

Q1

D&I Quarterly 2009

MERGERS & ACQUISITIONS

- » Draft Statements of the Takeover Panel

FINANCE & CAPITAL MARKETS

- » Supreme Court Rules on Book-Entry Register Information
- » Securities Market Legislation to be Amended

CORPORATE & COMMERCIAL

- » Finnish Competition Law under Review
- » ECJ Rules on Termination of Employment in connection with Transfer of Business

DISPUTE RESOLUTION

- » New Rules on International Jurisdiction

D&I EVENTS

MERGERS AND ACQUISITIONS

> DRAFT STATEMENTS OF THE TAKEOVER PANEL ON DISPOSAL OF TARGET SHARES AND CASH MERGERS

by Anders Carlberg and Wilhelm Eklund

Background

A committee was appointed by the Finnish Takeover Panel in September 2008 with the objective to review the need to amend the Takeover Code recommendations with regard to mergers, sale of securities that are subject to a tender offer and combinations of separate classes of shares. The committee issued its report on 25 February 2009.

No Amendments to the Takeover Code

Overall, the committee concludes that no amendment of the Takeover Code recommendations is necessary. However, with regard to mergers and sale of securities that are subject to a tender offer, the interpretation of the recommendations requires clarification.

Pursuant to the committees' findings, the Takeover Panel published draft statements concerning the interpretation of the recommendations.

Disposal of Target Shares

The Takeover Panel interprets the recommendation concerning the obligation of the offeror to, insofar as possible, seek to ensure that the conditions set for the completion of the offer are satisfied, as prohibiting the offeror from selling securities that are subject to the offer, unless special reasons for such transactions exist. In addition, the Takeover Panel interprets the recommendation as meaning that the offeror may not execute such transactions without prior disclosure to the market and recommends that the Takeover Panel be consulted in advance.

This clarification can be derived from the failed tender offer for all shares in TietoEnator made by Nordic Capital in the spring of 2008. In the offer document, Nordic Capital had reserved the right to dispose of shares in the target during the validity of the offer. Nordic Capital eventually sold its entire stake of 4.4 per cent without prior disclosure to the market, and subsequently announced the withdrawal of the offer.

Cash Mergers

The Takeover Panel notes that the offeror may consider and include in the offer document a merger as an alternative, should the offeror fail to acquire 9/10 of the shares and votes in the target company through the offer, *i.e.*, fail to achieve sufficient ownership in order to initiate a squeeze-out. The Takeover Panel's interpretation of the recommendation is that, as a starting

point, the shareholders of the target (merging) company should be allowed to remain shareholders of the acquiring company in such merger, consequently limiting the possibility of cash mergers. Offering other merger consideration than shares in the acquiring company would require a special reason, and the Takeover Panel should be consulted in advance.

Market Participants Requested to Comment

The Takeover Panel has requested market participants to comment on the draft statements and to provide general comments on the viability of the Takeover Code recommendations by 8 April 2009.



Anders Carlberg

Partner Anders Carlberg heads D&I's Mergers and Acquisitions practice area and has extensive experience in PTO transactions.



Wilhelm Eklund

Associate Wilhelm Eklund is a member of D&I's Mergers & Acquisitions practice area team. He holds separate degrees in law and economics and completed an internship with JP Morgan before joining D&I in 2008.

FINANCE AND CAPITAL MARKETS

> SUPREME COURT RULES ON LIABILITY FOR INCORRECT BOOK-ENTRY REGISTER INFORMATION

by Juha-Pekka Mutanen and Tove Johansson

Under Finnish law, a book-entry account operator is irrespective of negligence liable to compensate damage caused by an incorrect registration.

Importance of Ruling

According to a recent ruling of the Supreme Court, this strict liability does not, however, extend to situations where:

- (i) an incorrect register entry results from the invalidity of an agreement (e.g. pledge agreement); and
- (ii) the person who has suffered damage is a party to that agreement (e.g. pledgee).

