Q3

D&I Quarterly 2013

M&A & PRIVATE EQUITY

> AMENDMENTS PROPOSED TO THE SQUEEZE-OUT PROVISIONS OF THE COMPANIES ACT

by Pia Vepsäläinen

On 13 June 2013, a Government bill proposing amendments to the squeeze-out provisions of the Finnish Limited Liability Companies Act (624/2006) (the "Companies Act") and certain provisions of the Act on Chamber of Commerce (878/2002) was presented to Parliament. Changes are proposed, *inter alia.*, to the appointment of a trustee representing minority shareholders in the redemption procedure, the composition of the Redemption Committee of the Central Chamber of Commerce (the "Redemption Committee"), the right to appeal the Redemption Committee's decisions and the arbitration award, and the calculation of interest on the redemption price.

Background and Purpose

Majority shareholder's right to redeem shares

According to the Companies Act, a shareholder holding directly or indirectly through a group company more than 90 per cent of the shares and votes in a company has the right to redeem all the remaining shares in the company at a fair price in a squeeze-out procedure. A shareholder whose shares can be redeemed may request the majority shareholder to redeem those shares.

The squeeze-out is effected through arbitration proceedings which are usually initiated by the majority shareholder against all other shareholders. The redemption procedure is initiated when an application is submitted to the Redemption Committee to appoint arbitrators. Under the current Act, the Redemption Committee will petition the court for the appointment of a trustee to look after the interests of the minority shareholders in the arbitration unless all parties have declared that they consider the appointment of a trustee unnecessary.

The redemption procedure lasts approximately six months on average. The arbitration award can be appealed to a District Court and, if leave to appeal is granted, further to the Supreme Court.

Purpose of the proposed changes

The proposed amendments to the squeeze-out provisions seek to increase the effectiveness and clarity of the redemption procedure, reduce costs and improve the legal protection of the minority shareholders.

Proposed Changes

No trustee will be needed

The Redemption Committee could resolve not to submit a petition for the appointment of a trustee provided that the appointment is not necessary taking into account, *inter alia*, the legal protection of the minority shareholders and the interest at stake. The decision not to petition for the appointment of a trustee would be recorded in the Trade Register. The proposed amendment aims at quickening the redemption procedure and cutting costs without, however, significantly affecting the position of the minority shareholders.

For the purpose of increasing the investors' and minority shareholders' confidence in the Redemption Committee in the new situation in which it could resolve not to petition for a trustee, the composition of the Redemption Committee would be changed so that it would include at least one member appointed by the parties representing investors and minority shareholders.

Amendments to the rules on appealing

In order to ensure a prompt and undisturbed squeeze-out procedure, the Redemption Committee's decisions on petitioning or not petitioning for a trustee as well as on the election of the arbitrators could not be appealed separately. The trustee would be entitled to appeal the arbitration award, which would promote the implementation of the rights of the minority shareholders. All appeals would be centralized to the District Court of Helsinki.

Interest on the redemption price will accrue from the same date for all shareholders

Interest on the redemption price would begin to accrue from the date falling three weeks after submission of the application for appointment of arbitrators to the Redemption Committee. Compared to the current rules under which interest will begin to accrue from the date when a notice of the application for the appointment of arbitrators is served to the shareholder (or published in the Official Journal), which could be a different day for different shareholders, the new rules would enhance the equal treatment of shareholders.

The amendments are proposed to enter into force at the beginning of 2014.

Pia Vepsäläinen

Pia Vepsäläinen is an associate in D&I's Corporate & Compliance team. Her main area of expertise is corporate law as well as general contract and commercial law. She is a member of the firm's Corporate Advisory & CSR practice group.

FINANCE & CAPITAL MARKETS

> SUPREME COURT RULES ON DUTY TO UPDATE PROFIT FORECAST

by Juha-Pekka Mutanen

In a recent precedent, the Supreme Court held that the duty to issue a profit warning is more likely to arise if the company has issued exact numerical profit forecasts than in the case of less precise estimates.

The Supreme Court (KKO 2013:53) upheld the 2010 judgment of the Helsinki Court of Appeal concerning breach of disclosure duty by the interim managing director and a board member of Perlos, a contract manufacturer of electronic devices previously listed in the Helsinki Exchange. The Court of Appeal had sentenced also the company, the chairman of the board and the managing director but only the interim managing director appealed to the Supreme Court.

Background

Perlos had in its interim report for the third quarter of 2002, which was published on 29 October 2002, indicated that its earnings per share ("EPS") for the second half ("H2") of 2002 were expected to be approximately 0.20 euros. The realised EPS for Q3 2002 was 0.09 euros. The estimated EPS of 0.20 euros for H2 2002 included a tax credit of 0.06 euros, which meant that EPS for Q4 would have had to be 0.05 euros in order for EPS for H2 2002 to reach the forecast.

