

# Q4

## D&I Quarterly 2009

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D&I EVENTS

## FINANCE &amp; CAPITAL MARKETS

## > IMPLEMENTATION OF THE PAYMENT SERVICES DIRECTIVE

by Riikka Hartikainen

### *Government bills published*

The European Union Payment Services Directive (2007/64/EC) ("PSD") is proposed to be implemented in Finland by three new acts: (i) the Payment Services Act; (ii) the Act on Payment Institutions and (iii) the Act on Operations of Foreign Payment Institutions in Finland.

The Government has recently published the bills that constitute the legislative proposals for the new acts. None of the bills has yet been passed by Parliament. According to the bills, the acts are proposed to gradually enter into force by September 2010.

PSD provides the legal foundation for the creation of an EU-wide single market for payments and aims at establishing a comprehensive set of rules applicable to all payment services in the European Union. The objective of PSD is to harmonise the quality and timing of payment services as well as to improve consumer protection and competition. PSD also creates the necessary legal platform for the Single Euro Payments Area ("SEPA").

### *Payment services*

The proposed Payment Services Act will replace the current Account Transfer Act. The payment services covered by the proposed Act include account transfers, direct debits, credit and debit card payments as well as certain payments made by using mobile phones. Payments by cash are not covered by the Act. The proposed Act sets forth provisions concerning, inter alia, liabilities of the payment service providers to give information to the users of the services, amendment and termination of the frame agreement relating to the payment services as well as timing and execution of payment transactions.

### *Bank transfers within 1 working day by 2012*

One of the most significant goals of the proposed Payment Services Act is to make cross-border payments as easy, efficient and secure as national payments. Banks are to transfer funds to another EEA account within three working days. From the beginning of 2012 the time for an EEA transfer is intended to be one working day.

### *Liability of credit card holder reduced*

Under the proposed Payment Services Act, the liability of a credit card customer regarding unauthorised use of a credit card or other instrument of payment is reduced. The new Act sets a maximum limit of EUR 150 for customer liability. The maximum liability is to be applied when a credit card customer has not acted deliberately or with gross negligence.

Furthermore, according to the proposed Payment Services Act, the debit or credit card companies can no longer prevent retailers from charging actual costs deriving from the use of credit cards from their customers. If a retailer decides to charge the costs from its customers, he must inform the customers in advance. The purpose is to improve competition in the area and thereby reduce the commission fees for credit card payments.

### *Payments by mobile phone*

The proposed Payment Services Act is also intended to be applied to payments made by using mobile phones when a telecommunications company is the only party forwarding the payment. The telecommunication companies in Finland have suggested that they may reduce their mobile services if the proposed reform enters into force since they would be held liable for the possible credit losses, e.g., when their customer pays a tram ticket by SMS.

The proposed Act is intended to become applicable with regard to the telecommunication companies only as of September 2010. Otherwise, the proposed effective date for the Payment Services Act is 1 May 2010.

The enforcement of the Payment Services Act is proposed to be supervised by the Consumer Ombudsman and the Financial Supervisory Authority ("FSA").

### *Payment institutions and operations of foreign payment institutions in Finland*

In addition to the proposed Act on Payment Services, the Government has proposed a new Act on Payment Institutions and a new Act on Operations of Foreign Payment Institutions in Finland by which the other sections of PSD are implemented.

The proposed Act on Payment Institutions regulates the right to offer payment services. According to the proposed Act, the access to the business of providing payment services is subject to prior authorisation by the FSA. In addition, the FSA may under certain circumstances permit Finnish natural or legal persons to provide payment services without authorisation. In this case there are certain limits to such payment transactions.

In addition, the proposed Act on Payment Institutions includes provisions on the requirements for granting authorisation, permissible business activities, protection of customer funds, capital requirements, and establishment of a branch into another EU Member State.

Once the payment institution has obtained authorisation, it will be able to provide payment services in the EEA through a straight-forward notification procedure or by establishing a branch. The proposed new Act on Operations of Foreign Payment Institutions in Finland will cover the institutions which have the equivalent authorisation in another EEA Member State.



