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M&A & PRIVATE EQUITY

> HELSINKI TAKEOVER CODE REVISED

by Anders Carlberg

A new Securities Markets Act (the "SMA") entered into force on 1 January 2013. In that connection the old Takeover Panel was replaced by a Takeover Board. The Takeover Board acts under the Securities Market Association with the aim of promoting good securities markets practice in Finland. The Takeover Board published on 3 December 2013 a revised Helsinki Takeover Code replacing the 2006 Takeover Code. The revised Code will enter into force on 1 January 2014.

Comply or explain

The old Takeover Code was of a non-binding self-regulatory nature. Pursuant to the revised SMA, both the offeror and the target company are obliged to announce whether they are committed to complying with the new Takeover Code. The new Code is based on the "comply or explain" principle according to which both the offeror and the target are obliged to provide an explanation for not complying with certain provisions of the Code. Some of the provisions of the Code are, however, based on mandatory law from which neither the offeror nor the target may deviate.

The substance of the new Code is to a large extent similar to the old Code taking into account, however, the new provisions of the revised SMA as well as certain developments in market practice since 2006.

The following amendments and specifications of interest have been included in the new Code.

Ensuring Financing

Pursuant to the SMA, prior to making a bid public, the offeror shall ensure the availability of necessary funds for the bid. The provision is mandatory and can not be deviated from.

MAC clause permitted

The new Code provides certain specifications in relation to the degree of certainty of financing. The availability of financing may be agreed on a conditional basis for instance including a general market MAC or target specific MAC clause. A unilateral letter of strong interest by a lender does not constitute sufficient proof of availability of financing.

If the offer is subject to the offeror obtaining financing from the capital markets, the offeror shall, prior to making the bid public take the necessary steps to prepare the issue (for instance share or bond issue). The offeror may ensure the availability of financing for instance by obtaining a subscription or underwriting commitment for such an amount of securities that can be reasonably estimated to ensure completion of the issue.

Obligation to Convene General Meeting

The new SMA introduced a specific paragraph on the obligation to convene a general shareholders' meeting should the board of the target take measures aimed at frustrating a bid. The new Code specifies in more detail when it is mandatory to convene the general meeting before and after the bid is launched. The Code further specifies situations where the board may refrain from convening the general shareholders' meeting. in that case it is obliged to publish the reasons for it without delay.

Due Diligence

The new Code deals with both the due diligence on the target and the due diligence on the offeror when a share consideration is offered.

A detail has been added to the Code dealing with inside information and due diligence. If the offeror receives inside information in connection with the due diligence review, as a rule, the offeror may not launch the bid before such information has been made public. According to the Code, the target should not deliberately strive to frustrate the bid by handing over inside information to the offeror.

Due diligence on the offeror

In order for the board of the target company to be able to make a well founded assessment on the share consideration in an exchange offer, the offeror shall allow such a due diligence review by the target that can be considered necessary to allow the board of the target to reasonably assess the consideration.

Acquisition of Securities of the Target Company

A new recommendation is introduced according to which if the offeror intends to acquire securities that are subject to a public offer outside of the offer after the bid has been made public, the offeror is obliged to publish its intention prior to such acquisitions.

Invoking an Offer Condition

Under the regulations and instructions issued by the Finnish Financial Supervisory Authority, an offeror is entitled to invoke an offer condition only if the impact of the condition not being fulfilled is material. The new Code includes examples of what may be considered as material in this context. Pursuant to the new Code, if the offeror decides to invoke a condition, the grounds for such a decision shall be published immediately.

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M&A & PRIVATE EQUITY

> SIGNIFICANT YEAR END CHANGES TO TAX LAWS

by Kai Holkeri and Katja Rajala

The reduction of corporate income tax rate to 20% and the increased taxation of distributions to shareholders can be seen as a shift of focus in Finnish taxation.

