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FINANCE & CAPITAL MARKETS

> PROPOSED NEW RULES ON PROSPECTUS LIABILITY

by Anders Carlberg

A working group appointed by the Ministry of Finance published in October 2005 a report proposing amendments to Finnish rules on prospectus liability. According to the report, the existing legislation is unclear and fragmented and would therefore have to be revised.

No strict liability for issuers or underwriters

The working group recommends that the liability of issuers be based on negligence. The alternative of strict liability was rejected. The same principle would apply to underwriters. Issuers and underwriters would avoid liability by establishing the lack of negligence under a form of the business judgement rule with a reversed burden of proof. The liability of management would also be negligence-based, without a reverse burden of proof, however.

Underwriters would have an active duty to investigate. However, they would be entitled to rely on the auditor's report of the annual accounts. The duty to investigate other reports and opinions by auditors and other experts would depend on the degree of certainty of such reports and opinions.

Same rules would apply to tender offer documents

The rules on prospectus liability would also apply to tender offer documents and prospectuses prepared solely for the purposes of the listing of securities.

The issuer's liability would extend to all purchases of securities based on the prospectus including any form of transactions on the secondary market undertaken on the basis of information contained in the prospectus. The issuer would be liable until the error or omission is corrected.

According to the report, the amount of damages would, as a general principle, be calculated as the amount by which the price paid for the securities deviates from the price that would have been paid, had the prospectus not contained an error or omission. However, the report further gives room for compensation in excess of the above amount under certain circumstances. The report recommends that the liability of issuers would not be restricted by applicable capital requirement rules contained in the Finnish Companies Act.

The amendment to the rules on prospectus liability is expected to enter into force at the earliest during the autumn of 2007.

DISPUTE RESOLUTION

> DERIVATIVE ACTIONS UNDER THE PROPOSED COMPANIES ACT

by Mika J. Lehtimäki

The proposal for a new Companies Act enhances the shareholders' rights to claim damages on behalf of the company. The increased possibilities to bring derivative actions and an extension of the period of limitation of company law claims from three to five years may result in a larger number of shareholder claims in the future. Such claims may be brought against directors, shareholders or auditors.

Damages awarded will accrue entirely to the company

The new provisions will simplify the grounds on which a derivative action can be brought. In addition, the proposal will abolish the possibility for a court to order that shareholders who have brought the action receive their proportional share of the damages obtained. Instead, the damages will accrue entirely to the company.

As a prerequisite for a derivative action, the shareholder must show that it is likely that the company will fail to bring an action. In addition, it is required that either:

a) the claimant holds at least 10% of all the shares; or

b) discarding the claim would violate the principle of equality of shareholders.

There would be a violation of the principle of equality if, for instance, the company's decision to refrain from bringing an action against a director was motivated not by a desire to look after the interests of the company but by a desire to protect the director, thereby unjustly enriching the director or someone else. As under the current law, shareholders who bring an action are entitled to compensation for litigation costs provided that the claim is successful.

CORPORATE & COMMERCIAL

> SUPREME COURT RULES ON BUDWEISER – BUDVAR TRADEMARK DISPUTE

by Markus Mattila

The Finnish Supreme Court issued on 29 December 2005 its judgment in the dispute between the breweries Anheuser-Busch and Budéjovický Budvar regarding the use of, among others, the marks Budweiser, Budvar and Bud in Finland. This long-standing court dispute dated back to October 1996. Similar cases have been launched also in other countries.

Anheuser-Busch, which is the proprietor in Finland of, among others, the trademarks Budweiser and Bud, sought to prohibit Budéjovický Budvar from using the marks Budéjovický Budvar, Budweiser Budvar, Budweiser, Budweis, Budvar, Bud and Budweiser Budbraü on product labels, in advertising and other documents for commercial purposes.

Budweis is the German name for the Czech town of Budéjovice, which is the home of Budéjovický Budvar. The words Budweiser and Budvar are included in the English and French language trade names of the company and have appeared in commercial documents.

Despite a registered trade mark, use of "Budweiser Budvar" as a trade name was allowed "in accordance with honest commercial practices".

The Supreme Court reversed the judgment of the Court of Appeal and ruled that Budéjovický Budvar is allowed to use the mark "Budweiser Budvar" in order to indicate its trade name. The company is further allowed to use the mark on beer bottles, in advertisements and invoices as part of its trade name to indicate the manufacturer provided that the use takes place in accordance with honest commercial practices. On the other hand, Budéjovický Budvar is prohibited from using the mark "Bud" for its goods.