Background

A considerable part of shares and securities in Finland are no longer physical documents but registrations in special book-entry accounts ("*arvo-osuustili*") containing information on the account holder and the type and number of book-entries.

The book-entry accounts are part of the book-entry register, run by the Central Securities Depository ("*arvopaperikeskus*"). The book-entry register contains information on book-entries as well as on the rights and obligations pertaining to accounts and book-entries. Only authorized book-entry account operators ("*tilinhoitajayhteisö*") or their agents have the right to make registrations in the book-entry register.

In order to be validly perfected, a pledge of securities in a book-entry account must be registered in the relevant account. The pledge is registered upon the application of the pledgee.

Supreme Court Decision

On 22 December 2008 the Supreme Court handed down its decision (KKO:2008:116) in a civil case concerning a book-entry account operator's liability for damages caused by a forged pledge agreement and a resulting incorrect registration.

Facts of the Case

The Supreme Court's ruling establishes that account operators' obligation to examine the preconditions of the registration extends only to a formal examination of the relevant documents, in particular, examination of the legality of the request and the preconditions of the registration.

In October 2001, the sole shareholder of Company X sold his shares to a single buyer. A part of the purchase price was deferred and secured by means of a pledge of a book-entry account containing listed securities. The book entry account and the listed securities were owned not by the buyer but by another party, Company Y. The book-entry account was held by an agent of an account operator.

The pledge agreement was concluded by Company Y and allegedly signed by a person authorized to sign for this company. A person acting on behalf of the buyer had sent a copy of the signed pledge agreement to the agent of the account operator. Upon the seller's request, the agent registered the pledge and sent a confirmation thereof to the seller and Company Y.

When the buyer did not pay the remaining part of the purchase price, the seller tried to enforce the pledge. At that time it turned out that the signature of the representative of Company Y (the pledgor and account holder) had been forged, and the pledge could not be realised. As the seller could not recover the full amount of his claim from the buyer or the buyer's representative, he sued the account operator and its agent for compensation of the loss incurred as a result of an incorrect registration of the pledge.

Decision and Motivations of the Supreme Court

The Supreme Court ruled on the question whether the account operator and its agent should have a strict liability for the damage caused to the seller due to the invalidity of the pledge.

The Supreme Court held that the aim of the book-entry register system and the rationale of the regulations on strict liability are to protect public confidence in the correctness of information in the public book-entry register. As the seller was a party to the forged pledge agreement, he was not a third person within the scope of such particular protection. According to the Court, the damage was caused by the invalidity of the pledge agreement and not by the incorrect registration.

Even though account operators should follow registration guidelines which emphasize the duty to examine the registration requests, the Supreme Court considered that account operators' obligation to examine the preconditions of the registration cover only a formal examination of the documents.

The Supreme Court therefore ruled, as had the district court and the court of appeal before, in favour of the account operator and its agent and dismissed the claim.

Consequences

As a consequence of the ruling, pledgees are recommended to independently ascertain the validity of the pledge documentation to which they are a party – instead of relying on the account operator's decision concerning registration of the pledge.



Juha-Pekka Mutanen

Partner Juha-Pekka Mutanen heads D&I's Finance & Capital Markets practice area. He advises clients in various capital market and finance transactions as well as in mergers and acquisitions.



Tove Johansson

Associate Tove Johansson is a member of D&I's Finance & Capital Markets practice area team. She holds separate degrees in law and economics and in addition to finance transactions she advises clients in corporate law matters.

FINANCE & CAPITAL MARKETS

> SECURITIES MARKET LEGISLATION TO BE AMENDED

by Anders Carlberg and Eeva Pohja

Working Group Appointed

The Ministry of Finance appointed on 2 February 2009 a working group to draft proposals on a new Securities Market Act, new legislation on indirect holding of securities, amendments to legislation on the book-entry system and other related legislation. The working group will give its legislative proposals by the end of 2010.

Purpose of the Reform

The purpose of the reform is to ensure that the securities market legislation is functional, clear and understandable. The current legislation is fairly complex and incoherent having been amended several times over the years through, *inter alia*, partial reforms implementing EU directives.