Reduction of corporate income tax rate

The most significant change will be the reduction of corporate income tax rate from 24.5% to 20% as of 1 January 2014.

The new 20% tax rate is applicable for tax year 2014, i.e., in cases where the financial period ends during 2014. However, pursuant to a specific anti-avoidance rule, the new tax rate is not applicable for tax year 2014 if the company has on 21 March 2013 or later (i.e., the date on which the government announced the plan to cut the tax rate) decided to:

(i) extend its financial period to end during 2014, or

(ii) shorten its financial period so that the financial year ending during 2014 has started on 21 March 2013 or later.

Changes in dividend taxation

<u>Corporate taxation</u>

(i) Dividends received by private companies from listed companies will be fully taxable, unless the private company shareholder holds at least 10% of shares in the listed company. Currently, 75% of such dividends are taxable.

(ii) Dividends received by corporate shareholders from EEA resident companies would be tax exempt under domestic rules only if the distributing company is subject to tax on its profits at a rate of at least 10%. In practice, the tax treaties concluded by Finland currently exempt dividend income from Finnish tax if the Finnish company holds at least 10% of the votes in the distributing company.

(iii) Disguised dividends will be taxable up to 75%.

<u>Individuals</u>

(i) 85% of dividends from public companies will be taxable as capital income, 15% will be tax exempt.

(ii) Similarly, under the general rule, 85% of dividends from private companies will be taxable as capital income and 15% will be tax exempt, provided that the dividend does not represent an annual yield of more than 8% on the mathematical value of the shares.

(iii) However, to the extent that such dividends do not exceed EUR 150,000, only 25% of the dividend will be taxable, as capital income, and 75% will be tax exempt.

(iv) If the the dividend represents an annual yield of more than 8% on the mathematical value of the shares, 75% of the dividend will be taxed as earned income, at progressive rates, and 25% will be tax exempt.

Repatriation of funds from the reserve for invested unrestricted equity

Repatriation of funds from the reserve for invested unrestricted equity will generally be treated as dividends. For listed companies, this will always be the case.

For private companies, repatriation of funds from the reserve for invested unrestricted equity is treated as a disposal, thereby decreasing the remaining acquisition cost of the shares, only if the taxpayer demonstrates that:

(i) the funds are repatriated to the same shareholder that has made capital contribution,

(ii) the repatriated amount does not exceed the amount of capital contribution, and

(iii) the funds are repatriated within a period of ten years from the capital contribution.

However, in relation to capital contributions made before 2014, the new rules will apply to repatriation of funds from private companies only as of 2016.

Other material changes

<u>Interest limitation rule</u>

The interest limitation rule that restricts the deductibility of intra-group net interest expenses will be tightened. The amount of deductible interest will be limited to 25% of the company's EBITDA as determined for tax purposes. Currently the limitation is 30%.

Further, changes will also be introduced to the method of determining the EBITDA for tax purposes. Write offs and other losses on financial assets will no longer increase the calculation basis.

<u>Research and Development</u>

The tax incentives decided earlier for tax years 2013-2015 concerning (a) research and development costs; and (b) depreciation on productional investments are withdrawn for 2015.

Entertainment expenses

Entertainment expenses will not be deductible for tax purposes as of tax year 2014. Currently 50% of entertainment expenses are deductible.

Indirect taxation

Power stations will be subject to a power station tax as of 2014. The new tax is based on windfall profits in electricity market. In addition, also other indirect taxes will be increased apart from VAT.

Capital income progression threshold of individuals

While tax rates remain unchanged, the progression threshold for capital income of individuals will be lowered. Individuals will be subject to tax on capital income at 30%, and at 32% for taxable capital income exceeding EUR 40,000. The current threshold is EUR 50,000.

