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FINANCE & CAPITAL MARKETS

> NEW INSIDER GUIDELINES

by Juha-Pekka Mutanen and Tove Johansson

OMX Nordic Exchange Helsinki Oy ("OMX") has prepared and published new Insider Guidelines (*Sisäpiiriohje*) during the summer of 2008. The previous Guidelines have been updated and complemented so as to better reflect developments in the securities market. In addition, the regulatory developments including the Market Abuse Directive and the amendments of the Finnish Securities Market Act have been taken into account. The new Guidelines entered into force on 2 June 2008.

Aims of the revision

The purpose of the revision was to standardize company policies relating to projects and project-specific insider registers. By the introduction of more detailed Guidelines, OMX also aims at improving legal certainty and increasing confidence in the operations of the securities market.

The new Guidelines constitute a minimum standard which listed companies are obliged to comply with. Companies may complement the Guidelines with their own instructions.

Focus on company-specific insider register

The revision of the Guidelines has introduced supplementary explanatory sections. The most significant amendments to the Guidelines themselves have been concentrated to the chapter concerning company-specific insider registers. In addition to a public insider register, listed companies must maintain a company-specific insider register.

The company-specific insider register may consist of

- (i) a permanent company-specific insider register; and
- (ii) project-specific insider registers.

The permanent company-specific insider register lists persons who have regular access to inside information. On the other hand, persons working for the company and other persons who have access to project-specific inside information should be entered in a project-specific insider register.

M&A transactions

For a large part, the amendments to the Guidelines consist of specifications without major substantive changes. The revised Guidelines, however, now contain certain helpful clarifications as to when a corporate acquisition arrangement can be considered as a "project" necessitating the establishment of a project-specific insider register (or, where the company has decided not have such project-specific registers, inclusion of the relevant insiders in the company-specific insider register).

Bilateral acquisition

According to the revised Guidelines, in a bilateral corporate acquisition process, the arrangement is to be considered as a project, at the latest, following initial discussions with the other party, signing of a non-disclosure

agreement and making of a decision or other comparable statement to continue preparations in the matter. Hence, a "project" is already considered to exist prior to negotiations on the terms and structure of the transaction, due diligence review and management presentations.

Auction

In an auction process where the company is a potential buyer, the arrangement should, as a general rule, be considered as a "project" at least when the company has been informed of its inclusion in the second or actual bid round. In cases where the company is the seller in an auction process, it may be justified to establish a project once the company has made a decision to commence preparations for a disposal or has given an assignment to an investment bank for executing the disposal.

In determining the existence of a project, the Guidelines, however, stress the need for an overall assessment whereby the likelihood of realization of the arrangement and the significance of the expected impact on share price are taken into account.

Other developments

In addition to the revision of the Guidelines, OMX has amended and published other rules and guidelines during the summer of 2008, including the harmonization of the Disclosure Rules of the Exchange (*Yhtenäiset tiedottamissäännöt*) concerning listed companies in Finland, Sweden, Denmark and Iceland. As a consequence, technical amendments have also been made to the guidelines regarding Own Shares of a Listed Company (*Listayhtiön omat osakkeet*), which complement the provisions on the acquisition of own shares of the Rules of the Stock Exchange (*Arvopaperipörssin säännöt*).



Mr. Juha-Pekka Mutanen



Ms. Tove Johansson

DISPUTE RESOLUTION

> SUPREME COURT OUTLINES FORUM RULES IN COMPANY LAW MATTERS

by Eva Storskrubb and Mikko Koivula

According to the Finnish Companies Act, disputes concerning the application of that Act are dealt with exclusively in one of eight designated district courts, territorial jurisdictions of which are laid down by a Decree of the Government.

On 27 June 2008, the Supreme Court rendered a judgment which clarifies the forum rules concerning proceedings involving company law questions.

Background of the case

In that case, a shareholder claimed unpaid dividends from the company which the company had used to set off a receivable it had from the shareholder. The shareholder disputed the existence of such debt and filed a claim at the District Court of Tuusula, the city in which the company had its registered office. Tuusula District Court is not one of the eight district courts designated to handle company law issues.

The company demanded rejection of the claim on various grounds. In its closing statement, the company raised a corporate law argument according to which the case concerned repayment of a dividend that had ceased to exist following the set off and such repayment would breach the Companies Act.

