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MERGERS & ACQUISITIONS

> FSA APPLIES SUBSTANCE OVER FORM PRINCIPLE TO ALMA MEDIA'S IFRS MERGER ACCOUNTING

by Juha-Pekka Mutanen

On 25 January 2006, the Finnish Financial Supervision Authority ("the FSA") issued its ruling concerning the accounting treatment under the IFRS 3 Standard on Business Combinations of a series of transactions whereby Almanova Corporation, a newly established entity, launched a tender offer for and subsequently merged with Alma Media Corporation, a listed media company, with Almanova as the surviving entity. Prior to the 2005 tender offer and merger, Alma Media had sold its broadcasting business to a joint venture company owned by two Swedish companies, which were Alma Media's largest shareholders and which, as part of the arrangement, sold to Almanova their respective Alma Media holdings, amounting in total to approximately 41% of the shares and 48% of the votes in Alma Media.

Certain major shareholders of Alma Media established Almanova to effect the mixed cash and exchange offer for all shares in Alma Media and to serve as the surviving entity in the merger. In the tender offer, shareholders holding shares representing less than 13% of the shares and 5% of the votes in Alma Media tendered their shares, while the remaining shareholders elected to receive the all-share consideration in the merger. The purchase price payable by Almanova for the 41% stake in Alma Media held by the two Swedish shareholders was agreed to be set off against the unpaid part of the purchase price for Alma Media's broadcasting business upon the implementation of the merger.

In the opinion of Almanova and Alma Media, the arrangement constituted a business combination under the IFRS 3 standard with Almanova as the acquirer and Alma Media as the target. In such a case, the acquisition cost would be the fair value of the consideration given for the Alma Media shares in the share transactions, the tender offer and the merger; and the target's assets would be valued at their fair value. The difference between the acquisition cost and the fair value of the target's assets, an amount in excess of EUR 300 million, would be recorded as goodwill in the acquirer's accounts.

Accounting treatment determined on the basis of the economic substance of the arrangement

The FSA, whose task it is to supervise, inter alia, the accounts of companies obliged to comply with IFRS accounting standards, challenged the proposed accounting treatment. In the FSA's view, the appropriate accounting treatment must be determined by considering the arrangement as a whole on the basis of the economic substance, and not solely the legal form, of the arrangement. According to the FSA, Almanova, which did not carry out business activities and which had been formed solely for the purposes of the arrangement, could not be regarded as the acquirer for accounting purposes, but it was instead Alma Media which would have control over the

Arrangement considered as a reverse acquisition

merged entity following the transaction. The FSA based its view, inter alia, on IFRS 3.22, which states that “when a new entity is formed to issue equity instruments to effect a business combination, one of the combining entities that existed before the combination shall be identified as the acquirer on the basis of the evidence available”.

The FSA therefore considered that the arrangement constituted a reverse acquisition where Alma Media was the acquirer and Almanova the target. The FSA’s decision was contrary to the view of the IFRS section of the Finnish Accounting Board, whose conclusion, however, was reached after a tied vote with the chairman casting the deciding vote.

As a result of the FSA’s decision, the IFRS accounts of the merged entity had to be drawn up so as to identify Alma Media as the acquirer whereby Alma Media’s assets were recorded at their book value and no goodwill arose. The equity of the merged entity in the final 2005 consolidated accounts was around EUR 126 million, whereas a pro forma balance sheet as per the end of September 2005, prepared according to the accounting treatment proposed by the two companies, indicated that the equity of the merged entity would be approximately EUR 500 million.

FINANCE & CAPITAL MARKETS

> IMPLEMENTATION OF THE TAKEOVER DIRECTIVE

by Anders Carlberg

On 9 February 2006 the Finnish Government presented its proposal for the implementation of the Takeover Directive (Bill HE 6/2006). The bill received parliamentary approval on 8 June 2006 and enters into force on 1 July 2006. In connection with the implementation, other amendments to the existing regulations are also made. The amendments are primarily incorporated into the Finnish Securities Market Act.

Lower thresholds for mandatory bids

The thresholds for mandatory bids will be revised. The current threshold is two-thirds of the voting rights of the target company, which is considered to be exceptionally high in comparison with other EU countries. The revised Securities Market Act establishes a dual threshold of 30% and 50% of the voting rights in the target company.

Finland has not used the possibility found in the Directive that allows a member state to provide that a cash consideration is always offered as an alternative in a voluntary bid.

As a result, a bidder is not obliged to include cash as an alternative if the consideration offered consists of liquid securities admitted to trading on a regulated market within the EEA and the bidder has not purchased securities carrying 5% or more of the voting rights in the target company for cash over a period of six months.

Pricing of bids liberalised

Under the existing rules, the price in a mandatory bid is the fair price, defined as the historic 12 months' weighted average price or a possible higher price paid by the bidder during the same period of time. The existing rules have been widely criticised, especially since they lead to high prices if stock prices have been in decline for a longer period.

