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MERGERS & ACQUISITIONS

> **AUTHORISATIONS FOR SHARE ISSUE***by Tove Johansson**New Companies Act
brings more flexibility*

The new Companies Act, in force since September 2006, implied certain changes concerning authorisations to the board to decide on a share issue. Such authorisations are often used, for instance, in connection with M&A transactions where all or part of the consideration is paid as shares in the acquiring company.

Contrary to the previous legislation, the shareholders' meeting may now authorise the board to decide on a free issue. Also, there is no longer any limit on the number of shares which the board may be authorised to issue, whereas previously the authorisation (combined with other unused authorisations) could not exceed 20% of the total number of shares or votes at the time of the shareholder decision and the time of the board's decision concerning the new issue.

Under the new Act, the authorisation to the board must specify the maximum number of shares to be issued and the type of shares. The authorisation can thus not allow the issue of an unlimited number of shares.

Use of new regulations

Public companies have to some extent taken advantage of the increased flexibility in the new Act. At Annual General Meetings during the spring of 2007, authorisations have been issued in a majority of the companies, but the number of shares authorised to be issued often remained at around 20% or below. Some companies, however, authorised the issuance of a greater number of shares, such authorisations ranging from 50% to over 80%. These companies include media groups and electronics manufacturing companies.

There does not seem to be any specific uniting factor between the companies that have chosen to authorise the increase of their share capital with considerably more than the 20% previously allowed. Companies with a single important owner seem more prone to grant extended authorisations, but on the other hand, many companies with single important owners have granted relatively limited authorisations or have not granted any authorisation at all.

DISPUTE RESOLUTION

> CIVIL PROCEDURE AND EU LAW – DOCTORAL THESIS

Prize for best comparative-law thesis

Our associate, Ms. Eva Storskrubb, LL.Lic., successfully defended her doctorate thesis in October 2006 at the European University Institute in Florence.

Ms. Storskrubb has recently been awarded the 2007 Mauro Cappelletti Annual Prize for best comparative-law doctoral thesis by the Law Department of the European University Institute. The publication of her thesis is also forthcoming in early 2008 by Oxford University Press with the proposed title *Civil Procedure and EU Law: A Policy Area Uncovered*.

Her thesis examines the burgeoning European Union activity in the field of cross border civil and commercial litigation. The European Union has during the past years enacted several specific legislative measures and launched various legislative initiatives within the field of cross-border litigation. These deal amongst other with rules for service of documents and taking of evidence in cross border litigation as well as the classic international procedural questions of establishing jurisdiction and enforcement of judgments in cross border disputes.

Second generation measures

However, the European Union has also enacted so called second generation measures that are novel on the supranational level and introduce harmonised procedures for such procedural matters as payment orders and small claims. The European Union is also increasingly focusing attention on supportive networks and training of judges in order for the new procedural rules to be applied uniformly and efficiently throughout the Member States.

In Ms. Storskrubb's thesis the impact of these cross border procedural measures is evaluated, in particular their impact on due process rights. The policy area is also examined from the perspective of broader themes of the European integration process: market building, citizenship, fundamental rights, subsidiarity and governance.

The forthcoming book will conclude with a comparison of the European policy with the general procedural trends and broader international procedural efforts and with proposals for the future development of the policy area.



Eva Storskrubb specialises in civil and commercial dispute resolution. She joined Dittmar & Indrenius in 2006. After graduating from the University of Helsinki in 2000 and before conducting research in Florence she gained practical experience with a niche firm of solicitors in London dealing with commercial litigation and arbitration. She has also been a trainee both at the European Court of Justice and the European Commission.

CORPORATE & COMMERCIAL

> **NEW PUBLIC PROCUREMENT ACTS***by Hanna Laurila*

The new Finnish acts implementing the EC Public Procurement Directives 2004/18/EC and 2004/17/EC (the "Directives") entered into force on 1 June 2007. They are applied to procurement procedures beginning after the entry into force of the acts.

The two new acts reflect the two directives. They replace the old Public Procurement Act as well as related Decrees. The Act on Public Procurement (348/2007, in Finnish "Hankintalaki") covers procurement procedures of public authorities and other public contracting entities ("the Procurement Act"). The Act on Public Procurement in Special Sectors (349/2007, in Finnish "Erytisalojen hankintalaki") covers procurement procedures of entities operating in the water, energy, transport and postal services sectors ("the Act for Special Sectors"). The Act for Special Sectors is similar to the Procurement Act but the procedures are more flexible.