The new legislation is expected to be competitive and increase the efficiency of cross-border operations by enabling the creation of international structures and operating models. The intention is to avoid deviations from the regulations of other EU Member States that are essential operators in the market.

Furthermore, the purpose of the amendment is to protect the availability, security and feasibility of investment services offered by non-Finnish service providers. Also the supervision of the securities market and the sanctions for illegal conduct will be emphasized in the new legislation.

Tasks of the Working Group

The Ministry of Finance has listed several specific issues that need to be analyzed by the working group and covered in the proposals to be drafted in the form of government bills. The main tasks of the group include the following:

- (i) disclosure obligations and related responsibilities of the issuer and the management will be simplified;
- (ii) provisions concerning takeovers bids and mandatory bids, which have previously caused difficulties in interpretation, will be amended;
- (iii) provisions on the abuse of insider information and insider registers will be clarified;
- (iv) the concepts and definitions of the legislation will be harmonized and the structure will be simplified;

- (v) the general principles and the scope of the legislation will be clarified;
- (vi) custody, clearing and settlement services of securities will be improved; and
- (vii) the current sanctions for illegal conduct will be assessed as well as its effect on market players and investor protection.



Anders Carlberg

Partner Anders Carlberg heads D&I's Mergers and Acquisitions practice area, in addition his work focuses on capital markets and financing transactions as well as on corporate law.



Eeva Pohja

Associate Eeva Pohja joined D&I in 2007. She has gained experience of mergers and acquisitions transactions and is currently a member of D&I's Finance & Capital Markets practice area team.

CORPORATE AND COMMERCIAL

> FINNISH COMPETITION LAW UNDER REVIEW

by Hanna Laurila and Suvi Knaapila

Further Harmonization in Merger Control

The Competition Act 2010 Working Group appointed by the Ministry of Trade and Industry in June 2007 to identify needs to reform the Finnish Act on Competition Restrictions (the "Act") published its report on 29 January 2009.

The Working Group found that current merger control provisions are in general well-functioning and there is no need to introduce changes to notification thresholds.

However, one of the most debated issues has been the substantive test used in the assessment of mergers and acquisitions. In 2004 when the Act was last amended, Finland chose to keep the traditional dominance test. The main concerns in relation to the test, *i.e.* the possibility of tighter intervention policy and decreased legal security, are discussed in the report. Based on substantial case law and experience gained from the application of the so called SIEC test (significant impediment to effective competition) in the EU, the report proposes a switch to SIEC test also in Finland. In contrast with the EC Merger Regulation, co-ordination effects resulting from joint ventures will remain outside the scope of merger control.

The report also proposes clarifications to current review practices. The one week time limit for notification following conclusion of a binding agreement would be abolished and the possibility of notifying transactions before a binding agreement would be codified. As a result, the report proposes granting the Finnish Competition Authority ("FCA") a more specific right to extend procedural time limits in case of lack of information or delays in providing information.

The general prohibition to implement the transaction prior to approval is proposed to be extended. A transaction which is cleared with conditions could not be implemented if the notifying party appeals the approval decision (*i.e.* the imposed conditions) to the Market Court.

Increased Prioritisation of Cases and New Restrictions for Appeal

The report proposes that the FCA would be given more effective discretion to focus its resources on the most harmful competition restraints. Both complainants and accused companies would more expediently than before be notified of whether or not the FCA plans to open a full investigation. The Working Group further suggests that appeal against a decision to dismiss a

New Limitations to Publicity of Documents

complaint would be possible only subject to the Market Court granting leave to appeal. The Finnish Act on Openness of Government Activities (the "Openness Act") imposes on the FCA an extensive obligation to provide copies of documents in its possession. According to the report, the FCA should however be given the possibility to refuse to disclose documents relating to a specific investigation until a draft decision, which roughly corresponds to a statement of objections, is sent to the parties. Further, the FCA should have a more specific right to protect leniency applications.