Riikka Hartikainen

*Associate Riikka Hartikainen is a member of D&I's Finance & Capital Markets practice area. In addition to finance transactions she advises clients on various corporate law matters.*

## CORPORATE &amp; COMMERCIAL

## > REVIEW ON THE CORPORATE GOVERNANCE CODE AND NEW GUIDELINES PUBLISHED

by Jan Ollila and Tove Johansson

The updated version of the Finnish Corporate Governance Code (the "Code") entered into force only a year ago but has already been the object of a detailed review published by NASDAQ OMX Helsinki (the "Helsinki Exchange"). The Finnish Securities Market Association has also published two guidelines on the interpretation of the Code aimed at assisting listed companies in preparing necessary statements which should be placed on the company websites.

### *The Helsinki Exchange's review*

The Code is based on the *comply or explain principle* meaning that a listed company may depart from an individual recommendation provided that it provides an explanation therefore. Some recommendations are, however, based on mandatory legislation and may therefore not be disregarded.

The Exchange's review published on 16 October 2009 does among other things assess how well listed companies have complied with the Code. According to the Exchange's review, 60% of Finnish listed companies had complied with the Code, whereas 40% of Finnish listed companies had complied but with departures from individual recommendations. Most commonly the departures from the recommendations were related to the board of directors.

The review, which can be viewed on the Securities Market Association's website ([www.cgfinland.fi](http://www.cgfinland.fi)), shows that all listed companies have published the information required by the Code on their website.

### *Remuneration Guideline*

The Code requires that listed companies give a statement on their remuneration policies and principles on their websites. The information provided should be clear and easy to find and is not to be divided between several different websites. The Securities Market Association has on 12 October 2009 issued a non-binding Remuneration Statement Guideline ("Remuneration Guideline") aiming at assisting companies to prepare investor-friendly websites by providing a model for the remuneration statement.

According to the Code and the Remuneration Guideline, the remuneration statement shall cover the rewarding practices of the company concerning the members of the board of directors, the executives including the managing director and the members of the supervisory board (if the company has one).

The Remuneration Guideline does not significantly widen the extent of the statement compared to the situation before the issuing of the said Guideline, but the contents and the different parts of the remuneration are emphasized and listed in a systematic order. The Remuneration Guideline lists the different types of remunerations and rewarding including salaries, annual remuneration, other financial benefits and the number of shares and share-related rights which the company should take into account in the statement. The Remuneration Guideline does, however, not require that the benefits paid are reported on an individual level for the executives with the exception of the managing director.

### *Corporate Governance Guideline*

A second guideline ("Corporate Governance Guideline") has been issued during the autumn concerning the corporate governance statement which listed companies are required to present in connection with the annual report. Similarly to the Remuneration Guideline, the use of the Corporate Governance Guideline is not compulsory for companies.

Whereas the Code includes a list of topics which should be presented in the corporate governance statement, the Corporate Governance Guideline published on 2 November 2009 provides a more detailed description of the listed issues. Parts of the descriptions in the Corporate Governance Guideline have already been taken into account in the explanations to the Code's recommendations. The Corporate Governance Guideline is, however, more detailed than the explanations and is structured to serve as a model or checklist for companies when drafting their corporate governance statement.

According to the Code the statement shall, *e.g.*, include a description of the main features of the internal control and risk management systems pertaining to the financial reporting process.

The Corporate Governance Guideline specifies the extent of this description by listing the issues to be presented, including a description of the monitoring mechanisms of the operations and controls as well as a description of the operating principles for internal control. The Corporate Governance Guideline also emphasizes that the extent and contents of the statement depend on the size of the company and the structure of the business operations.



Jan Ollila

*Managing Partner Jan Ollila advises international and domestic public and private corporate clients, private equity houses and financial institutions in a wide range of matters including corporate governance matters.*



Tove Johansson

*Associate Tove Johansson is a member of D&I's Corporate & Commercial practice area. She holds separate degrees in law and economics and advises clients in various corporate law matters.*

## CORPORATE &amp; COMMERCIAL

## &gt; FINAL JUDGMENT IN THE ASPHALT CARTEL CASE

by Juha-Pekka Mutanen and Eeva Airamaa

### *Ruling of the Supreme Administrative Court*

On 29 September, the Supreme Administrative Court ("Court") rendered final judgment in the asphalt cartel case and imposed on seven asphalt contractors fines totalling EUR 82.55 million, the highest fines imposed in Finland for cartel activities.