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DISPUTE RESOLUTION

> HELSINKI DISTRICT COURT AWARDS DAMAGES IN PRECEDENT-SETTING ANTITRUST CASE

by Toni Kalliokoski and Hanna Laurila

On 28 November 2013, the Helsinki District Court gave precedent-setting judgments in 41 antitrust damages claims in the asphalt cartel damages litigation. The claimants won on nearly all points of law in the court of first instance which suggests that Finland is among the more claimant-friendly antitrust damages jurisdictions. The judgments are not yet final and can be appealed to the Court of Appeal.

Background and outcome

The Finnish asphalt cartel operated at least in 1994–2002. In 2009 the Supreme Administrative Court confirmed the record fines of EUR 82 million on the asphalt companies. Following the award, the State of Finland and 40 municipalities claimed EUR 120 million in antitrust damages from the cartel companies.

A EUR 57 million claim of the State of Finland was dismissed entirely with costs because certain institutions of the State were considered to have known about and even participated in the cartel. The court ordered the respondents to pay the 40 municipalities EUR 37.4 million with costs and interest out of their original claims of EUR 65 million.

Precedent-setting rulings

The judgments are noteworthy because there was no prior significant case law concerning antitrust damages in Finland. Many of the questions under dispute were thus of a precedent-setting nature and are also likely to have broader implications.

Infringement ruling has binding effect

The court gave the final decision of the infringement proceedings a binding effect. Thus, the infringement decision sets the minimum bounds in the damages proceedings, and it is not possible to dispute the existence of the infringement, the parties responsible for the infringement or the infringement period.

However, it is possible to show that the infringement periods are longer than those found in the infringement proceedings, or that there are other infringing parties.

Multiple remedies are available

The antitrust damages provision contained in Finland's previous Competition Act (480/1992) did not apply to most of the municipalities because they were not business undertakings. The current damages provision of the Competition Act (948/2011), which was not applied in this case, applies to anyone who has suffered damage from an antitrust infringement.

In addition to the Competition Act's damages provision, the court established that contractual liability for damages always applies to the contract partner because a cartel is a breach of contract. The court based the liability of cartel members other than the contract partner on the general Tort Liability Act (412/1974).

Economic succession applies to damages

Some of the respondent companies had not participated in the infringement. They had purchased the assets of certain infringing companies, and subsequently liquidated the infringing companies, thereby seemingly leaving no suitable respondent.

The court found that EU law compelled the court to ensure the effectiveness of antitrust damages remedies. When national law prevented an effective outcome, the court considered itself obligated to ignore national law and apply EU law directly.

Thus, the court applied the EU competition law doctrine of economic succession to antitrust damages. So far, this doctrine had only been applied to fines imposed in the infringement proceedings. The court's ruling therefore represents a significant new interpretation.

Limitation period runs from infringement decision

The multiple remedies applied in the case caused several statutes of limitations to also apply. Regardless of which statute was applied, the limitation periods began to run from the Supreme Administrative Court's final decision. According to the court, the claimants could not have been expected to know whether there was a cartel and who was responsible for it before the final decision on the existence of the infringement.

Liability is joint and several

The respondents were considered jointly and severally liable towards the claimants for all the damage caused by the cartel to a claimant during the respondent's participation in the cartel. It did not matter if the respondent concerned had never submitted asphalting bids to a specific claimant or if the respondent only operated on the other side of the country.

Contract partner is ultimately liable

Between the jointly and severally liable cartel members, the ultimate liability for a specific claimant's damages falls to the company that had entered into a contract with that claimant. For example, if companies A and B are found jointly and severally liable but only company B is the contract partner and company A pays the damages, then company A can claim the entire amount from company B.

If an individual claim has become time-barred against any cartel member, joint and several liability ends. After that, the claimant can only obtain damages from its contract partners. This put a number of municipalities into a difficult position because their contract partner is in bankruptcy.

Interest can increase amounts significantly

Due to the availability of pre-judgment interest in Finland and the long time periods involved, interest typically increased the total awards by more than 50%.