The realised EPS for October was 0.01 euros and for November 0.00 euros. EPS for December 2002 would, therefore, have had to be 0.04 euros in order for the company to reach its forecast. On 16 January 2003, the company published a profit warning stating that the result for the full year 2002 would be negative.

Indictment

Perlos and its management were indicted for a breach of disclosure duty during 9 December 2002 – 15 January 2003. According to the prosecution, Perlos had during that time failed to correct the EPS forecast of 0.20 euros for H2 2002 even though it was already clear at the beginning of December, when the zero result for November became known, that the company would not reach its profit forecast.

Failure by a listed company without undue delay to publish information which is likely to appreciably affect the price of the securities constitutes a criminal offence.

Judgment

Detailed forecasts seen as a signal by investors

The Supreme Court firstly considered whether a deviation of 0.04 euros in the forecast EPS figure for H2 2002 constituted a circumstance which was likely to have a material effect on the price of Perlos shares. The Court held that, even though small changes in a profit forecast do not necessitate a public announcement, detailed forecasts covering a short time period are regarded as a signal by the company that it is able to estimate its results accurately and are therefore considered as reliable by investors. Where a company has issued a relatively precise numerical EPS forecast, it will be expected to update that forecast in the case of a change which is likely to affect a reasonable investor's decision making.

Taking into account the importance of the EPS figure for investors, the company's previous disclosure practice, the development of the earlier months' results and the views of the management at the relevant time, the Court concluded that a deviation of 0.04 euros in the published EPS forecast of 0.20 euros for H2 2002 had a material effect on the price of the Perlos shares.

Percentage of deviation not the sole relevant factor

The Court emphasized that in assessing materiality it was not correct to consider solely the magnitude of the percentage change in the published EPS forecast, as the Court of Appeal had indicated, but account must also be taken of other factors including previous stock market reactions to changed forecasts and the level of detail in the company's prior disclosure practice.

The Court secondly found that the management of Perlos knew at the beginning of December 2002 that the company's profit for December would likely remain on the same level as in November and that it would be unlikely for the company to reach its published profit forecast for H2 2002. The Court consequently held that the interim managing director had failed to take measures to prepare a profit warning and was therefore guilty of a breach of disclosure duty.

Consequences

Stringent practice

The Supreme Court's judgment confirms the stringent application of the duty to issue a profit warning established in earlier Court of Appeal decisions concerning Stonesoft (2008), Scanfil (2009) and Perlos (2010). If a change in a disclosed profit forecast can be expected to materially affect the share price, the company is obliged to update the forecast without delay. It is in such a case not acceptable to wait until the publication of the next interim or full year results before making the announcement.

In assessing materiality, the Court emphasized that the duty to update the profit forecast is more likely to arise if the forecast has been precise. Companies experiencing uncertainties in forecasting future performance may therefore wish to avoid precise numerical profit forecasts as the courts clearly treat such forecasts more strictly than less precise estimates.

Juha-Pekka Mutanen heads the firm's Finance & Capital Markets practice. His work focuses on finance and capital market transactions, mergers and acquisitions and corporate law.

Juha-Pekka Mutanen

FINANCE & CAPITAL MARKETS

> WIND POWER PROMOTED THROUGH PERMIT FACILITATIONS

by Tuomas Rytkönen and Teemu Oksanen

Finnish Government has set a production target of 9 TWh for wind power in 2025. Currently, the estimated annual production is under 1 TWh. Wind power construction has now been promoted through the new Act on Wind Power Compensation Areas (490/2013) and by proposing amendments to the Land Use and Building Act. Additional facilitations and incentives are in the pipeline.

Wind Power Compensation Areas

Wind turbines severely interfere with radars, e.g., by producing false echoes and creating fringe areas. This interference causes problems for airspace surveillance conducted by the Defence Forces. Wind power producers must currently present a clarification on the effects on radars, and a positive opinion of the Defence Forces is a precondition for constructing a new wind turbine.

Wind power fee replaces radar clearances

According to the new Act on Wind Power Compensation Areas, which came into force in July 2013, no radar clearance will be required for wind power plants located in the areas as specified in the Act. A previous negative opinion of the Defence Forces will not be an obstacle to a wind farm in a compensation area either. The wind power producer must, instead, pay a turbine-specific wind power fee to the Energy Market Authority. This is expected to expedite the permission process and also lower the investment costs.