Tuusula District Court held that there had been no grounds for set off and that the company therefore was obliged to pay the dividend. The District Court also held that the dispute did not concern the interpretation of the Companies Act referring *inter alia* to the fact that the company had made the repayment argument only in its closing statement.

The Court of Appeal of Helsinki upheld the decision of the District Court in relation to jurisdiction.

Supreme Court ruling

In its decision the Supreme Court referred to enhanced specialization as the aim of centralization of cases concerning the application of the Companies Act.

The Supreme Court held that the issue of jurisdiction should be considered *ex officio* by district courts and that matters regarding application of the Companies Act cannot be heard before a district court other than the eight specific courts set forth in accordance with the Companies Act.

Interpretation of jurisdiction

The Supreme Court held that the case concerned the application of the Companies Act. Contrary to the decisions of Tuusula District Court and the Court of Appeal of Helsinki, the Supreme Court found that there had been no change in the grounds of jurisdiction after the proceedings had been instituted.

Consequently, the Supreme Court reversed the decisions of Tuusula District Court and the Court of Appeal of Helsinki remitted the case to Helsinki District Court.

The most interesting feature of this decision is the Supreme Court's ruling on the question whether a case concerns the application of the Companies Act. According to the Supreme Court, that question cannot be determined solely based on the grounds and legislative acts referred to in the claim. The Supreme Court's decision is in this respect contrary to the preparatory works of the Companies Act according to which jurisdiction shall be determined on the basis of the grounds of the claim.

According to the Supreme Court, the decisive issue in determining jurisdiction is whether or not the Companies Act is applicable in resolving the matter, taking into account the facts raised by the parties. This implies that both the plaintiff's claim and the arguments presented by the defence are taken into account when determining jurisdiction.

In a dissenting opinion two Supreme Court justices argued that a claimant cannot know beforehand what arguments the defence will raise and could therefore not be certain as to where to lodge his claim. The dissenting opinion also argues that functional arguments and the interest of the parties support the view that the courts should determine jurisdiction based on the grounds of the claim only.

In practice, the ruling of the Supreme Court may cause delay and increased costs in certain cases, as proceedings may have to be started over in another district court.

However, the ruling also supports the specialization of designated district courts and will hopefully result in a careful review by district courts of possible company law issues at an early stage of proceedings.



Ms. Eva Storskrubb



Mr. Mikko Koivula

CORPORATE & COMMERCIAL

> REQUIREMENT OF LOCAL COMPANY REPRESENTATIVE ABOLISHED

by Eeva Pohja

The Finnish Act on the Right to Carry on a Trade ("Trade Act") was amended as of 1 June 2008 to correspond to the requirements of EC legislation. The purpose of the amendment was to relax the requirements of appointing a Finnish resident company representative.

Pursuant to the old rules, entrepreneurs who were natural persons not resident in Finland as well as Finnish companies which did not have a Finnish resident managing director, board member or authorized signatory were obliged to appoint a local Finnish resident company representative.

That local company representative's sole function was to receive summonses and other notices on behalf of the company. The aim was to make sure that there was always a local Finnish resident representative for purposes of service of process and other notices. Under tax law, the representative is liable for taxes imposed on the branch.

Formal notice of the Commission

In 2007, the European Commission sent a letter of formal notice to Finland stating that the Finnish legislation discriminated against service providers established in other Member States.

Furthermore, according to the Commission, the obligation to appoint a local representative limited the freedom to provide services by forcing companies from other Member States to incur additional expenses in Finland. In addition, the Commission noted that entrepreneurs from other Member States were placed in an unequal position in comparison to Finnish entrepreneurs *inter alia* with regard to the representative's tax liability.

The amended Trade Act

Pursuant to the amended Trade Act, EEA resident entrepreneurs are no longer obliged to appoint a local company representative in Finland. Furthermore, a local representative is not needed for a Finnish company if the company has at least one authorized signatory or other registered company officer who is resident in the EEA. EEA corporations may also appoint a representative resident in other Member States of the EEA.



Ms. Eeva Pohja

CORPORATE & COMMERCIAL

> WITNESS TESTIMONIES IN COMPETITION LAW CASES – SOME RECENT DEVELOPMENTS

by Hanna Laurila

It appears to have become more difficult for competition authorities to obtain written evidence of competition restrictions, especially cartel behavior, as companies have become aware of the authorities' investigation rights and the severity of the penalties for breach of competition law. As a result, also the Finnish Competition Authority ("FCA") has sometimes relied rather heavily on oral witness statements in gathering evidence of competition law violations.

