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D&I Quarterly 2014

EDITORIAL

D&I - 115 Years of Insight

Dear reader

This past year has been filled with exciting events and interesting cases. Just recently, we advised Adelis Equity Partners Fund I in its acquisition of a majority stake in Med Group, Aller Media in its acquisition of a social media business advisory company Dingle and J.P. Morgan Limited in the Finnish aspects of the financing of Geberit AG's public tender offer for all shares in Sanitec Oyj. In a landmark competition case, we assisted the Finnish Competition and Consumer Authority when the Market Court ordered Valio to pay the largest ever fine imposed on an individual company due to a competition law violation.

This year we also celebrated D&I's 115th anniversary. Throughout its history, D&I has been committed to the success of its clients, striving to provide business oriented advice and enduring solutions to meet the challenges of the changing marketplace. We are thankful and proud for the trust our clients have placed in us and look towards the new year with excitement and anticipation.

I would like to thank our clients and friends for the events we have shared during the year and wish you a joyous holiday season and a happy and successful 2015!

Juha-Pekka Mutanen
Partner

Juha-Pekka Mutanen

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

FINANCE & CAPITAL MARKETS

> PROPOSED WHISTLEBLOWING DUTY FOR AUDITORS

by Sakari Sedbom

Sakari Sedbom

Sakari Sedbom is an associate in D&I's Finance & Capital Markets team. Sakari's main areas of expertise are banking and finance transactions as well as capital markets with a particular focus on equity and debt securities offerings, investment funds and public M&A transactions.

A Government bill proposing amendments to the Auditing Act (459/2007) was presented to the Parliament at the end of October 2014. The proposal presents a new obligation for auditors to notify the management of the audited entity and, if necessary, the authorities of suspected violations of rules and regulations in the administration or financial statements of the entity. The aim of the proposed amendments is to prevent white-collar crime and black market economy.

Under the current Auditing Act, auditors are not permitted to disclose any information received while carrying out an audit. Even in cases where the auditor suspects irregularities or misconduct, the law does not entitle the auditor to depart from the confidentiality obligation.

Although ISA standards, which are part of good auditing practice, instruct the auditor to contact the board in case of suspected misconduct, the auditor cannot do much if the board fails to correct the irregularities in the financial statements. In cases of misconduct, the auditor may include a remark in the auditor's report. Minor violations rarely come to the authorities' knowledge. Auditors also tend to be very careful when it comes to disclosing information about their clients.

Main Changes

Auditor is obliged to notify suspected irregularities

The proposed amendments would primarily oblige the auditor to notify the management of the audited entity if there are grounds to suspect that irregularities have occurred in the administration or financial statements of the entity. The auditor should invite the entity to investigate the matter and to take appropriate measures to correct the irregularities.

The aim of the amendments is to prevent white-collar crime and black market economy

The aim of the proposal is to prevent white-collar crime and black market economy. The proposed amendments are expected to encourage audited companies and foundations to pay closer attention to compliance with rules and regulations and to independently take into consideration the remarks made by the auditor in order to avoid notifications to the authorities.

Corresponding EU Regulation

The proposed amendments largely correspond to the new EU Regulation 537/2014 on specific requirements regarding statutory audit of public-interest entities, which will be applicable in 2016.

Amendments are intended to enter into force before the EU Regulation

The main difference is that the scope of application of the national provisions is broader. The notifying obligation of the Auditing Act is extended to all audited companies and foundations, whereas the EU Regulation only applies to public-interest entities. In addition, the amendments are intended to enter into force well before the corresponding EU regulation, in early 2015.

Upcoming Reform of Auditing Legislation

The Government has also presented a Government bill for the Parliament for the reform of the Finnish auditing legislation. The reform will, inter alia, affect the system of degrees and curricula and the general oversight of auditing.

The new legislation is intended to enter into force at the beginning of 2016.

TAX & STRUCTURING

> CENTRAL TAX BOARD CLARIFIES EQUITY RATIO EXEMPTION UNDER INTEREST LIMITATION RULES

by Kai Holkeri and Katja Rajala

Kai Holkeri

Kai Holkeri heads D&I's Tax & Structuring practice. He advises clients on structuring and optimisation of M&A and financial transactions, incentive schemes and general corporate tax and tax litigation.

Katja Rajala

Katja Rajala is an associate in D&I's M&A & Private Equity team. Her main area of expertise is corporate tax and tax litigation. She advises also on indirect taxation. Katja is a member of the firm's Tax & Structuring practice.

The advance ruling by the Central Tax Board of 8 October 2014 clarifies the interpretation of the equity ratio exemption under the Finnish interest limitation rules. Under the equity ratio exemption, the interest limitation rule does not apply if the equity ratio of the debtor is equal to or higher than the equity ratio of the consolidated group.