The total estimated amount of the collected wind power fees shall correspond to the compensation sum allocated by the state for compensatory measures such as procurement of additional radars for the Defence Forces. The producer shall pay the wind power fee annually in five instalments. Should the total sum of the fees exceed the compensation sum, the excess payments will be refunded.

First compensation area in Bothnian Bay

The first Wind Power Compensation Area with an area of 2,425 km^2 has been founded in the Bothnian Bay close to the City of Raahe. The area, consisting of both on-shore and off-shore locations, has been found to be especially suitable for wind power production. The wind power fee for Bothnian Bay is 50,000 euros per turbine and the compensation sum is 18.5 million euros.

The Act is intended to apply as a framework act for the current and all prospective compensation areas. New compensation areas are expected to be establised later when case-by-case solutions for radar interference have been found.

Facilitations for Wind Power on Industrial and Harbour Areas

Deviation permit for a wind turbine in industrial area

A Government bill proposing amendments to the Land Use and Building Act (132/1999) was presented to Parliament in August 2013. According to the bill, municipalities could grant a deviation permit for building a wind turbine on area designated for industrial or harbour purposes in the local detailed plan ("asemakaava"). Currently, no deviation permit can be granted for building with substantial impact. The deviation could only concern one industrial turbine.

The proposed amendment would also provide municipalities a possibility to grant a building permit for a wind turbine in accordance with the special local master plan ("yleiskaava") regulating the construction of wind farms, even though such plan would not yet be legally valid due to appeal. The construction could, however, start only after the local master plan has entered into force.

The amendment is intended to enter into force at the beginning of 2014.

Future Plans

Today there is strong political will behind wind power. In addition to the facilitations described above, the Government is planning measures to increase the general acceptability of wind farms. The Ministry of Employment and the Economy will also choose a pilot offshore wind power project in 2014 for which a sum of 20 million euros has been allocated as energy investment aid.

Tuomas Rytkönen

Tuomas Rytkönen is an associate in D&I's M&A & Private Equity team. His main areas of expertise are mergers and acquisitions, energy, infrastructure and natural resources, as well as general corporate and commercial law.

Teemu Oksanen

Teemu Oksanen is an associate in D&I's Finance & Capital Markets team and a member of the firm's Energy, Infrastructure & Natural Resources practice group.

DISPUTE RESOLUTION

> PROPOSED NEW RULES ON PLEA BARGAINING

by Tom Ehrström

New rules on plea bargaining are proposed to enter into force on 1 May 2014. The ambition is to shorten and simplify the criminal proceedings in which a confession can be obtained.

More lenient penalty against confession

A Government bill proposes rules on plea bargains to be included in the Criminal Investigations Act (449/1987) and the Criminal Procedure Act (689/1997). According to the bill, the prosecutor would not be required to investigate all offenses if the suspect facilitates the investigation by confession. In such situations, or if the suspect has confessed to a single offence he is suspected of, the prosecutor could also commit to request punishment on a more lenient scale.

Expedited hearings

A verdict proposal, rendered by the prosecutor with the suspect's consent, would be subject to a lighter form of court hearing than normal proceedings. The court would try the validity of the confession, other issues regarding the verdict proposal, and the demands in relation to the confessed crime. The court would render its verdict in accordance with the proposal if it finds the accused guilty as suggested in the proposal and does not find any other obstacle for the verdict. The court would also measure the punishment on a more lenient scale.

Serious crimes excluded

The rules on plea bargains would be applicable to the offenses for which the maximum penalty does not exceed six years' imprisonment. Crimes against life, health sexual integrity would, however, be excluded from the scope of the plea bargain rules.

Similar rules in continental Europe

Plea bargain arrangements were originally developed in the United States after which they have spread in other common law jurisdictions such as Canada, England and Wales. During the last decades, also continental jurisdictions, including France, Germany, Italy, Poland and Estonia, have adopted similar proceedings.

Arrangements where a suspect or a defendant is offered benefits against confession have traditionally been viewed with reservation in Finland. The current legislation does not recognize plea arrangements between prosecutors and defendants. However, a confession can affect the verdict also at present, albeit rarely in practice.

Proposed rules hoped to lower costs of criminal proceedings

The Government justifies its proposal with increasingly limited resources available to the police, the prosecution and the courts. By adopting clear rules on plea bargains, the Government suggests that the resources required in cases in which a confession could be obtained would be significantly

lowered. It is noted that in its Recommendation of the Committee of Ministers concerning the simplification of criminal justice, the European Commission recommends adopting rules on guilty pleas where constitutional law and traditions permit. It is further noted that the European Court of Human Rights has found that plea bargains are of significant benefit for the accused, criminal authorities and victims.