Without undermining the public importance of intervening in serious competition law violations, it is also important to recognize that the use of oral witness statements involves significant legal protection issues for the companies suspected of competition law violations. Following the amendment of the Finnish Act on Competition Restriction (the "Act") in May 2004, whereby *inter alia* a leniency procedure was introduced and the mechanism for amounts of penalty payments was amended, the penalty payments proposed by the FCA have increased substantially.

The Finnish Market Court has given only one judgment in a cartel case after the amendment of the Act. In that case, the Market Court found seven asphalt companies guilty of illegal price and bidding cooperation and allocation of markets. One defendant, the Finnish Asphalt Association, was considered guilty of prohibited exchange of information. An appeal of the decision is currently pending before the Supreme Administrative Court.

Market Court's views in the Asphalt cartel case

Oral witness testimonies are as such an accepted form of evidence in competition law proceedings. In the Asphalt cartel case, the Market Court heard a large number of witnesses (43)¹ and assessed the evidentiary value of their statements. In its decision of 19 December 2007, the Court concluded that a witness testimony did not constitute sufficient proof of infringement if it was:

- (i) based on hearsay (i.e. the person has not been present in the meeting or discussion concerned but has received information from someone else);
- (ii) general and unspecified; or
- (iii) based on the witness's own conclusions and impressions.

¹ This does not include the legal representatives of the suspected companies which cannot be heard as witnesses under oath but can only be heard for information purposes.

Narrow privilege against self-incrimination

In the Asphalt cartel case, the Market Court also handed down an important procedural decision concerning self-incrimination. The Court held that a witness cannot refuse to respond to questions in the Market Court on the grounds that due to his/her testimony the FCA could propose penalty payments for his/her employer or his/her employer could be found guilty of the alleged violation.

Implications of the Asphalt cartel case

Although the Market Court's decision in the Asphalt cartel case has not become final, the FCA has recently dismissed another case based largely on Market Court's reasoning in the Asphalt cartel case on the value of witness testimonies.

In this recent matter, the FCA suspected forbidden cartel cooperation in the sector for steel channels used in air-conditioning and gave a draft statement of objections to three companies for comments in September 2005. Having received their responses and the Market Court's decision in the Asphalt cartel case, the FCA concluded in June 2008 that it did not have sufficient grounds to propose penalty payments. In its dismissal decision, the FCA referred to the patchy nature of the written evidence, the alternative explanations provided by the companies and, specifically, the reasoning of the Market Court in the Asphalt cartel case as regards the value of witness testimonies as evidence.

It remains to be seen whether the Supreme Administrative Court upholds the rather categorical reasoning of the Market Court regarding, especially, the evidentiary value of hearsay. The decision of the Market Court was, nevertheless, a welcome development from the point of view of legal protection of the companies suspected of competition law violations. Unless supported by reliable written evidence, the FCA now appears less willing to take into account allegations and rumors by competitors, terminated distributors or former employees of affected companies.

The Market Court's decision may also have had an indirect influence on leniency. It would seem that the FCA currently applies a somewhat higher threshold for accepting leniency applications, at least with respect to applications supported by scanty written evidence.



Ms. Hanna Laurila

D&I EVENTS

AWARD FOR BEST DISSERTATION

- > D&I have since 1999 supported the University of Helsinki and the pursuit of excellence in research by funding an annual prize for the best dissertation by a Master of Laws student in the field of corporate and commercial law. The winner is chosen by the faculty of the Law Department. This year Essi Rimali and Toni Kalliokoski were jointly awarded the prize at a ceremony held on 17 June 2008. Their dissertations respectively concerned share price determination in squeeze out of minority shareholders in listed companies and damages as a sanction for breach of competition law in cartel cases.

FINANCE AND CAPITAL MARKETS TEAM GROWS

- > Senior Attorney Mika Lehtimäki who worked for D&I several years has in September returned to the firm after a short period in another law firm. Mika has considerable experience in finance and transaction work and will strengthen our Finance and Capital Markets team that has also recently been supplemented with newly graduated Jonatan Hallvar, confirms partner Juha-Pekka Mutanen.

REAL-ESTATE EVENT IN COPENHAGEN

- > Partner Raija-Leena Ojanen has as a member of the planning committee participated in a successful seminar on Cross-border real estate investment in Europe organised by the European Forum and several committees of the International Bar Association in Copenhagen on 17-19 September 2008.

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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