Compensatory interest (Finnish: *tuottokorko*) was payable on the damages. It began to accrue from the time the overcharge was paid and ran until overdue interest began to accrue. The interest rate applied was the European Central Bank's reference rate.

Overdue interest was payable on both the damages awarded and the compensatory interest. It began to accrue from the time the statement of claims was served on the respondents and runs until the date of payment. The interest rate was the European Central Bank's reference rate plus 7 per centage points.

Implications

As far as questions of law are concerned, the judgments are a nearly complete victory for the municipal claimants. If the judgments hold in higher courts, they form a reasonable and coherent basis for antitrust damages claims in Finland. They establish Finland among the more claimant-friendly jurisdictions where it is difficult for respondents to evade liability. However, the amounts awarded continue the conservative line generally followed by Finnish courts when awarding damages.

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DISPUTE RESOLUTION

> SUPREME COURT RULES ON BINDING EFFECT OF ARBITRATION CLAUSES

by Tom Ehrström

In a recent decision (KKO 2013:84), the Supreme Court confirmed that when a claimant based his entire claim on a contract to which he was not a party, he was still bound by its arbitration clause. The decision illustrates an exception to the main rule that only parties to an arbitration agreement are bound by it.

Background

In the dispute, the Supreme Court investigated whether A was bound by an arbitration clause in a shareholders agreement entered into between two companies, J Oy and M Oy. The agreement stipulated, among other things, that A had the right to purchase the shares owned by J Oy in M Oy on certain terms. A was not a party to the shareholders agreement.

Subsequent to the signing of the shareholders agreement, J Oy sold its shares in M Oy to a third party regardless of A's demand to be allowed to purchase them in accordance with the agreement. A filed an action in the Satakunta District Court, seeking damages from J Oy. J Oy argued that A's claim was entirely based on the shareholders agreement and, as J Oy and M Oy were bound by its arbitration clause, A could not be granted broader rights regarding dispute resolution.

According to the Finnish Arbitration Act (967/1992), arbitration clauses have the same effect as arbitration agreements. A court must reject an action if the matter is subject to an arbitration agreement or clause and a party requests it to do so.

Handlings in lower courts

Non-signatory can be bound by arbitration clause

The District Court stated that, in some instances, a non-signatory can be bound by an arbitration agreement. The court, however, held that in this case A was not bound by the arbitration clause in the shareholders agreement. The District Court held that the fact that the shareholders agreement granted A some rights did not in itself cause A to be bound by the arbitration clause.

The Court of Appeals stated that it is a fundamental principle of contract law that the parties may grant rights to non-signatories but that third parties cannot be made subject to obligations under an agreement to which they are not signatories. In the case of arbitral agreements, this implied that the arbitration clause in a shareholders agreement would only be binding on the signatories.

Agreement established rights for non-signatory

The Court of Appeals, however, held that in establishing rights for A the parties to the shareholders agreement were also allowed to decide on what terms they were liable towards A. J Oy and M Oy were, therefore, allowed to establish that A was to abide by the arbitration clause if A wished to make use of its rights under the agreement.

Supreme Court's decision

In its somewhat brief comments, the Supreme Court noted that A was not a party to the shareholders agreement in which the arbitration clause was contained. The court also noted that A had not become subject to the agreement as a result of succession.

However, the Supreme Court maintained that, as A's claim was based on the alleged breach of a term in the shareholders agreement, the assessment of the claim required application and interpretation of the agreement. Pursuant to the arbitration clause of the shareholders agreement, all disputes relating to the agreement were to be resolved through arbitration.

As J Oy had demanded that the Disrtict Court should reject the matter and refer it to arbitration, the Supreme Court found that the matter could not be tried in sn ordinary court.

Conclusions

Binding effect on non-signatory is a deviation from the main principle

Already prior to this decision by the Supreme Court, it has been the general understanding among practitioners that, when wishing to invoke a right that follows from a contract, a party is bound by the arbitration clause in that contract even if he is not a signatory. This is a deviation from the main principle that arbitration agreements are only binding between the parties.