Tom Ehrström

Tom Ehrström is an associate in D&I's Dispute Resolution team. His main areas of expertise are dispute resolution and capital markets, as well as general corporate and commercial law.

DISPUTE RESOLUTION

> TERMINATION OF DIRECTOR'S CONTRACT ON COLLECTIVE GROUNDS

by Seppo Havia and Nora Jaari

In a recent judgment (KKO 2013:48), the Finnish Supreme Court found that a director was terminated on proper financial and production-related grounds and not on grounds relating to the employee's person. Organizational changes within the company leading to the expiry of the director's post had not been undertaken in order to terminate the director's employment on individual grounds.

Background

The claimant director of support functions was working as an employee under a director agreement. The group to which the employer company belonged started a process of renewing the director agreements in the group. The claimant director was the only director who refused to sign the new agreement as he considered its terms and benefits weaker than those of his existing agreement.

Shortly after the renewal process, cooperation consultations regarding organizational changes within the company were conducted. The changes led to the expiry of the director's post and he was offered a position as a store site manager which he did not accept. Consequently, the company terminated his employment on financial and production-related grounds. The director claimed that he was terminated because he was unwilling to accept the new director agreement and that the reasons behind the termination were, in fact, personal. He argued that his termination was therefore unlawful.

Grounds for Changing Terms of Employment

Terms of employment can be changed by agreement or by giving notice

It was undisputed that changing the terms of a director agreement or any other employment agreement requires either the consent of the employee or legal grounds for the termination. Termination may only take place on proper and sufficiently weighty grounds.

The employer is generally entitled to make an employee redundant if:

(i) work has diminished or been materially reduced due to economic or productional reasons, or due to the restructuring of the company; and

(ii) the reduction of work is permanent.

Reduction of work may result also from the employer's own business decisions like the reorganisation of the company, as in the case at hand.

Decrease in the amount of work may result from the employer's own business decisions

However, in order for termination on collective grounds to be lawfu, it is required that the actual reasons for the decision donot relate to the individual concerned.

A precondition for terminating an employment contract on economic or productional grounds is that the employee, with respect to his/her skills, cannot reasonably be repositioned or retrained.

Distinctive Features of the Role of a Director

Commitment and loyalty obligation are emphasized in the role of a director

As a starting point, the Supreme Court emphasized the significance of the position of the director. In such a position, it is customary that a director receives certain financial and other benefits which are related to his/her position as the director of a company. In exchange, the employer may expect commitment in promoting the company's interests, commercial targets and profitable activity. Commitment and loyalty to the company are therefore emphasized. Although the grounds for terminating the employment of a director are similar to those concenring other employees, these distinctive features should be taken into account in the evaluation.

The Supreme Court considered it as noteworthy that the changes within the group concerned all director agreements and that other directors except the claimant accepted the changes.

The Court also noted that the claimant had no legal obligation to accept the change in the terms of his employment though he should have understood – taken into account his position – that if he did not accept the new terms, it may have an effect on his future position in the company and within the group. An employee in this position is expected to be aware that a negative attitude towards changes initiated by the upper management might be taken into account in assessing the individual's aptitude for managerial duties.

No Individual Reasons Underlying Termination on Collective Grounds

According to the Supreme Court, it was undisputed that the company did not have grounds for termination when initiating the renewal of the director agreements. The dispute was whether the actual reason for the termiantion was personal, *i.e.*, the director's refusal to sign the new director agreement.

Lawful termination on collective grounds requires that no individual elements underlie the decision

Termination of employment on collective grounds may be unlawful if the underlying reasons for termination are in fact personal, i.e., reasons deriving from the person or his/her behaviour. In the present case, the organizational change within the company due to which the director's post expired was reported as being production-related.

According to case law, the employer enjoys relatively broad discretion in organizing its operations. In the case at hand, organizational changes had recently been relatively common within the company and the reform in

question was undertaken to strentghen the operations as a result of rapid growth and internationalization.

On evidence, the Court found that there was an administrative need for organizational changes within the company and the production-related grounds for termination could therefore not be considered artificial. Further, it had not been shown that the renewal of the director agreements and the organizational changes were connected.

The company had disputed that its intention was to terminate the claimant's employment. Instead, the intention was, according to the company, to offer him a new position as a store site manager. This was supported by two witnesses and the fact that the company offered to improve the terms of employment after the claimant's refusal so that they were clearly better than what the other store site managers had.

Based on the above reasoning, the Court ruled, following voting, that the company had a proper and weighty production-related reason to terminate the director's employment.