The comments below mainly relate to the Procurement Act which is more commonly applied.

New national thresholds

New national thresholds were introduced to the Public Procurement Act after a heated political debate. The thresholds are EUR 15,000 for goods and services, EUR 50,000 for healthcare and social services and EUR 100,000 for works contracts. The Act for Special Sectors does not include national thresholds and is applied only if EC thresholds are exceeded.

Notice obligation

According to the new Procurement Act, the contracting entities may no longer invite tenders without public notice if the national thresholds are exceeded. National notices are published in the electronic HILMA-system maintained by the Finnish Ministry of Trade and Industry. Companies willing to participate in public procurement procedures must monitor the notices more actively than before. The number of national notices is expected to increase from approximately 2,000 to 40,000 per year due to the notice obligation. This may improve the possibilities for smaller companies and new entrants to participate in procurement procedures.

Procedures

The Procurement Act largely corresponds to the existing procurement rules. The procedures are defined in more detail than before and the aim is to apply the same type of procedures in procurements both at the EU and national level. The Procurement Act also includes new procedures based on the Directives such as competitive dialogue and framework agreements. The

use of electronic processes such as dynamic purchasing systems and electronic auction will be defined by a Decree at a later stage.

If the new national thresholds are not exceeded, the Procurement Act does not apply. The procurement entities may then apply their own procurement procedures which must fulfil the minimum requirements for transparency and non-discrimination under EC law.

Conduct of the procedure

The detailed rules of conduct laid down in the Directives continue to be applicable in procurements exceeding the EC thresholds while the rules for national procedures rules are more flexible. The main amendments to the Procurement Act required by the Directive include the following:

- (i) Tenderers which have committed certain serious crimes must be excluded;
- (ii) Relative weight of the criteria chosen to determine the most economically advantageous tender must generally be specified in advance;
- (iii) The details for publishing notices have been updated and will be laid down in a specific Decree.

In house -rules

Neither the EC nor the national procurement provisions have included specific guidance on when procurement arrangements with affiliated entities can be concluded without public procurement procedure. The case law of the European Court of Justice gives some guidance to this question. Although the case law is still in a state of flux, it was considered necessary to include the existing legal guidance to the new Procurement Act.

The Procurement Act is thus not applied to procurements from a formally independent affiliate entity provided that

- (i) the contracting entity controls the affiliate entity in the same manner as it controls its own entities; and
- (ii) the affiliate entity conducts the main part of its activity with the contracting authority or authorities by which it is controlled.

The preparatory materials specifically refer to current case law which indicates that shareholding by a private undertaking in the affiliated entity automatically means that condition (a) above is not fulfilled and public procurement procedures apply.

Legal protection

Since the EC directives on remedies in public procurement procedures are currently under review, the rules on legal protection were not amended at this stage. However, the possibility to appeal to the Market Court does not exist if the national thresholds are not exceeded.

CORPORATE & COMMERCIAL

> COURT OF APPEAL RULES ON COPYRIGHT TO CONTRACT TERMS

by Inari Kinnunen

The Turku Court of Appeal issued on 20 February 2007 a judgment concerning copyright to standard contract terms (THO 2007:3). The main issues of the case were whether the disputed contract terms were considered as copyrighted work and whether copyright infringement had occurred. The judgment has gained legal force.

Contract terms

Both parties were Finnish companies engaged in electronic commerce via the Internet. The claimant used in its electronic marketplace standard contract terms that were drawn up by the company's managing director. The defendant had very similar standard contract terms in its electronic market place, and it was claimed that by publishing the terms in the Internet it had infringed the claimant's copyright.

The claimant's standard contract terms were detailed and consisted of numerous sections and subsections. The terms contained more than six pages of provisions on ordering, prices, delivery, payment, right to return, guarantee and defect situations. The contents of the terms were to some extent similar to other e-commerce companies' contract terms due to consumer protection and other mandatory legislation as well as commercial practices.

