

# Q3

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## MERGERS &amp; ACQUISITIONS

## > THE REDEMPTION PRICE OF POHJOLA SHARES SLIGHTLY RAISED BY ARBITRATORS

by Ville Törmänen

### *Background*

An arbitration tribunal appointed by the Central Chamber of Commerce decided on 2 May 2007 upon the redemption price of shares in Pohjola Group plc ("Pohjola"). The redemption price set by the arbitration tribunal was EUR 1.00 higher than the price offered by OKO Bank Plc ("OKO Bank").

In autumn 2005, OKO Bank undertook measures to acquire ownership of Pohjola, a publicly listed insurance company. On 12 September 2005, OKO Bank purchased 58.5 per cent of Pohjola's shares and voting rights from two large institutional shareholders. During the last quarter of 2005, OKO Bank launched both a voluntary tender offer and a mandatory offer for all shares in Pohjola.

In January 2006, OKO Bank had acquired more than 90 per cent of Pohjola shares and decided to redeem the minority shareholders through a squeeze-out procedure set forth in the Finnish Companies Act. According to the Finnish Companies Act, a shareholder holding more than 90 per cent of shares and votes in a company has the right to redeem the shares held by the other shareholders at fair value. The offered squeeze-out price was EUR 13.35 per share which corresponded to the previous share purchases and earlier offers made by OKO Bank. However, the offered squeeze-out price was deemed as too low by several minority shareholders. OKO Bank commenced a statutory arbitration proceeding as set forth in the Finnish Companies Act, in which an arbitration tribunal sets the price for the minority shares.

As provided by the Finnish Companies Act, in determining the redemption price, the arbitrators should take into account all the relevant circumstances of each individual case.

### *Fair value*

The right to receive compensation for redemption is part of the minority shareholders' protection provided by the law. The redemption price should be a fair value, which would correspond to a price a minority shareholder could receive in case of a voluntary transfer of a share. According to the arbitration tribunal, the principal rule for publicly traded companies is that the redemption price should correspond to the market value of the share at the time of the squeeze-out demand provided that shares have been sufficiently traded before that.

### *All relevant circumstances*

Additionally, all relevant circumstances, including a principle of shareholders' equality, should be taken into consideration when determining the squeeze-out price. The market price does not indicate the fair value of a share if the market price has not developed reliably, for example due to lack of correct information, manipulation or other similar market distortion.

### *Negative information*

The arbitration tribunal stated that Pohjola shares have been sufficiently traded prior to the commencement of the squeeze-out procedure and thus squeeze-out price could be based on the market value. The arbitration tribunal noted, however, that during the mandatory bid process in 2005, OKO Bank had disclosed information regarding rearrangement of Pohjola's business which consisted of selling Pohjola's business as a whole to OKO Bank. In addition, OKO Bank announced a new dividend policy which meant that Pohjola was to discontinue its long-term dividend policy.

According to the arbitration tribunal these measures are normally part of the controlling shareholders' rights and on the other hand part of the risk that an investor should bear. However, the arbitration tribunal noted that during the mandatory bid process these acts were unpredictable and caused the market to lose interest in Pohjola shares. The announced information strengthened the impression to the market that Pohjola will be integrated to OKO Bank and as such potential increase in the market price was prevented.

### *Principle of shareholders' equality*

The arbitration tribunal stated that these types of measures carried out by OKO Bank were against the principle of shareholders' equality and offended minority shareholders' rights. Pursuant to the principle of shareholders' equality, the controlling shareholder has a duty to observe that the market price of the share is not influenced by its own acts and thereby the value of the minority shareholders' investment is not being reduced. This matter is emphasized if the market has been informed by the controlling shareholder that it aims to acquire sole ownership in the company.

Considering the principle of shareholders' equality and the minority shareholders' rights, the arbitration tribunal decided to increase the redemption price by EUR 1.00 per share to EUR 14.35 per share.

### *The redemption dispute continues*

The redemption dispute regarding the Pohjola shares continues at Helsinki District Court as both OKO Bank and certain minority shareholders have appealed the arbitration ruling. OKO Bank has appealed that its initial offer price of EUR 13.35 should be confirmed while certain minority shareholders deem that the redemption price set by the arbitration tribunal is still too low.