The highest individual fine imposed on Lemminkäinen, regarded as the leader of the cartel, was EUR 68 million. The fines imposed on the other operators (VLT Trading, NCC Roads, Skanska Asfaltti, SA-Capital, Rudus Asfaltti and Super Asfaltti) ranged from EUR 50,000 to EUR 4.8 million each.

### *Significant increase in the level of fines*

The Market Court rendered its judgment in the matter in 2007 and imposed fines of EUR 19.4 million in total. The increase in the level of the fines in the judgment of the Supreme Administrative Court was significant and the awarded level corresponded closely to the amounts originally claimed by the FCA.

Some of the fines were close to the maximum fine under the Act on Competition Restrictions, *i.e.*, 10% of a company's turnover from the year preceding the Market Court's judgment. In assessing the level of the fines, the Court pointed out that the matter was the most serious competition infringement ever dealt with in Finland. Appeals made by six of the asphalt contractors for annulling the Market Court's judgment were dismissed.

### *Nation-wide cartel in place for several years*

The Supreme Administrative Court considered that the seven asphalt contractors had participated in a nation-wide cartel during 1994–2002 involving allocation of customers and markets, illegal exchange of information and bid rigging. The participants had infringed Sections 5 and 6 of the Act on Competition Restrictions (in force at the time of the cartel) as well as Article 81 of the EC Treaty.

According to the Court, the cartel was continuing, national and covered all contract types, whereas the Market Court had considered that the cartel had been limited as to its duration, territory and type of contract covered.

### *Overall view of the activities*

The Supreme Administrative Court held that, although the evidence presented by the FCA did not cover all individual events of the cartel, the possibility that such series of similar events took place simultaneously by chance could be ruled out. According to the Court, it is essential to assess the evidence comprehensively, *i.e.*, to study the connection between

individual events within a certain time frame. Similar events and actions in the market may indicate a competition infringement if no other logical explanation for the activities can be found.

On the basis of the evidence presented by the FCA, the Court considered that it was able to form an overall view of the activities that took place in the Finnish asphalt market during the years 1994–2002. The Court found that the most credible explanation for the series of events was that the seven asphalt contractors had, under Lemminkäinen's lead, agreed on allocating the Finnish asphalt market and on the measures for implementing their plan.

This conclusion was reached based on previous experiences with regard to cartels and cartel investigations, observations of the witnesses and the fact that similar activities took place simultaneously in the asphalt market all over Finland. According to the Court, the purpose of the cartel participants was to remove competition from the Finnish asphalt market.

### *No credible alternative explanation*

The Court noted that, in order to prove their innocence and to undermine the FCA's evidence and conclusions, the asphalt contractors should have been able to provide the Court with a credible alternative explanation for the operations. In assessing the evidence, the Court also took into account the fact that Lemminkäinen had not appealed the Market Court's decision in whole and had not challenged part of the findings. This further strengthened the Court's impression that the cartel allegations were true and also affected the credibility of the asphalt contractors' witnesses who had denied the existence of a cartel.



*Juha-Pekka Mutanen*

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



*Eeva Airamaa*

*Associate Eeva Airamaa is a member of D&I's Corporate & Commercial practice area and the firm's Competition & Public Procurement practice group.*

## DISPUTE RESOLUTION

## &gt; THE ROME I REGULATION

by Eva Storskrubb and Johanna Jacobsson

The Rome Convention (1980) on the law applicable to contractual obligations was in June 2008 replaced by the European Union Regulation, (EC) No 593/2008, on the same subject matter, the so called Rome I Regulation ("Regulation"). Below some of the main rules of the Regulation are depicted.

The Regulation applies to contracts concluded after 17 December 2009. The main principles of the preceding Convention are retained in the Regulation but some significant changes have also been brought about.

### Scope

The Regulation provides for uniform choice of law rules in civil and commercial matters for all EU Member States (except Denmark). Certain matters listed in Article 1(2) are excluded from the scope of the Regulation, *e.g.*, obligations arising under bills of exchange, cheques, promissory notes and other negotiable instruments, arbitration agreements and questions governed by the law of companies and other bodies.

### Universal application

The Regulation confirms the principle of universal application, *i.e.*, that any law designated shall be applied regardless of whether it is the law of a Member State.

### Freedom of choice

Similarly to the Rome Convention, party autonomy or freedom of choice is the main rule in the Regulation. The Regulation accepts both express and implied agreements on choice of law, although in the latter case the choice must be clearly demonstrated by the terms of the contract or the circumstances of the case. By mutual agreement the law applicable to the contract may be changed at any time.