According to the advance ruling, the consolidated financial statements used as reference in the comparison under the equity ratio test refer to the consolidated financial statements of a parent company even in circumstances where the parent company is not obliged to prepare consolidated financial statements.

The advance ruling related to a case where a Luxembourg investment fund held a Finnish subgroup through a Luxembourg holding company ("Holdco"). A Finnish company had prepared consolidated financial statements for the Finnish subgroup. Holdco had no obligation to prepare consolidated financial statements pursuant to an exception under Luxembourg law.

The question at issue was whether the equity ratio of the debtor was to be compared to the equity ratio in the consolidated financial statements at Holdco level or at the level of the Finnish subgroup parent company.

The Central Tax Board concluded that the equity ratio under the consolidated balance sheet was to be analysed at Holdco level, regardless of the fact that Holdco was not obliged to prepare consolidated financial statements under local accounting provisions. Further, the Central Tax Board

held that the requirement to prepare consolidated financial statements for the purposes of the equity ratio test does not constitute an infringment of the freedom of establishment under EU law.

The ruling has been appealed and is not final. However, the interpretation adopted by the Central Tax Board could facilitate tax planning opportunities, for example, for domestic investment funds structured as a limited partnership.

EMPLOYMENT, BENEFITS & PENSIONS

> SUPREME COURT RULING: NO DISCRIMINATION OR UNEQUAL TREATMENT IN DENIAL OF SUPPORT PACKAGE

by Jessica Brander

Jessica Brander

Jessica Brander is an associate in D&I's Corporate & Compliance team. Her main areas of expertise are employment and labour law, as well as general corporate and commercial law, life sciences and intellectual property rights.

In its ruling KKO 2014:47, the Finnish Supreme Court assessed the acceptability of the terms of a voluntary financial support package offered by an employer to employees made redundant. The employees were eligible for the package if they had failed to re-employ or were not retired or in the process of retiring by the expiry of the employer's 12-month re-employment obligation.

Duty of equal treatment

An employer has a statutory obligation to treat its employees equally. The employer may deviate from the duty of equal treatment only if this is acceptable based on the relevant employee's duties and position. Further, the employer may not, without an objectively justified reason, exercise any unjustified discrimination against employees on the basis of personal characteristics, such as age.

Background

The plaintiff, who was one of the employees made redundant, was denied the support package because he had the possibility to retire with enhanced unemployment benefits during the 12-month re-employment period. Based on his age, the employee was entitled to earnings-related allowance until the age of 65, but had informed the employer of his interest to continue working.

Elderly employee was denied support package

The employee considered that he was discriminated against as denial of the support package was due to his entitlement to the extended allowance and, thus, directly based on his age. He therefore claimed damages for the denial of the support package, as well as compensation for age discrimination.

Rulings of Lower Courts

Support of subsistence and re-employment

The District Court found that the terms of the support package did not place the employee in a less favorable position than the other redundant employees. Further, the aim of the arrangement, *i.e.*, to enhance the re-employment and subsistence of the employees, was considered acceptable and the arrangement was executed by appropriate means.

The Court of Appeal partly agreed with the District Court, stating that when it came to the subsistence of the employees, the arrangement was justified. However, as the purpose of the package was also to support re-employment, the employer had discriminated against the plaintiff, who wished to continue working, by denying him the package.

Supreme Court Ruling

Difference in treatment ensured equal treatment

The Supreme Court found that the plaintiff had been placed in a less favourable position than the other redundant employees based on his age. Nevertheless, the court considered that the aim of the support package was to support those who were left in the most vulnerable financial position after the redundancies and, thus, there were justified grounds for differential treatment. Hence, as the terms of the package de facto ensured equal treatment of the redundant employees, the employer was not guilty of unequal treatment.

Further, as the difference in treatment based on age derived from an objectively and appropriately justified purpose relating to employment policy and the labour market, no discrimination was at hand. The Supreme Court therefore dismissed both the discrimination claim and the claim for damages.

Conclusion

In spite of the employer-friendly outcome of the above ruling, age-based allocation of employee benefits remains risky for employers as no general conclusions can be drawn from the judgment. Cautious and thorough preparation of support packages which involve differentiated treatment of employee groups continues to be necessary.

COMPETITION & PUBLIC PROCUREMENT

> WHEN IS IT TOO LATE TO LODGE A DAMAGES CLAIM FOR COMPETITION LAW INFRINGEMENTS?

by Hanna Laurila and Toni Kalliokoski

Hanna Laurila

Hanna Laurila heads the firm's Competition & Public Procurement practice. She advises domestic and international corporate clients in a wide range of competition and public procurement matters. She has also extensive experience in commercial contracts including distribution arrangements.

