meeting for a shareholder to request that an issue be discussed at the meeting. Such issues must be mentioned in the notice provided that they are of such nature that they should be noted on the agenda for the general meeting. In addition, the Bill contains specific requirements regarding *e.g.* the contents of the notice, the use of more than one proxy representative and publication of voting results after the general meeting.

Notice of participation

The Bill contains an additional amendment which only concerns companies that have been entered into the book entry system. The intention is to clarify the rules regarding registration in the temporary shareholders register as well as the rules concerning the shareholder's notice of participation. The amendments will make general meetings easier to arrange and also make it easier for non-Finnish nominee-registered shareholders to participate.



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CORPORATE & COMMERCIAL

> ADOPTING WHISTLEBLOWING SCHEMES IN FINLAND

by Raija-Leena Ojanen and Johanna Ijäs

Background

The US Sarbanes-Oxley Act that was enacted in year 2002 requires that US listed companies set up procedures whereby employees can anonymously report any suspicious activities or misconducts. These so called "whistleblowing" schemes have been implemented in a growing number also in Finland by companies that have the ultimate parent in the US. The whistleblowing scheme often includes a telephone number operated by an external service provider outside Finland that collects the information and forwards it onto the appropriate persons in the company.

Companies are allowed to set up reporting schemes in Finland provided that the domestic employment law, consultation and data privacy requirements are met.

Employment law requirements

According to the Employment Contracts Act, each company has an obligation to direct and supervise its employees in the workplace. Primarily, internal rules and regular reporting channels, such as employee representatives, line management and internal audits, need to be in place to prevent misconduct. Whistleblowing schemes can be used to supplement the supervisory activities of a company. The mere failure by an employee to report suspicions cannot, however, be used as basis for disciplinary actions against such employee.

In addition, companies should not take any action against a suspected employee based on information received through whistleblowing before the accuracy of such information has been sufficiently verified. The law also requires that the person is afforded an opportunity to be heard in relation to the findings especially if disciplinary actions are taken in relation to the misconduct. Unjustified termination of employment can entitle a former employee to claim significant indemnity.

Consultations with personnel

Before adopting any whistleblowing scheme, the purpose, implementation and methods used in the scheme must be discussed with the employees in consultation as set forth in the Finnish Act on Co-operation within Undertakings. Consent of the employees is not required, it is sufficient that the employees have been given the relevant information and the opportunity to state their views on the matter.

In Finland, companies employing less than 20 employees are not under an obligation to go through a formal consultation procedure but should in an informal manner communicate to the employees the details of the whistleblowing scheme.

Data privacy issues

The information collected based on a whistleblowing scheme constitutes a data register if there is information that can be identified to a person. The Finnish data privacy legislation follows in general the EU directives concerning collecting, processing, using, disclosing and storing of personally identifiable information. There are, however, also additional rules that relate specifically to the protection of the privacy of employees in working life that restrict the possibility of companies to monitor employees.

Even when the data is collected outside of Finland, Finnish rules apply if the data relates to Finnish employees. If the whistleblowing scheme is administered outside of the EU it is considered under the privacy legislation as exporting of personal data. Such exporting is allowed only if the relevant company ensures that the exporting does not jeopardize an adequate level of data protection or if there is explicit consent of the employees for the export. If consent is not obtained from each employee, adequate protection can be ensured by a US Safe Harbor arrangement or the use of the EU Commission model clauses.



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D&I EVENTS

AWARD FOR BEST DISSERTATION

- > D&I have since 1999 supported the University of Helsinki and the pursuit of excellence in research by funding an annual prize for the best dissertation by a Master of Laws student in the field of corporate and commercial law. The winner is chosen by the faculty of the Law Department.
- > This year Anu Aaltonen and Katri Havu were jointly awarded the prize at a ceremony held on 18 May 2009. Their dissertations respectively concerned control of pricing abuse in the fixed networks market and the right of a public sector entity to damages for breach of competition law.

NORDIC LAW LIBRARIANS' MEETING

- > Legal Information Specialist Inari Kinnunen has as a member of the planning committee organised and participated in the eighth Nordic Law Librarians' Meeting held in Helsinki on 10 - 12 June 2009.
- > The theme of this year's meeting was our common legal heritage – history, present and future. The conference delegates visited D&I's library and participated in Inari's lecture on our information services.

BREAKFAST SEMINARS ON EMPLOYMENT ISSUES

- > D&I's employment law practice group has since April organized a series of monthly breakfast seminars for clients and parties that we cooperate with.
- > The aim is to review and discuss current employment law related issues that businesses are facing from a practical point of view and to provide a setting for meeting colleagues and experts in the field.

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