### Closest connection

In the absence of choice of law in the contract, the law governing the contract is determined according to the criteria laid down in Article 4 of the Regulation. The ethos already under the preceding Convention was that the contract is governed by the law of the country with which it is most closely connected. Unlike the preceding Convention, the Regulation in Article 4(1) determines the applicable law for certain types of contracts, *inter alia*:

- (i) the law of the seller's habitual residence for sale of goods contracts;
  - (ii) the law of the service provider's habitual residence for service contracts;
  - (iii) the law of the franchisee's habitual residence for franchise contracts;
  - (iv) the law of the distributor's habitual residence for distribution contracts;
- and

- (v) the law of the country in which immovable property is situated for contracts relating to immovable property (with the exception for tenancy agreements for a period of less than six months for which the law of habitual residence of the landlord shall apply provided that the tenant is a natural person and has his habitual residence in the same country).

The new solution is intended to promote predictability since in the absence of choice the applicable law is now specifically determined for some of the most common types of contracts.

Where a contract is not covered by any of the specific types mentioned in Article 4(1) the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

However, if it is clear that a contract is manifestly more closely connected with another country than the one determined in accordance with the above mentioned rules, the law of that other country is applied.

### *Mandatory provisions*

As the preceding Convention, Article 3(3) of the Regulation refers to mandatory provisions of the law of another country than that chosen by the parties. Such provisions become applicable in a situation where all other elements relevant to the situation at the time of choice are located in another country than the one whose law has been chosen.

Moreover, according to the new provision of Article 3(4) of the Regulation, if the parties choose the law of a non-Member State when all other elements relevant to the case are situated in one or more Member States, the choice does not prevent the application of mandatory provisions of Community law.

### *Overriding mandatory provisions*

Article 9 of the Regulation provides for the application of overriding mandatory provisions of the law of the forum. Overriding mandatory provisions are provisions regarded as crucial by a country for safeguarding its public interests. The forum state may apply them irrespective of the law otherwise applicable to the contract. A court may also under certain circumstances give effect to overriding mandatory provisions of the law of another country even if that is not the law governing the contract.

### *Consumer, Employment and Insurance contracts*

Some types of contracts are specifically regulated in the Regulation. Among these are consumer and employment contracts, for which there is a perceived need to ensure that the weaker party is not deprived of protection afforded by relevant mandatory provisions. Therefore specific rules are included in the Regulation.

A noteworthy reform of the Regulation is that choice of law provisions for insurance contracts are now included in the Regulation. Previously the provisions were included in separate Insurance Directives. The Regulation distinguishes between reinsurance contracts, insurance contracts covering large risks and other insurance contracts and does not substantially change the substance of the choice of law provisions set out in the Directives. The Directives still apply to the Member States of the European Free Trade Association and Denmark.



*Eva Storskrubb*

*Associate Eva Storskrubb is a member of D&I's Dispute Resolution practice area. In addition to her doctoral thesis in the area of EU law, she has published a number of articles in the field of dispute resolution.*



*Johanna Jacobsson*

*Associate Johanna Jacobsson is a member of D&I's Dispute Resolution practice area. Prior to joining Dittmar & Indrenius in 2009, she completed an internship with the European Court of justice in Luxemburg.*

## D&amp;I EVENTS

## 110 YEAR ANNIVERSARY CELEBRATIONS

- > On 9 December 2009 D&I published an anniversary publication "Dittmar & Indrenius 110 – The Law Firm Partner to Business in Finland". The anniversary publication describes the development of a commercial law firm and related people, clients and phenomena as a part of the history of business in Finland. Linked with history, the book also contains guest articles from several client representatives and business life opinion leaders which cast light on the present. Guest articles from respected researchers of history deepen the emerging themes.
- > Other events during the past autumn to mark D&I's 110 year-anniversary have included two seminars organised by our Mergers & Acquisitions and Corporate & Commercial practice areas respectively. The topics of the seminars were "Post-Crisis M&A – A New Environment" and "Managing Legal Compliance".

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*Dittmar & Indrenius, Pohjoisesplanadi 25 A, FI-00100 Helsinki, Finland*

*Tel: +358 9 681 700, Fax: +358 9 652 406*

*www.dittmar.fi*