Toni Kalliokoski

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

Finland is amongst the first EU member states where competition-related damages cases have been tried. Time-barring has emerged as one of the most important issues for both plaintiffs and defendants. So far, the Finnish case law seems to favour plaintiffs.

Limitation period is subject to interpretation

The applicable law in current damages proceedings is the previous Finnish Competition Act. It was replaced in November 2011 but continues to be applied to infringements committed before November 2011. According to this Act, the period of limitation for damages claims is five years and begins to run when the plaintiff knew or ought to have known that it had suffered damage. The wording of the Act is open to various interpretations. As a result, the Helsinki District Court has issued contradictory rulings on time-barring.

In the Timber Cartel damages litigation, which relates to a timber buyers' cartel, the District Court found that the limitation period began to run already from the national competition authority's first press release. In other cases, the limitation period was found to run only from the final infringement decision.

Court of Appeal acts on contradictory rulings

The claims now decided by the Court of Appeal in the Timber Cartel case were lodged in December 2011. This was within five years of the competition authority's fining proposal in 2006.

However, the District Court found that the first press release concerning the investigation in 2004 contained sufficient information for potential plaintiffs to file their claims. The District Court also took into account that there was a

Time-barring to be decided case by case

leniency applicant that had confessed the cartel and that the competition authority considered its case to be strong. The District Court considered that potential plaintiffs ought to have known they had suffered damage on the basis of this information. Therefore, the claims lodged in 2011 were time-barred.

On 21 November 2014, the Helsinki Court of Appeal quashed the District Court's ruling. First, the Court of Appeal held that the beginning of the limitation period must be decided case by case.

Final infringement decision was decisive

Second, the Court of Appeal found that the plaintiffs could not have been expected to lodge claims before the final infringement decision because the cause of action was too uncertain. A leniency application or the national competition authority's fining proposal did not constitute sufficient proof of the existence of an infringement to begin the limitation period.

Despite a case-by-case analysis, the Court of Appeal's reasoning implies that, at least in case of a secret cartel, the limitation period typically begins to run from the final infringement decision.

Appeal judgment is in line with new damages directive

The Court of Appeal's judgment can be seen to strengthen the plaintiff-friendly interpretation of time-barring adopted in the majority of Finnish cases so far. In other antitrust damages cases pending before Finnish courts, the beginning of the limitation period has been held as the final infringement decision (Asphalt Cartel, Car Spare Parts Cartel) or the European Commission's fining decision (Hydrogen Peroxide Cartel). In most cartel cases, plaintiffs could expect to wait until the final infringement decision is available before lodging their claims. This plaintiff-friendly interpretation on time-barring is in line with the European Union's recently adopted Antitrust Damages Directive. However, the matter is not yet finally settled as no Supreme Court precedent exists.

For more information, please see our recent article "Developments in Finnish Private Antitrust Litigation: Finland Fast-Forwards into the Future?" published in the European Competition Law Review Volume 35 Issue 11 2014.

INTELLECTUAL PROPERTY

> EXTENDED COLLECTIVE LICENSING PROPOSED FOR NETWORK PERSONAL VIDEO RECORDING SERVICES

by Inari Kinnunen

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 clients in marketing and consumer law, regulatory matters and life sciences.

A Government bill proposing several amendments to the Copyright Act (404/1961) was presented to Parliament in October 2014. In addition to tackling copyright issues concerning network recording services of television programmes, enhanced protection against copyright-infringing network distribution is proposed. The proposal also includes a specific provision on adjusting unreasonable copyright contract terms. The amendments are intended to enter into force in early 2015.

NPVR Services

Network recording services operate without permissions

There are around twenty network personal video recording ("NPVR") services operational in Finland at the moment, most of which are provided by telecommunications operators, for instance as a part of their broadband access. NPVR services enable effortless time-shifting for consumers, making it is possible to view *e.g.* television programmes at a more suitable time without recording the programmes onto the consumers' own devices.

To date NPVR services have used audiovisual works without permission of the copyright holders and hence the holders have not been compensated for the use of their works. The proposed legislation concerning NPVRs has been prepared on the basis of a stakeholder initiative submitted by television companies, NPVR service providers and collective management organisations, the last of which have an important role in the Finnish copyright system.

In the proposal, Finland adopted the view that NPVR services do not fall within the scope of private use, which as a copyright exception would not require permission from the rights holders.

Finnish solution unique in Europe

Apparently there are no express legislative measures concerning NPVR services in the EU member states at the moment. The Finnish proposal of extended collective licencing would be a unique solution in Europe.

It is evident that separate agreements with different rights holders would be impossible to implement as the number of works and rights holders is so substantial. Extended collective licencing, somewhat of a Nordic speciality in the field of copyright, is now proposed to solve NPVR services' licensing challenges.