The Supreme Court overturnedthe decisions of the District Court and the Court of Appeal who had found the company guilty of unlawful termination.

Seppo Havia

Seppo Havia heads the firm's Employment, Benefits & Pensions practice. He has extensive experience of Finnish and international employment and pensions law and advises corporate clients in all employment related issues, including reorganizations, M&A, outsourcing arrangements and dispute resolution.

Nora Jaari

Nora Jaari is a senior associate in D&I's Dispute Resolution team. Nora advises corporate clients in employment and HR matters.

CORPORATE & COMPLIANCE

> EUROPEAN COMMISSION PROPOSES DIRECTIVE FOR ANTITRUST DAMAGES ACTIONS

by Toni Kalliokoski and Hanna Laurila

In June 2013, the European Commission proposed a draft directive concerning antitrust damages actions in national courts. The draft directive contains a number of claimant-friendly measures. It also addresses the Commission's concerns over the possible disclosure of leniency documents. In a recommendation separate from the draft directive, the Commission recommends that all member states allow collective actions.

Background

It has been the Commission's aim for almost a decade to increase private enforcement of EU competition law, which the Commission thinks is hampered by divergent or ineffecive national legislation. Therefore, it is not surprising that the draft directive mainly contains measures that can be considered claimant-friendly. The draft directive concerns the infringements of both national and EU competition law.

At this stage, the draft directive is only a proposal and does not have any legal effect on the member states. To enter into force, it needs to be approved by both the European Parliament and the European Council, which may amend the draft directive or not approve it at all. If it does pass, member states will have a two-year period to implement the directive in their national legislation. Whatever the draft directive's ultimate fate, more and more member states are introducing legislation on this subject. Whether the draft directive survives or not, it may still come to serve as a legislative blueprint for member states.

Claimant-friendly Proposals

Access to evidence

The Commission seeks to ensure that parties have access to the documents they may need as evidence. This measure may somewhat broaden the scope of disclosure in Finland, but will not introduce U.S. style discovery procedures. The defendant will have the same right to access evidence as the claimant.

Harmonized limitation periods

The limitation periods and the dates from which the periods begin to run will be harmonized. The limitation period begins to run only once the claimant has sufficient information that it can effectively make its claim. Also, the limitation period cannot begin to run before the infringement has ended. The limitation period is at least five years. However, if the

infringement has been investigated by a competition authority, the limitation period is suspended during those proceedings. The suspension lasts at least one year after a final decision in the proceedings.

Liability is joint and several

The draft directive makes it explicit that joint competition infringements result in joint and several liability for damages. Thus, the claimant does not need to bring action against all cartel members but can claim compensation for the entire amount of harm from any one of them.

Harm is presumed

The draft directive includes two cases where harm is presumed unless proven otherwise. First, it is presumed that cartels cause harm. Second, the position of indirect customers is improved by the legal presumption that some of the harm was passed on to them. In both cases, national courts are given the power to estimate the amount of harm.

Interest accrues early

The draft directive requires that interest on the compensation begins to accrue from the moment the harm occurred. Considering the long time periods and large monetary amounts often involved in major antitrust damages cases, this could have a significant impact on damages awards.

Defendant-friendly Proposals

The draft directive introduces some defendant-friendly measures as well, especially to protect cartel whistleblowers.

Leniency statements protected

First, corporate leniency statements and settlement submissions would enjoy full immunity against disclosure. This is unsurprising because the Commission and national competition authorities have been eager to protect their leniency programs by preventing the disclosure of key documents.

Second, the whistleblower is only liable for the harm it has caused to its own direct and indirect customers, not jointly liable for all the harm caused by the cartel. However, if the other cartel members are unable to pay the full amount, then the whistleblower still becomes liable for the remaining amount.

Passing-on defence available

Third, the draft directive confirms that the passing-on defence is available to the defendant if the direct customers have passed on some of the overcharge further down the supply chain. However, the burden of proof concerning the passing-on and its impact is on the defendant.

Fourth, in passing-on situations national courts are to take into account the effects of other actions concerning the same infringement. The intention is to prevent multiple recovery of damages.

Collective Actions Recommended

Separately from the draft directive, the Commission has recommended that the member states should adopt the possibility of collective actions for infringements of EU law.

Opt-in actions as basis

However, the recommendation includes several limitations on collective actions. Importantly, the recommendation only includes opt-in type of collective actions where members of the class must specifically join the class to become part of the action. Furthermore, the Commission recommends limiting the types of parties eligible to bring collective actions, limiting third-party funding, limiting contingency fees, adopting the "loser pays" principle for costs, and prohibiting punitive damages. The above is a clear attempt to distance the Commission's proposal from U.S. style class actions.