Extended Inspection Rights for the FCA

The report proposes an extension of the inspection rights of the FCA to correspond to the powers of the European Commission. The FCA could conduct an inspection also outside the business premises of the suspected undertaking, for example in private residences provided that it reasonably suspects a severe competition restriction and it has sought an advance authorisation from the Market Court.

Significant Potential Increase in Fines

The report proposes harmonisation of the competition infringement sanction system with Council Regulation (EC) No 1/2003, in order to improve predictability.

In its current practice the FCA has imposed fines at the lower end of the scale. Contrary to the current national practice it is proposed that a group of companies could under certain circumstances be considered as a single undertaking within the meaning of Finnish competition law. The maximum statutory fine is 10 % of the total turnover of an undertaking, regardless of whether it is single legal entity or a group of companies. The proposed change could therefore significantly increase the maximum and the actual amount of fines.

In addition, the report proposes a clarification to the succession rules regarding liability for competition law infringements. The aim is to secure that liability remains after corporate transactions and even if the infringing entity would have (legally) ceased to exist.

Clarified and Updated Rules for Damages

The current Act only provides for compensation of damages caused to a business undertaking. It is proposed that everyone who has suffered damage as a result of an infringement would be entitled to claim damages on the basis of the Act. This amendment would harmonize the Finnish rules with the Community legislation.

Limitation periods for damages claims would also be clarified. Currently the right for compensation expires if the action for damages has not been instituted within five years from the date that the business undertaking was informed or should have been informed of the occurrence of the damage. It has been difficult to determine the exact moment when the right to claim

damages expires. Therefore it is proposed that the right to claim damages would expire after ten years have elapsed from the day on which the infringement was committed or, in case of a continuing infringement, on which the infringement ceased. If a claim is based on a decision by a court or the FCA, the limitation period would expire two years after the decision has gained legal force.



Hanna Laurila

Senior Attorney Hanna Laurila heads the firm's Competition and Public Procurement practice. She holds separate degrees in law and economics and has previously worked with the Finnish Competition Authority.



Suvi Knaapila

Associate Suvi Knaapila joined D&I in 2008 and is member of the firm's Dispute Resolution practice area team. Prior to joining D&I she completed an internship with a Dutch private equity fund.

CORPORATE AND COMMERCIAL

ECJ RULES ON TERMINATION OF EMPLOYMENT IN CONNECTION WITH TRANSFER OF BUSINESS

by Christian Langenskiöld

Introduction

The European Court of Justice ("ECJ") handed down a judgment on 27 November 2008 in relation to a reference for preliminary ruling from the Finnish Supreme Court. The referred questions concerned the obligations of an assignee towards the employees' of a transferred company. The ECJ ruled that the assignee cannot be liable for the deterioration of an employee's working conditions if the assignee has fulfilled its obligations under the transferred employment agreement until it expires. However, the employee is entitled to salary and other benefits during the time of notice if employment is terminated due to such deterioration.

Facts of the Case

The case concerns the interpretation of Directive 2001/23/EC regarding the protection of the rights of employees' in the event of a transfer of businesses. In the case at hand, ownership of the restaurant in which the plaintiff worked was transferred, after which the assignee informed the plaintiff that the terms of her employment would be changed. The plaintiff terminated her employment agreement due to the deterioration of her working conditions. The plaintiff's previous collective terms of employment had officially ended on the day the transfer of the restaurant's ownership took place.

The plaintiff sued the assignee based on Finnish legislation that implements Directive 2001/23/EC and stipulates that the assignee is responsible for the termination of employment if such termination is due to the substantial weakening of the employee's employment terms as a result of the transfer of the employer's business. The plaintiff claimed damages based on the Finnish labour legislation that stipulates a right of a former employee to receive damages from the employer when termination has taken place without justifiable reason. Even if the termination is justifiable, the employee has a right to receive her salary during the notice period.