An employee of the defendant admitted having compiled the terms published on the defendant's website from various e-commerce marketplaces and other companies' standard contracts, one of which was the claimant's standard contract. Most of the terms were, however, identical to the claimant's contract terms, and the contracts even included the same typing errors.

Copyright protection

The standard for copyright protection is relatively low in Finland, but is always subject to case-by-case evaluation. In order to obtain copyright, the work in question must be independent and original.

Before bringing action in the Hämeenlinna District Court, the claimant had requested an opinion from the Finnish Copyright Council, a body which gives non-binding opinions in matters related to copyright and consists of copyright experts and representatives of owners and users of copyrighted materials. The Copyright Council's opinion (2003:17) dealt solely with the question whether the claimant's contract terms should be considered as copyrighted work.

The Copyright Council considered the claimant's standard contract terms as copyrighted work. Both the District Court and the Court of Appeal shared that view. Even though the contents of the standard contract were relatively commonly used in similar contracts, the expressions and choices of words were deemed to differ from other contracts. The contract terms in question were therefore to such a degree independent and original that they were as a whole considered as a literary work protected pursuant to Section 1 of the Finnish Copyright Act (404/1961). The Copyright Council also stated that mere headings of contract, individual pieces of information and customary contract clauses are not protected as copyrighted works.

The Appeal Court considered that the defendant had in the Internet produced a copy of the claimant's copyright protected work. Since the defendant did not have the claimant's consent to such action, it had infringed the claimant's exclusive right to control the work by producing copies thereof.

CORPORATE & COMMERCIAL

> RENEWED ACT ON COOPERATION WITHIN UNDERTAKINGS

by Seppo Havia

The renewed Act on Cooperation within Undertakings (the "Act"), which brings about certain significant changes, entered into force on 1 July 2007.

SCOPE OF APPLICATION

The new Act is applied to undertakings that regularly employ at least 20 employees, instead of the former requirement of 30 employees. However, undertakings employing regularly at least 20 but less than 30 employees are obliged to follow the Act only as of 1 January 2008, unless the possible redundancies concern at least ten employees. Furthermore, certain provisions of the Act are applied also in the future only to undertakings employing at least 30 employees, such as provisions regarding the principles and practice in recruitment and internal communications as well as proceedings with different plans and other matters based on mandatory legislation.

MAJOR AMENDMENTS

Information to be provided on subcontractors and part-time employees

The employer is obliged to provide employee representatives, on their request, with annual clarification of the use of external subcontractors. If the use of external subcontractors affects permanent personnel, the effects must be dealt with in the cooperation procedure. The employer is also obliged to provide employee representatives with information on fixed-term and part-time employees on a quarterly basis. Further, an undertaking is obliged to prepare a personnel plan and training targets every year; the plan and targets must be dealt with in the cooperation procedure. The employee representatives' right to obtain information has also been widened.

The changes extended the minimum negotiation time regarding redundancies and lay-offs from seven days to 14 days. However, the former six-week negotiation time continues to apply where the planned redundancies affect at least ten employees and lay-offs last for at least 90 days and affect at least ten employees.

Transfer of business

After transfer of a business the transferee is obliged to provide the employee representatives with information regarding, *inter alia*, the grounds for the transfer, the legal, financial and social consequences of the transfer to employees as well as the planned measures concerning employees. The information must be given within one week after the transfer. Furthermore, the transferee is obliged to reserve an opportunity for the employee

representatives to present additional questions and give answers to these questions.

The period for filing suit against an employer breaching the Act has been harmonized with other labour legislation. Action for breach of the Act must be commenced within two years after the expiration of the employment relationship. In case the employment relationship continues, suit must be filed within two years from the end of the calendar year during which the breach took place.

SANCTIONS

The principles for determining compensation for an employee who has been made redundant without following the provisions of the Act generally remain unchanged. However, the Act now sets the maximum amount of compensation at EUR 30,000 in respect of each employee concerned, whereas previously the limit was 20 times the monthly salary of each affected employee.

An employer or employer representative who breaches the Act may be sentenced to pay fines. The Act also includes a possibility for an employee representative to claim that a court order the employer to fulfil its information obligations pursuant to the Act within a specified period of time under penalty of a fine.

Dittmar & Indrenius is an independent law firm 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.

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