Limited Impact in Finland

If the draft directive were to be implemented in its current form, it would not cause dramatic changes to the ligel situation in Finland. The main changes would be the legal presumptions concerning harm, the whistleblower's protection against joint liability, and the early accrual of interest. The other measures are either already law or will most likely be adopted by courts in the upcoming pilot cases.

Toni Kalliokoski

Toni Kalliokoski is a senior associate in D&I's Dispute Resolution team. He specialises in competition litigation and antitrust damages. He also practises real estate law and corporate and commercial law.

Hanna Laurila

Hanna Laurila heads the firm's Competition & Public Procurement practice group. She advises domestic and international corporate clients in a wide range of competition and public procurement matters.

CORPORATE & COMPLIANCE

> HELSINKI DISTRICT COURT INTERIM JUDGMENT IN ANTITRUST DAMAGES CASE

by Toni Kalliokoski and Hanna Laurila

On 4 July 2013, the Helsinki District Court gave an interim judgment in an antitrust damages case concerning the European hydrogen peroxide cartel ruling, *inter alia*, on the effect of arbitration clauses and limitation periods.

Background

The Finnish chemicals company Kemira Oyj ("Kemira") was a member of the hydrogen peroxide cartel. Kemira sold hydrogen peroxide to Finnish pulp and paper companies Metsä-Botnia and M-real ("M Companies"), which belong to the Metsäliitto Group. The M Companies claim that they paid an overcharge because of the cartel. They have sold their claims to the Cartel Damage Claims company ("CDC"), which is now pursuing them.

District Court has Jurisdiction despite Arbitration Clauses

The hydrogen peroxide supply agreements contained various arbitration clauses. Kemira argued that the arbitration clauses prevented the District Court from hearing the case, which should instead be settled in multiple arbitration proceedings. However, the District Court ruled that the damages claim was not "immediately" based on the supply agreements but on Kemira being a party to an illegal cartel agreement. Therefore, the District Court considered that it was competent to hear the case in its entirety.

This means that antitrust damages claims can be taken to general courts despite the prevalence of arbitration clauses in business agreements. It is still unclear how wide-reaching the effects of this ruling are for antitrust damages claims. It remains to be seen, for example, whether this rules out contract law remedies.

Limitation Period Begins from the Commission's Fining Decision

According to the previous Competition Act, which is applicable in this case and other infringements that took place before November 2011, the limitation period begins to run once the claimant received or should have received sufficient information concerning the harmful event. The District Court stated that the limitation period began to run from the Commission's decision to impose fines on the cartel companies. The Commission announced the names of the fined cartel companies in a press release. The Commission's fining decision was only made public over a year later, but the

District Court considered that the M Companies had received sufficient information from the press release.

It remains to be seen what this means for infringements based on the decisions of the national competition authority. The Commission can find an infringement and impose fines by itself, but the national competition authority can only propose that the Market Court confirm an infringement and impose fines. Based on the interim judgment, it is not clear whether the deciding factor is the decision to impose fines, which the national competition authority cannot do, or the competition authority's conclusion that competition rules have been infringed.

The Court set a low threshold to interrupt the limitation period. It is sufficient that the cartel member understands that the matter concerns the cartel and that the claimant wants compensation.

Antitrust Claims Transferable

Transfer must be real

CDC purchased the claims from the M companies at a nominal price but the final purchase price will be determined on the basis of the compensation CDC may be able to recover from Kemira. The District Court ruled that the purchase of the antitrust damages claim at a nominal price was not a simulated legal act. Kemira was concerned about the nominal purchase price and that instead of the M Companies pursuing the claim themselves, they had transferred it to CDC, which may be unable to pay Kemira's costs in case CDC loses the case. However, the District Court considered the transfer to be real and not simulated. This seems to confirm that using specialist antitrust litigation companies to pursue claims is possible in Finland.

Finally, the hydrogen peroxide supply agreements contained clauses preventing the assignment of the agreements or the rights and obligations conferred by the agreements. However, as with the arbitration clauses, this did not prevent selling the antitrust damage claims to CDC because the claims were not based on the supply agreements.

Implications

There are currently no clear precedents as regards antitrust damages under Finnish law. For that reason, even this limited interim judgment is useful because it clarifies the District Court's reasoning and what can be expected in other judgments. The key parts of the interim judgment are that under the limitation period under the previous Competition Act begins from the Commission's fining decision, and that antitrust damages are not immediately based on the contractual relationship that may exist between the infringer and the victim.

However, the interim judgment still leaves open many questions that will have to wait until around the end 2013, when the first complete judgments are expected.