The Helsinki District Court and the Court of Appeal ruled against the plaintiff. The plaintiff appealed to the Supreme Court. She claimed that one purpose of Directive 2001/23/EC is to establish liability on part of the assignee in cases where the assignee has abided by the employee's collective terms of employment but has changed those terms when they have expired. Thus, the assignee would be liable for the termination of employment if the expired terms of an employment relationship are renegotiated to the

employee's disadvantage. The Finnish Supreme Court reference included two questions concerning the situation where an employer has fulfilled its obligations under a collective agreement and renegotiated such an agreement when it has expired:

- (i) is the employer liable for the termination of the employment agreement when the changes have led to the deterioration of the employee's working conditions; and
- (ii) conditional upon liability being established under point (i), should damages be the same as when an employment agreement has been unlawfully terminated or less extensive and, thus, only include compensating the employee's pay and other benefits during the notice period.

Ruling of the European Court of Justice

The ECJ held that the purpose of Directive 2001/23/EC is to secure that the rights of an employee are the same under the assignee as under the previous employer when ownership of a company is transferred. However, the Member States may themselves decide how to achieve the result envisaged by the Directive in relation to the rights of an employee when ownership of an employer is transferred. The ECJ also stated that national legislation must secure an employee's right to pay and other benefits during the notice period if employment is terminated in connection with the transfer of business.

The ECJ held that an assignee's duty to secure an employee's rights under a collective agreement which is transferred from the previous employer to the assignee only remains in force until such an agreement expires. In other words, the assignee can renegotiate the employment agreement when the old one is no longer effective. Thus, the ECJ ruled against the plaintiff's argument that the Directive secures an employee's rights beyond the term of the employment agreement.

Conclusion

The ruling of the ECJ clarifies the scope of the Directive 2001/23/EC. It establishes that an assignee that has fulfilled its obligations according to the law and its duties under employment agreements is not liable for a termination of employment that is based on the deterioration of an employee's working conditions.



Christian Langenskiöld

Associate Christian Langenskiöld joined D&I in 2008 and is a member of D&I's Corporate and Commercial practice area team.

DISPUTE RESOLUTION

> NEW RULES ON INTERNATIONAL JURISDICTION IN CIVIL MATTERS

by Markus Mattila

Scope of Application

In February Parliament adopted new rules in relation to both domestic and international jurisdiction in civil matters. The new jurisdiction rules will enter into force on 1 September 2009. As Finland is a member state of the European Union, the EU rules on international jurisdiction, such as the Brussels I and II Regulations, (EC) No 44/2001 and (EC) No 2201/2003, and other provisions regarding certain specific subject matters, are applicable. The new rules on international jurisdiction will apply in cases falling outside the territorial or subject matter scope of the applicable EU regulations or international conventions binding Finland.

Principal Grounds for Jurisdiction

The main and primary basis for international jurisdiction according to the new rules is the domicile or habitual residence of the defendant.

In addition, in the following cases an alternative jurisdiction is also available:

- (i) as regards disputes relating to the operations of a branch, agency or other establishment of a legal entity, the location of the establishment;
- (ii) as regards disputes relating to employment contracts, the place where the work is habitually carried out or, in case the work is not habitually carried out in Finland, also the place where the employer, which engaged the employee, has an establishment;
- (iii) as regards disputes relating to damages not based on a contract, the place where the damage or the act or negligence causing the damage occurred;
- (iv) as regards immovable property, the location of such property; and
- (v) as regards disputes relating to maintenance allowance, the domicile or habitual residence of either the claimant or the respondent.

However, Finnish courts have exclusive jurisdiction with regard to, *inter alia*, certain family law or inheritance matters; and although these have not been expressly mentioned in the Act, registration or validity of intellectual property rights; validity of entries into public registers; and status of legal persons or validity of decisions of their organs.

The new rules are hence based on the concept of a "sufficient connection" and follow internationally recognised jurisdictional bases. However, even if a "sufficient connection" to Finland exists based on the above-mentioned grounds, courts will not hear a case if it is evident that a Finnish court ruling would not in fact have legal relevance, e.g. in case the Finnish ruling would not be enforceable or recognised in another relevant state.