Under the new rules, the fair price will be the highest price paid by the bidder during the period of six months before the obligation to make a mandatory bid arose. Should a bidder not have acquired any securities during the six months preceding the bid, the fair price will be the historic three months' weighted average price for the securities. The price may be adjusted on the basis of weighty reasons.

The six months' rule would also apply to voluntary bids. However, if the bidder has not purchased any securities within the previous six months, the pricing in the voluntary bid would, as a rule, be at the bidder's discretion.

The obligation to launch a mandatory bid if the 30% and 50% thresholds are exceeded in a voluntary bid concerning all equity securities of the target company has been removed. Hence, as a consequence of the new rules, it will be possible to make a voluntary bid for all the shares in the company

Increased possibilities for all share bids

with only shares as consideration, without any requirement for a minimum price.

A top-up obligation would apply in cases where the bidder acquires target securities for a higher price than the initial offer price after the announcement of a voluntary offer or the triggering of the obligation to launch a mandatory offer for a period of nine months after the expiry of the offer period.

Board opinion

Currently, the obligations of the board of a target company are regulated by general provisions included in the Finnish Companies Act relating to the duties of a board. In line with the Takeover Directive, the new Act includes an explicit obligation for the board to render its opinion on the offer.

The opinion must include an assessment of the bid for the security holders of the target as well as the effects of the implementation of the bid on the target's business and on its employees.

Takeover Panel established

Finland has opted in with respect to Article 9 and opted out with respect to Articles 11 and 12(3). It is proposed that the need for more detailed rules implementing Articles 9 and 11 would be determined through self regulation. For that purpose, a new "Takeover Panel", which is to function in connection with the Finnish Central Chamber of Commerce, is proposed. The "Takeover Panel" would be authorised to issue recommendations of a general nature as well as, upon application, recommendations on a case-by-case basis on issues that may arise under Articles 9, 11 and 12(3).

FINANCE & CAPITAL MARKETS

> FUTURE PROSPECTS AND SECURITIES LAW DISCLOSURE LIABILITY

by *Mika J. Lehtimäki*

Earlier this year, the Helsinki District Court gave a significant judgement relating to breach of disclosure duties in listing particulars and in materials, such as stock exchange releases, concerning the on-going disclosure duty of listed companies. The case concerned the listing and share sale of the Internet company TJ Group Plc, and especially statements about the company's future prospects in the listing particulars and stock exchange release. In criminal proceedings, the prosecutor charged, inter alia, the company's board members and managing director, as well as the investment bank which had arranged the share sale and new issue, with various securities market crimes including breach of the disclosure duty and abuse of insider information.

FACTS OF THE CASE

In February 2000, TJ Group Plc issued and its shareholders sold a total of approximately 15 million shares, which yielded approximately EUR 50 million for the company and EUR 219 million for the selling shareholders. The company was not able to deliver the results it had indicated and subsequently the price of the shares collapsed.

A stock exchange release issued by the company on 26 January 2000 stated, inter alia, that the goal of TJ Group was to be a market leader in Europe within two years and to become one of the leading companies in the world in its field. Furthermore, the release stated that the group believed itself to be one of the few profitable Internet-consulting companies in the world. The listing particulars dated 2 February 2000 contained similar statements, albeit in a slightly modified form. According to the prosecutor, the downturn in the company's operations was apparent already at the time of the share issue and sale and the statements were, therefore, unfounded.

BOUNDARIES OF DISCLOSURE DUTIES

The District Court dismissed the majority of the charges and upheld only one charge concerning delay in issuing a post-listing profit warning in April 2000. The court's judgment contains a number of statements which are relevant in assessing whether disclosed information relating, in particular, to an issuer's future prospects can be regarded as false or misleading under the Finnish Securities Markets Act.

*Successive disclosures
may be assessed together*

First, the court stated that successive disclosures of the company made within a short period of time should not be evaluated separately but that, in this case, the stock exchange release of 26 January 2000 and the listing

Detailed and explicit disclaimers may limit liability

Court assessed whether the issuer would have had realistic possibilities to reach its stated goals

particulars dated 2 February 2000 should be read together from the perspective of the prospective investor. This appears to have made it possible for the court to consider that certain disclaimers included in the listing particulars were also relevant in assessing the stock exchange release.

Second, it was important that the section in the listing particulars concerning investment risks, entitled "Matters to be considered when making an investment decision", contained a description of a number of risk factors which may negatively affect the company's business operations in the future. The court noted, in particular, that the listing particulars contained an explicit statement according to which there were no guarantees that the group would reach its stated growth target. This can be seen as affirmation of the general principle that a general disclaimer is unlikely to avoid liability whereas a specific disclaimer may do so. Therefore, any statement in disclosed materials purporting to restrict liability for information on future prospects should be explicit and detailed.