Nordic speciality: Extended collective licencing

After the new legislation has entered into force, the NPVR service providers would negotiate direct agreements with the television companies concerning the right to use the broadcasting signal, technical details etc. Secondly, negotiations would be conducted between the collective management organisations and the service providers, and the possible agreements on the use of copyrighted works and remuneration would be legally binding also on non-represented rights holders. This so-called extension effect would also cover foreign works. Nevertheless, the non-represented rights holders would be entitled to individual remuneration from the collective management organisations.

There are specific requirements concerning the collective management organisations, including the approval of the Ministry of Culture and Education and reporting requirements. In order to be approved, the organisation should represent also foreign rights holders as broadly as possible.

No veto for rights holders

Stakeholders as a whole have been pleased with the proposal, but the solution has been criticized by collective management organisations as well as film producers for not including a veto right for the rights holders of programmes. The chosen solution does not allow individual rights holders to prohibit inclusion of their programmes in NPVR services. According to the proposal's reasoning, using a veto right could become practically impossible to carry out in for the NPVR service providers. It remains to be seen, whether the amendments will be passed in the proposed form and how the negotiations will be carried out in practice. According to the proposal, all extended collective licences should be granted simultaneously and with compatible terms.

Finland's goal was to eliminate the legal uncertainties relating to NPVR services and enable consumers to use said services in a sustainable manner – both legally and economically. This is also considered to allow the development of the NPVR services as well as the business models concerning them.

Blocking Orders

Provisions on preventing online access to copyright-infringing material were introduced to the Finnish Copyright Act in 2006. First court-mandated

injunctions to internet service providers ("ISPs") were ordered in 2011 to block access to the file-sharing service Pirate Bay.

Blocking access to copyright-infringing services expanded

Amended rules are now proposed concerning blocking access to infringing services in situations where the administrator of the service is unknown. A court could issue an injunction ordering an ISP to block access as a result of legal action brought by the rights holders even if the actual infringer is unknown. Furthermore, cost issues relating to the enforcement would be clarified, and assessment of the injunction's reasonableness would be required from the court, also in relation to the users of the service.

Adjustment of Contract Terms

Copyright assignment contracts' reasonableness highlighted

To date it has been possible to make adjustments to copyright contracts if they have been considered as unreasonable under the Contracts Act. In order to increase awareness of the possibility of adjustments and to enhance the importance of good contract practice in copyright assignment contracts, a specific provision on adjustment of unreasonable terms of copyright assignment contracts is now proposed.

The provision would only apply to contracts between the original author and the first assignee. As regards other contractual relationships, the Contract Act's adjustment provision would continue to apply. The new provision is aligned with the corresponding provision in the Contracts Act, and the intention is not to alter the present legal practice. In assessing reasonableness, account should be taken *e.g.* of existing practices in the respective field of business.

The objective of the proposal is to make copyright assignment contracts reasonable for both parties. Copyright holders, on the other hand, have raised concerns over legal certainty. However, adjustment of contracts by courts has been and most likely will remain unusual.

D&I NEWS AND EVENTS

D&I APPOINTS ANDERS CARLBERG AS THE NEW MANAGING PARTNER

> Mr Anders Carlberg has been appointed as the new Managing Partner of Dittmar & Indrenius as of 1 January 2015. The long-term Managing Partner, Mr Jan Ollila, returns to client advisory work and takes on the role as Senior Partner and Chairman of the Board.

D&I ADVISED ADELIS EQUITY PARTNERS

> D&I advises Adelis Equity Partners Fund I in its acquisition of a majority stake in Med Group Oy, one of the fastest growing healthcare services companies in Finland, from Terveysrahasto Oy and the company's two founders. The founders together with the broader management team continue to own a significant part of the company. The company caters to the public sector as well as individual customers across Finland.

D&I ADVISED J.P. MORGAN LIMITED

> D&I advised J.P. Morgan Limited as Arranger in the Finnish aspects of the financing for Geberit AG's SEK 9.7 billion public tender offer for all shares in Sanitec Oyj listed on NASDAQ Stockholm.

D&I ADVISED KAROLINSKA DEVELOPMENT

> D&I advised Karolinska Development AB, the Swedish listed Life Sciences company when it closed its financing round in the Finnish drug development company Forendo Pharma Oy, which announced the successful closing of the EUR 12 million financing round. Novartis Venture Fund and MS Ventures participate in the financing round, alongside the current major shareholders Karolinska Development AB, Novo Seeds and Finnvera.

D&I ADVISED MELLBY GÅRD

> D&I advised Mellby Gård AB, the Swedish investment company, in its acquisition of the joinery installations business of Mestarinikkarit Oy and its Swedish subsidiary Nikkarit AB.

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