The Finnish Supreme Court had referred the matter to the European Court of Justice ("ECJ") for a preliminary ruling with regard to the interpretation of the TRIPs Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) and the EC Trademark Directive. The ECJ ruled, among other things, that a sign, which is identical or similar to a trademark of another, can be used to indicate a trade name, provided that such use is in accordance with honest practices in industrial or commercial matters. The ECJ left it for the Finnish Supreme Court to assess on the basis of Finnish national law whether the marks had been used in accordance with such honest practices.

On the basis of the wording of the Finnish Trademark Act, trademarks would enjoy wider protection against trade names than on the basis of the EC Trademark Directive. However, the Supreme Court ruled that it is possible to apply the Trademark Act consistently with the EC Trademark Directive.

CORPORATE & COMMERCIAL

> DISCRIMINATION RULING AGAINST COPYRIGHT AGENCY GRAMEX

by Juha-Pekka Mutanen

On 4 October 2005, the Supreme Administrative Court upheld the 2003 judgment of the Market Court according to which Gramex, the copyright-management society for performing artists and record producers, had abused its dominant position by discriminating against Radio Nova, a national radio station.

Gramex had charged from Radio Nova a minimum fee that was not applied to local radio stations, as well as a higher turnover-based fee. The Supreme Administrative Court also confirmed the EUR 200,000 fine that the Market Court had imposed on Gramex.

Copyright fee can be a percentage of turnover

Gramex had argued that Radio Nova, which can be heard across the country, and the local radio stations were different customers, which justified a higher fee for Radio Nova. According to Gramex, the so-called consumption effect of playing music on radio, *i.e.*, the alleged drop of music sales resulting from radio performances, was greater in the case of Radio Nova than local radio stations. Both the Supreme Administrative Court and the Market Court disagreed and held that there was no evidence of any adverse effect on music sales from the performance of music on radio. According to the courts, the income received by radio stations from advertisements constituted an acceptable criterion for determining the value of the copyright and the fees for exploiting the copyright.

No actual harm to competition required

Neither the Market Court nor the Supreme Administrative Court appeared to place much emphasis on whether the higher fee payable by Radio Nova had in reality considerably distorted competition between Radio Nova and its competitors and, if so, whether consumers had been harmed by such distortion. In fact, the Market Court implied in its judgment that no actual effect on competition was necessary at all since, according to the Market Court, a mere offer that was discriminatory constituted an abuse of a dominant position even if the offer did not lead to the conclusion of a contract.

CORPORATE & COMMERCIAL

> DIRECTORS' LIABILITY TO BE MODIFIED

by Mika J. Lehtimäki and Juha-Pekka Mutanen

The proposed new Companies Act, which is expected to enter into force in August this year, contains modifications to the liability of directors of limited companies. The most important changes concern a presumption of negligence on the part of directors in certain situations, and a possibility to limit directors' liability through the Articles of Association.

According to the current main rule, which is proposed to remain in effect, a director, *i.e.*, a member of the board of directors or the supervisory board or the managing director, is liable to compensate for the damage or loss resulting from a breach of duty of care and loyalty. Directors are also liable for damage or loss caused to the company, shareholders or other parties through a breach of the Companies Act or the Articles of Association.

Presumption of negligence

Under the proposed Act, a director is deemed to have acted negligently where damage or loss has been caused by a breach of the Companies Act or the Articles of Association or through an act which benefits a party belonging to the inner circle of the company. The inner circle consists of entities in which the company exercises control or considerable influence as well as parties controlling or exercising considerable influence in the company. The director concerned would be allowed to rebut the presumption of negligence by showing that he or she had acted with appropriate care. However, negligence would not be presumed in the case of a breach of one of the general principles proposed to be included in the Act, such as the equality of shareholders or directors' duty of care, due to the generality of such principles.

Possibility to limit directors' liability through articles of association

On the other hand, the proposed Act also includes a possibility to limit directors' liability. A company will be able to include a clause in its Articles of Association excluding directors' liability for damage or loss caused by negligence.

There are nevertheless some important limitations to adopting such a clause. First, the amendment must be accepted by all shareholders, thus making it virtually impossible in widely-held companies. Second, liability cannot be excluded in the case of wilful misconduct, gross negligence or a breach of mandatory provisions of the Act. One example of such mandatory provisions is the provision concerning the equal treatment of shareholders. Third, the limitation is effective only in respect of damages claimed by the company and does not affect the rights of shareholders, creditors or other third parties. However, a limitation of liability is expected to be effective, for example, as against an insolvency administrator or a liquidator because an insolvency estate is normally only entitled to the rights which the company would have had against the directors.

The proposed provision appears to allow flexibility in drafting the limitation clause. For example, the limitation clause might be drafted to apply only to non-executive directors, thereby potentially increasing the attractiveness of a non-executive director's post; or the clause might include a monetary limitation of liability. In addition, adopting a limitation clause might be contemplated as a supplementary measure, for instance, in arranging liability insurance coverage for directors.

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