Third, the court held that, in assessing whether disclosed information on a company's future business prospects was misleading, it should be considered whether the company would objectively have had actual possibilities to reach its stated goals. In the case of TJ Group, the court ruled that, inter alia, the analyst reports, which praised the group's competitiveness, and the numerous business acquisitions of the group showed that the group genuinely believed in its ability in reaching its goals and growth predictions and that such predictions could not, in the light of the information available at the time, be regarded as materially misleading.

It should be noted, however, that the court appears to have placed emphasis on evidence according to which TJ Group was indeed at the material time a leading new media company in Finland. Thus, mere analyst forecasts and on-going business acquisitions are, as such, unlikely to be regarded as providing an objective basis for growth prospects.

An appeal of the decision is currently pending in the Helsinki Court of Appeal.

DISPUTE RESOLUTION

> NEW LEGAL REMEDIES AGAINST INFRINGEMENTS OF INTELLECTUAL PROPERTY RIGHTS

by Markus Mattila

On 31 March 2006, the Finnish Government issued a legislative proposal regarding the implementation of the European Community Directive 2004/48/EC on the enforcement of intellectual property rights.

According to the proposal, a court could order a defendant and certain third parties to provide information on the origin and distribution networks of goods or services found to be infringing an intellectual property right, provided that the order would not cause unreasonable inconvenience in relation to the rights to be secured. The order could be issued when it has been established that an infringement has taken place, either during or after the main proceedings.

Interlocutory injunctions may be granted against telecom operators

The scope of interlocutory injunctions would be extended. Interlocutory injunctions could be granted also against intermediaries, which, in practice, means telecom operators whose services are used to infringe an intellectual property right. In urgent matters, the interlocutory injunction could be ordered without providing the alleged infringer an opportunity to be heard. However, contrary to the wording of the Directive, the proposal does not provide for a possibility to apply for a final injunction against intermediaries.

Further, under certain conditions the plaintiff could be given the right to publish the judgment or other relevant information regarding the infringement at the infringer's expense.

Five-year limit for obtaining compensation

Although not required by the Directive, the compensation provisions in the different intellectual property laws will be unified with regard to limitation periods. Damages and indemnification could be claimed for the five years preceding the court proceedings.

The Directive is a so-called "minimum directive", which provides for the minimum level of harmonization of legislation. It should be noted that Finnish law is in certain respects more favorable for rights holders than the Directive. For instance, a Finnish court may also order third parties to present evidence in court proceedings substantiating the claims of the plaintiff, whereas according to the Directive such an order can be issued only to the defendant.

CORPORATE & COMMERCIAL

> **NEW COMPANIES ACT - MERGER RULES***by Raija-Leena Ojanen*

Finnish merger rules will undergo a number of changes when the new Companies Act ("the Act") enters into force. The Act, which is currently being read by the Finnish Parliament, is expected to enter into force on 1 September 2006 unless there are delays in the parliamentary approval process.

The Act will provide three alternative merger procedures:

- i) an absorption merger - one company is merged into another;
- ii) a combination merger - two or more companies merge together to form a new company; and
- iii) a trilateral merger - which follows the rules for absorption mergers but the merger consideration is paid by a third party on behalf of the receiving company.

New trilateral merger introduced

The first two alternatives already exist under the current legislation. The absorption procedure is most commonly used as it is the only alternative which is accorded tax-free treatment under the current tax rules. If the merging company is a wholly-owned subsidiary of the receiving company, the completely new procedure of the trilateral merger becomes an option. In such cases, the third party that pays the merger consideration may be, for example, the parent company or the ultimate parent company of the receiving entity.

Although there are no major changes to the main elements of the current merger procedure, the purpose of the new rules is to clarify and speed-up the overall process. In a nutshell, the merger procedure consists of:

- i) approval of the merger plan by the respective boards of directors and, in certain cases, the shareholders of the merging companies;
- ii) registration of the plan and issuance of notice to creditors by the trade register; and
- iii) implementation of the merger if no creditor objects.


Minimum time for completion of merger reduced to four months

Currently, a typical merger procedure, which requires the convening of a shareholders' meeting, takes approximately six months. The new rules will reduce the minimum timeframe for completing a merger to four months from the date the merger plan is signed.

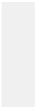
The Act sets out stricter requirements concerning the contents of the merger plan and reduces the number of necessary appendices. The requirement of attaching financial statements for the three years preceding the proposed merger is replaced by a duty to include in the merger plan a

description of the economic positions of the merging companies, the effect of the merger on the balance sheet of the receiving company and the accounting and valuation methods used. Furthermore, the merger plan must specify whether the merging companies have the right to engage in transactions that are outside the scope of ordinary business and have an effect on the company's equity or number of shares. The obligation to obtain a statement from a certified auditor concerning the merger plan is retained.

The new merger rules will apply to all merger plans that are registered after the entry into force of the Act. Providing the new rules do come into force as scheduled, it should be possible to complete by the end of 2006 a merger that is commenced under the new rules at the beginning of September. However, if it is critical that the effective date for completing a merger is during 2006, it is recommended to continue to rely on the current rules..



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