## FINANCE &amp; CAPITAL MARKETS

## > SIGNIFICANT CRIMINAL SANCTIONS SENTENCED FOR SECURITIES MARKET VIOLATIONS BY HELSINKI COURT OF APPEALS

by Essi Lavikkala

On 5 July 2007, Helsinki Court of Appeal rendered two-year suspended prison sentences to the main owners of a Finnish software producer, TJ Group Plc, for aggravated abuse of insider information and breach of disclosure duties. The criminal sanctions rendered by the Court of Appeal are the severest sanctions ever given in Finland for securities market violations.

The case dates back to February 2000 and to the listing of and sale of shares in TJ Group Plc. The company issued and its shareholders sold up to 15 million shares, yielding the company approximately EUR 50 million and the selling shareholders EUR 219 million. Earlier in January 2000, in connection with the share issue, a stock exchange release presenting optimistic growth expectations was issued and, correspondingly, the listing particular issued four days later contained similar statements. In the midst of the internet frenzy the investors paid vast sums for the company's shares, but the company was not able to deliver the results it had indicated and subsequently the value of the stock plummeted.

*Only fines imposed by district court*

Charges for various securities market crimes were pressed and in January 2006 the District Court of Helsinki delivered an unanimous judgment. In addition to aggravated abuse of insider information, charges were raised for breach of disclosure duties applicable to publicly listed companies. The prosecutor demanded prison sentences and demanded the managing director and the chairman of the board of directors each to forfeit over EUR 48 million in alleged illegal benefit. The court, however, dismissed the primary charges and ultimately sentenced two members of the board of directors merely to income-linked fines for delaying the publication of a profit warning in April 2000. The judgment was appealed to Helsinki Court of Appeal by both parties.

*Earlier acquittals reversed*

The Court of Appeal's judgment reversed the earlier acquittals reached on nearly all of the charges by the District Court. The reasoning of the Court of Appeal contains a number of statements relevant in assessing the disclosure duties from a retail investor's perspective under the Finnish Securities Market Act. All in all, the Court of Appeal emphasized clearly the retail investors' legal rights as well as the public credibility of trading on the securities market. The Court of Appeal states in its judgment that these general principles are not to be jeopardized under any circumstances.

*Significant criminal sanctions for all defendants*

The Court of Appeal stated that the disclosed information is to be assessed as a whole in the form and magnitude it was given on the date of the disclosure and thus subsequent events are not relevant to the assessment. The disclosure duties are accentuated in connection with a share issue, during which a retail investor is dependent only on the information given by the issuer. From the disclosure duty perspective, a reporting biased in favour of a retail investor should be emphasised and relevant risks should be reported clearly and explicitly. A general disclaimer cannot be considered adequate.

The fact that a breach of disclosure duties is an endangerment offence was accentuated as well. The factual effect on the value of the shares is not a precondition and therefore solely the possibility of information affecting the value is a sufficient condition for assessing if the disclosure duties have been breached

The court found the defendants guilty of aggravated abuse of insider information and breach of the disclosure duties. The managing director and the chairman of the board were given two-year suspended prison sentences. They were also ordered to forfeit approximately EUR 8 million each to the state. In addition, the chief financial officer of the company was given a five-month suspended sentence for aiding and abetting in the abuse of insider information. The company itself was ordered to pay a corporate fine of approximately EUR 50,000, but was not ordered to lose profits raised in the share issue. According to the court, such a move would endanger the existence of the company itself and cause unreasonable hardship for the more than 15,000 shareholders of the company.

A petition for an appeal and a letter of complaint concerning the judgment is pending in the Supreme Court.

We have written about the District Court judgment concerning this case in our Q2 2006 Quarterly release. That article is also available at our website.

## DISPUTE RESOLUTION

## > FACILITATION OF CROSS-BORDER DEBT COLLECTION IN EUROPE

by Eva Storskrubb and Mikko Koivula

Among the recent European Union initiatives and legislative measures to simplify and speed up cross-border civil and commercial litigation two measures aim to facilitate creditors in enforcing their claims.