Toni Kalliokoski

Toni Kalliokoski is a senior associate in D&I's Dispute Resolution team. He specialises in competition litigation and antitrust damages. He also practises real estate law as well as corporate and commercial law.

Hanna Laurila

Hanna Laurila heads the firm's Competition & Public Procurement practice group. She advises domestic and international corporate clients in a wide range of competition and public procurement matters.

CORPORATE & COMPLIANCE

> DATA PROTECTION REINFORCED IN THE TRADE REGISTER

by Jukka Lång and Iiris Keino

A Government bill proposes amendments regarding protection of company representatives's personal data. The proposed amendments would bring limitations to the availability of home addresses and personal identity numbers from the Trade Register.

The personal data on company representatives forms a substantial part of the data content of the Trade Register. Through the digitalisation of data acquisition, the use of data acquired from the Trade Register continuously increases. Due to this development, it has been deemed essential to strengthen the protection of such data and the privacy of the individuals it concerns. Therefore, a Government bill to amend the current Trade Register Act (129/1979) was introduced to the Parliament on 20 May 2013. The amendments are intended to enter into force on 1 January 2014.

Enhancing data protection in cost of publicity of information

The bill aims to improve the safety and protection of the representatives of companies and housing companies by preventing the abuse of personal data. In addition, the bill aims to standardize the processing of personal data held by the public authorities. Despite its positive effects on privacy, the proposed amendments have also been criticized due to limitations for identification of company representatives which has been considered to affect, *e.g,.* prevention and deteciton of white-collar crime.

According to the bill, company representatives would include, among others, entrepreneurs, members of the board of directors, managing directors and partners.

The Finnish Trade Register is a public register containing information on traders and businesses. Currently, the information entered into the Register is available to everyone except where restrictions based on personal security apply. The Act on the Openness of Government Activities (621/1999) is applicable to the data and documents entered into the Trade Register.

Revising Data Content and Disclosure

Limitations to the availability of company representative's home address

The current legislation regarding the data content of the Trade Register is proposed to be revised so that representatives residing in Finland are no longer required to enter their home address in the Register. Instead, they are only required to submit information on their home municipality. Representatives' current home addresses may be attained through the Local Register Office and, thus, it is not seen as necessity to include the adresses in the Trade Register.

If a company representative permanently resides outside of Finland and his/her home address is, thus, not attainable through the Local Register Office, the proposed changes would not apply. Therefore such representatives are to be required to provide their home address in full also in the future. However, the bill does include provisions that limit the disclosed information to primarily include only the representative's country of domicile.

Personal identity numbers

In addition, the bill includes provisions that restrict the disclosure of the final four digits of a Finnish representative's personal identity number. According to the bill, only the representative's date of birth would be disclosed, unless the information request includes grounds justifying the disclosure of the full personal identity number.

No changes to information currently held in the Trade Register

The Act is not proposed to have retroactive effect. The addresses which have been entered into the Trade Register prior to the amendments will not be systematically removed from the Register.

In addition to the direct impacts of the bill, the changes may also have indirect effects on the way company representatives' data is available for direct marketing purposes. For instance, a company representative may restrict the disclosure of his/her data for marketing purposes in the Local Register Office's register. Such a restriction is not possible in the Trade Register and may therefore affect the amount of marketing directed at representatives by making it more difficult to obtain such data for marketing purposes.

Public Bodies Adapting Stricter Data Protection Policies

Ppossibility to use post office box when registering a company

The bill reflects a growing awareness on the part of public officials of data protection issues in business. Simultaneously with these changes, also other public bodies and officials are adapting their policies to today's data protection requirements.

As an example, persons having obtained a restriction regarding the disclosure of their personal data from the Population Information System due to personal security reasons are, as of July 2013, able to attain a company post office box prior to the registration of their company.

Previously, an individual was required to enter the company's street address and was able to acquire a post office box address only after the company had been entered into the Trade Register, thereby possibly endangering his/her personal security in the process.

Jukka Lång

Jukka Lång heads the firm's Data Protection, Marketing & Consumer practice group. He specialises in the legal issues that derive from the use of information technology and the internet.

Iiris Keino is an associate in D&I's M&A & Private Equity team and a member of the firm's Data Protection, Marketing & Consumers practice group. She specialises in data protection law and technology and IP related matters.

CORPORATE & COMPLIANCE

> DISTINCTIVE SHAPE OF A TRADEMARK – ACQUIRED DISTINCTIVENESS AND MARKET SURVEYS

by Inari Kinnunen and Gabrielle Hjelt

The Supreme Administrative Court of Finland ("SAC") has for the first time published a decision regarding the trademark protection of product appearance, namely the shape of a biscuit. When considering acquired distinctiveness in its yearbook decision KHO 2013:94, the SAC took into account a marketing survey conducted over a year after the trademark application date.