Facultative Jurisdiction

Courts will also have facultative jurisdiction *inter alia* in certain consumer certain matters; cases of multiple simultaneous actions; certain cases of subsidiary jurisdiction, such as place of previous residence or domicile in Finland or location of assets or property in Finland; and connection to Finland based on other material circumstances.

On the above-mentioned grounds, courts would have jurisdiction unless it is evident upon an *in casu* review that a Finnish court ruling would not in fact have legal relevance or it is clearly more appropriate to hear a case in a court of another state taking into consideration connections of the dispute to other states, production of evidence, costs to be incurred by the parties and other circumstances.

According to current domestic law, a temporary place of residence or location of assets in Finland, regardless of the value, has generally been considered sufficient grounds for the exercise of jurisdiction. According to the new rules, Finnish courts would no longer automatically have jurisdiction on such grounds, which may in many cases be considered overreaching. The courts would have more discretion to assess whether there are sufficient connections to Finland in such cases.

As regards jurisdiction based on "other material connection to Finland" the place of performance of a contract being in Finland will usually be a "sufficient connection", according to the Government bill. However, in contrast to the Brussels I Regulation, such a connection would not automatically establish jurisdiction in case it would be more appropriate to hear the case in a court of another state. Further, the fact that a contract being the subject of a dispute has been made in Finland is not alone a sufficient basis for establishing jurisdiction according to the Government bill.

Even where it would be clearly more appropriate to hear a case in the courts of another state, Finnish courts shall nevertheless have jurisdiction in case the foreign court procedure or the substantive law would be contrary to fundamental principles of Finnish law (*ordre public*). The *ordre public* exception would undoubtedly be applied only in extreme situations. However, as regards substantive law, punitive damages have been expressly mentioned in the Government bill as an example of a remedy that is contrary to fundamental principles of Finnish law.

Jurisdiction Agreements and Examination of Jurisdiction

Even if a dispute would not be deemed to have a sufficient connection to Finland, courts accept jurisdiction based on a jurisdiction agreement unless the dispute is subject to the exclusive jurisdiction of a particular court. In consumer, employment and maintenance allowance matters the agreement can only be made after the dispute has arisen. In order to be valid, jurisdiction agreements must be made in writing. In contrast to domestic jurisdiction agreements, agreements on international jurisdiction need not necessarily be signed.

In matters falling within the scope of exclusive jurisdiction, Finnish courts examine the correct jurisdiction *ex officio*. Otherwise the correct jurisdiction is examined only in case the defendant makes a jurisdiction plea or does not respond to the action at all. However, even in cases where a jurisdiction agreement is allowed, Finnish courts can dismiss an action if the judgment clearly would not have legal relevance for the parties.

Conclusion

Particularly as a result of the application by analogy of the existing provisions on domestic territorial jurisdiction, the international jurisdiction of Finnish courts has been extensive, even where there may have been only a weak connection to Finland. Further, due to the lack of statutory law, in some cases it may have been difficult to predict the outcome of court rulings on international jurisdiction. The proposed new rules provide a welcome and long-awaited reform, as the rules improve legal certainty and eliminate certain grounds for jurisdiction that are arguably excessive.



Markus Mattila

Senior Attorney Markus Mattila is a member of D&I's Dispute Resolution practice are team. He has considerable experience and represents clients in a broad range of litigation matters, amongst other IP related disputes.

D&I EVENTS

INTERNATIONAL SPEAKING ENGAGEMENTS

- > Partner Petteri Uoti will speak on the topic "Collective redundancy in times of crisis: Are the normal rules applied in abnormal situations?" at the annual congress of the European Employment Lawyers Association in Amsterdam on 6 May 2009 (see <http://www.eela.org/>).
- > Associate Eva Storskrubb will speak on the topic "What changes will European procedural harmonisation bring" at the annual meeting of the International Association of Procedural Law in Toronto on 5 June 2009 (see <http://www.iapl2009.org/>).

Dittmar & Indrenius is an independent law firm, established in 1899, focused on the quality of its services within four practice areas: mergers & acquisitions, finance & capital markets, dispute resolution, and corporate & commercial. 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*