The European Enforcement Order Regulation has been applicable nearly two years and it regulates accelerated procedures for recognition and enforcement of uncontested claims. The European Payment Order Regulation that will be applicable from the end of next year forms a further step in this development. It aims to create a simplified procedure to obtain an enforceable order. These measures apply to all EU Member States with the exception of Denmark.

### *Enforcement order*

The Regulation creating a European Enforcement Order for uncontested claims, (EC) No 805/2004, has been applicable since 21 October 2005.

The goal of Regulation (EC) No 805/2004 is to simplify access to enforcement of a judgment in a Member State other than that in which the original judgment was given. The term "uncontested claims" means a specific monetary claim for which the creditor has obtained either a court order against the debtor or an enforceable document that requires the debtor's express consent, that has not been disputed by the debtor.

After a judgment has been given under national procedures it can be certified as a European Enforcement Order ("EEO") by the court of origin. A certified EEO it is to be treated in each Member State as if it was a judgment delivered by a court of where the enforcement in question is sought. The creditor who applies for enforcement in another Member State should not be required to provide a security, bond or deposit on grounds that he is of foreign nationality or that he is not resident in the member state of enforcement.

Member States are required to establish certain minimum standards for the proceedings leading to the judgment. This is important due to differences in the Member States' civil procedure rules and in order to ensure that the debtor has had sufficient information and possibilities enabling him to arrange his defence.

### *Order for payment procedure*

The Regulation provides an opportunity for rectification of the EEO in the Member State of origin on limited grounds. In the Member State of enforcement refusal of enforcement of the EEO may also only be based on specific limited grounds.

Regulation (EC) No 1896/2006 creating a European Order for Payment Procedure will be applicable from 12 December 2008.

The purpose of Regulation (EC) No 1896/2006 is to speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims. It permits free circulation of European orders for payment throughout the Member States by creating minimum procedural standards. Compliance with these standards renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

The procedure is uniform and is based on standard forms and standardised deadlines for the court and parties. It will serve as an additional optional means for the claimant: he is free to choose a procedure provided for by national law.

If the defendant lodges a statement of opposition to the claimant's application within the time limit, the proceeding shall be transferred to ordinary civil proceedings. If the defendant does not lodge a statement of opposition, a European Payment Order ("EPO") will be issued. Review of the EPO in the Member State of origin can be done on limited grounds.

An enforceable EPO handed down in one Member State will be regarded for the purposes of enforcement as if it had been issued in the Member State in which enforcement is sought. Enforcement may be refused only on limited grounds.

CORPORATE &amp; COMMERCIAL

## > LIST OF TRADEMARKS WITH REPUTATION INTRODUCED

by Markus Mattila

### *Separate from the trademark register*

The Finnish National Board of Patents and Registration (the "NBPR") has established a specific list for trademarks with a reputation. Trademarks with a reputation are eligible for a wider scope of protection than other trademarks as the proprietor of a trademark with a reputation can prevent others from using similar trademarks regardless of the similarity of the goods or services in question, provided that the use without due cause would take unfair advantage of the distinctive character or repute the trademark or be detrimental to it.

### *Registration process*

The new list is distinctly separate from the Trademark Register and is intended for informative purposes only. Consequently, entry into the list does not, as such, create any additional legal rights to a trademark proprietor. However, it is an authoritative decision by the NBPR on the reputation of a trademark and it thereby indicates that also other authorities and courts would consider such trademark to have a reputation. This is likely to prevent trademark disputes and to facilitate litigation with regard to burden of proof.

When examining a subsequent application for the registration of a trademark, the NBPR notifies both the applicant and the trademark holder where the trademark being applied for is liable to be confused with an earlier trademark with a reputation. However, a trademark entered into the list is not automatically regarded as an obstacle for any subsequent registration of a similar trademark. It is up to the proprietor of the earlier trademark with a reputation to decide whether to file an opposition against the subsequent registration.

### *Thirty applications filed so far*

An entry into the list remains in force for a period of five years and can be renewed upon application. Applications for entry into the list and also renewal applications must be accompanied with a proof of reputation of the trademark. The reputation is assessed in the target group of the trademark, which also appears in the entry in to the list. It is required that the trademark is familiar to a significant part of the target group. Thus far approximately thirty applications have been filed with the NBPR. All of these applications are still pending.

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