The need for such a deviation is especially clear in a situation where a debtor transfers his claim to a third party. It is a long-established rule that if the original claim is subject to an arbitration clause also the new debtor is bound by it.

In this case, the claim had not been transferred by succession but the claimant relied entirely on a right derived from the shareholders agreement to which he was not a signatory.

In some jurisdictions, commentators and courts have sought to justify the applicability of arbitration clauses in such situations by arguing that the claimant has *de facto* become a party to the arbitration clause. Different legal constructions have been used to reach this effect. In the Nordic countries, courts and commentators have felt it more appropriate not to employ any legal constructions but simply maintain that the claimant is bound by the arbitration clause, although he is not a party to the agreement. The recent decision by the Supreme Court follows that approach.

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CORPORATE & COMPLIANCE

> CHANGES TO CONSUMER PROTECTION IN DISTANCE SELLING

by Jukka Lång and Iiris Keino

A Government bill proposes amendments to the Finnish Consumer Protection Act (38/1978) (the "CPA") in order to implement the newest amendments to the Directive on Consumer Rights (2011/83/EU). The aim of the Directive is to facilitate the full exploitation of the cross-border potential of distance selling.

Full harmonisation of consumer protection legislation

The implementation of the Directive calls for amendments to the CPA especially in the field of distance selling. Up till now, the cross-border capacity of direct selling has been constrained by, among other things, the differences between the national legislation of the European Union member states and the varied protection they provide to consumers.

Due to the goals of the Directive, it relies on the full harmonisation of key regulatory aspects in order to provide a predictable and coherent regulatory framework throughout the European Union. The amendments to the CPA are intended to enter into force in June 2014.

Standardising consumer rights in distance selling

The Government bill proposes a number of changes regarding, for example, distance selling. As the Directive aims at full harmonisation, it is not possible to derogate from the provisions of the Directive even to provide a higher level of consumer protection. While some of the changes are found to strengthen consumer protection in Finland, others are generally seen to weaken it.

Changes to withdrawal in distance selling

The most significant changes to the current CPA are related to the trader's information obligations and the consumer's right of withdrawal. As an example, according to present legislation, the trader bears the cost of returning the goods in the event of withdrawal. These costs form a significant item of expense. In the distance selling of clothes, for instance, the percentage of contracts ending in withdrawal can be up to 30–40 per cent. The proposed allocation of the direct costs of returning the goods from the trader to the consumer is, therefore, seen as one of the most significant amendments. When taking the market into account, it is likely that traders will, however, continue to commit themselves to bearing the costs of returning the products.

Informing consumers of the amendments is the key to avoiding misunderstandings

In addition to bearing the costs, the consumer is also obliged to expressly inform the trader of his/her withdrawal. Therefore, unlike in the present legislation, the mere returning of the goods will not be seen as an indication of withdrawal.

It is important for traders to take into account that such seemingly slight changes may cause significant misunderstandings during the early stages of the application of the new rules if consumers are not sufficiently informed of the new procedures.

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D&I NEWS AND EVENTS

D&I - 115 YEARS OF INSIGHT

> Dittmar & Indrenius celebrates its 115th anniversary in 2014. Since 1899 we have served businesses in Finland with an ambition for excellence. Today Dittmar & Indrenius has over 70 professionals working hard to provide the best legal services in complicated transactions and demanding disputes. We also strive to be the best long-term law firm partner in Finland for demanding corporate clients. The anniversary will be celebrated in a number of ways. Stay tuned!

JUHA NURMINEN STRENGTHENS D&I'S M&A & PRIVATE EQUITY TEAM

> Attorney at law, BBA Juha Nurminen joins D&I's M&A & Private Equity team. His main area of expertise is M&A, private equity and corporate law. Prior to joining D&I in 2013, Juha has gained experience from other Finnish law firms and an investment bank.

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