Acquired Distinctiveness

Distinctiveness may be acquired through use

A fundamental feature of trademarks is that they distinguish the goods and services of a company from the similar goods and services of other companies. Trademarks lacking distinctive character are therefore not valid for registration. Finnish trademark law states that, in assessing whether a trademark should be considered distinctive, all the factual circumstances shall be taken into account, particularly the length of time and extent to which the mark has been used. In other words, even though a trademark is not inherently distinctive, distinctiveness may be acquired through use. Market and reputation surveys are common instruments for proving the extent of trademark use.

Earlier Proceedings

Biscuit sold with same name, shape and appearance since the 1920's

Both the National Board of Patents and Registration of Finland ("NBPR") and the Board of Appeal of the NBPR had rejected the trademark application concerning the shape of the "Carneval" biscuit. Carneval biscuits have been sold in Finland since the 1920's with the same name, shape and appearance. The graphic representation was depicted in the application as a square with wavy edges and a film-like surface.

According to the NBPR's statement of reasons, the shape of the Carneval biscuit lacked distinctiveness as its appearance was considered customary in relation to other biscuits. The claim concerning acquired distinctiveness was dismissed, mainly on the grounds that the market survey submitted as evidence had been conducted over a year after the trademark application had been filed. As a rule, a trademark should have acquired distinctiveness at the moment of the trademark application.

Proceedings in the SAC

The appeal to the SAC focused on the general criteria for registering a shape of goods and the admissibility of market survey evidence even though it had been conducted after filing the trademark application.

As regards the inherent distinctiveness of the shape of the Carneval biscuit, the SAC stated that it is not solely composed of a form that is characteristic of the goods in question, which would have rendered the registration impossible. Nevertheless, the shape was considered neither original nor uncharacteristic in a way that it could have been held as inherently distinctive. According to the SAC, the shape of the biscuit would be registrable only if it was proven to have acquired distinctiveness through use.

Market survey conducted after application date admissible

Contrary to the NBPR's views, the SAC found the market survey admissible in the case even though it had been conducted over a year after the application date. This conclusion was supported by the case law of the Court of Justice of the European Union. The market survey showed that 72 per cent of respondents recognized the biscuit based on its appearance. A notable part of them, namely 36 per cent, was also able to identify the name of the product.

According to the SAC, the level of awareness relating to the mark had not significantly changed between the filing date and the time of the market survey. Therefore, the shape of the Carneval biscuit had in fact acquired distinctiveness prior to the application date on the basis of its extensive and long-term use. The SAC overruled the prior decisions and returned the matter to the NBPR for the purpose of registering the trademark.

The ruling confirmed that surveys conducted after filing a trademark application may have relevance also as regards the awareness relating to the trademark on the application date. Naturally, it requires that the market situation has remained unchanged.

Inari Kinnunen

Inari Kinnunen is a senior attorney in D&I's Corporate & Compliance team. Her main area of expertise is intellectual property, specifically trademark law. She also advises corporate clients in relation to marketing and consumer law, regulatory matters and life sciences.

Gabrielle Hjelt

Gabrielle Hjelt is an associate in D&I's M&A & Private Equity team and a member of the firm's Technology & IPR and Life Sciences & Healthcare practices. She advises Finnish and foreign companies in a wide range of general corporate and contracts law matters

D&I NEWS AND EVENTS

D&I'S NEW WEBSITE LAUNCHED

> D&I's new website has been launched. To learn more about us and read our latest news, visit www.dittmar.fi.

IIRIS KEINO STRENGTHENS D&I'S DATA PROTECTION, MARKETING & CONSUMERS PRACTICE

> Iiris specialises in data protection law and technology related matters, she is also a member in D&I's M&A & Private Equity team. Prior to joining Dittmar & Indrenius Iiris gained experience by working at the Office of the Data Protection Ombudsman.

Dittmar & Indrenius, established in 1899, is an independent law firm focused on the quality of its services within four practice areas: M&A & Private Equity, Finance & Capital Markets, Dispute Resolution and Corporate & Compliance. Our aim is to be the best long-term law firm partner in Finland for our clients. We also strive to provide the best legal services in complicated transactions and demanding dispute resolution in our jurisdiction.

Dittmar & Indrenius, Pohjoisesplanadi 25 A, FI-00100 Helsinki, Finland
Tel: +358 9 681 700, Fax: +358 9 652 406
www.dittmar.fi