

# Q4

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## FINANCE AND CAPITAL MARKETS

## &gt; EFFECTS OF MIFID ON FINNISH LAW

*by Mika J. Lehtimäki*

The implementation of the Directive on markets in financial instruments (2004/39/EC, "the Directive") will bring about extensive changes to the Finnish securities and financial services law. Most importantly, the existing Act on Investment Firms will be replaced entirely and the Securities Markets Act will be substantially amended. The extent of the regulation is increased by the Commission Directive 2006/73/EC on organisational requirements and operating conditions of investment firms and by the Commission Regulation 1287/2006/EC on recordkeeping, transaction reporting, market transparency and admission of financial instruments to trading – both instruments supplementing the Directive. In addition, the Finnish Financial Supervision will revise its standards and decide on the possible use of the national exemption options afforded by EU regulation.

This will result in a rather burdensome exercise to the stock exchange, the Finnish Financial Supervision and especially certain market participants. We will discuss some of the changes below.

*Changes to the Act on Investment Firms*

The main changes in the new Act concern the definition of a financial instrument and the new investment services subject to the authorisation regime. The definition of a financial instrument will be extended to cover commodity derivatives. Also, the requirement to have an investment services licence will be extended to investment advice, organisation of multilateral trading and trading in own account. The capital requirements of investment firms will be revised as well.

Investment advice will generally cover all individualised recommendations concerning financial instruments. General advice or an investment recommendation directed to public would not be considered as regulated investment service business. Addressing this question may require careful planning, *e.g.*, in connection with marketing of funds on a private placement basis.

Trading in own account appears to be a somewhat vague concept because the definitions are not exact and the exceptions to the licensing requirement not completely clear – an issue to be considered especially in corporate finance of companies carrying on commodities business and trade. As a general rule, trading in own account means transactions in financial instruments in one's own account, excluding, *e.g.*, mere inactive investment of the company's own funds. However, there are exceptions applicable to situations such as where trading in own account is ancillary to the main business.

## *Changes to the Securities Markets Act*

The main changes to the Securities Markets Act concern organisation of multilateral trading, admission to trading and as a counter-party in such trading, securities disclosure obligations, internal execution of the trades, market transparency, code of conduct and settlement of trades.

The current division between public trading on a stock exchange and other trading will be abolished and replaced with public trading (regulated market) and multilateral trading. In practice, multilateral trading would be subject to self-regulation by the trading platform, whereas public trading would be subject to the requirements imposed by law. Multilateral trading would generally be subject to a more lenient self-regulatory disclosure regime, and there would be fewer flagging thresholds. Also the requirement to make a mandatory public offer would be set at 50% in the case of companies subject to multilateral trading instead of 30% and 50% in the case of companies subject to public trading.

The new rules also provide an extensive new regime for investment firms. One important change is the classification of clients into professional and non-professional clients and as eligible counterparties. An important feature of this classification is that whereas an investment firm must ensure that the transactions or advice are 'appropriate' to the non-professional client taking into consideration his or her background and other factors (so-called 'suitability test'), there is no such requirement in relation to professional investors. The same rule applies to the provision of certain information to clients prior to conclusion of an investment service contract. Most of the trading conduct rules are not applicable when the client is categorised as an eligible counterparty.

## *Next Steps*

The Finnish Financial Supervision is currently carrying out a regulatory survey on the need to amend its standards. The FSA is also assessing how to carry out trade reporting on a practical level. The FSA has recently opened a site containing information on Mifid, its practical implications and guidelines for market participants – a useful platform considering the extent of the changes to the law.

## DISPUTE RESOLUTION

## > REFORM OF ENFORCEMENT LEGISLATION

by Jussi Lehtinen and Juha-Pekka Mutanen

In June 2006, the Finnish Government issued a proposal for reform of the Enforcement Act and related legislation. The proposal is currently being heard by the Parliament and is expected to enter into force at the beginning of 2008.

The most significant changes concern the time-barring of private individuals' judgment debts, specification of rules on security in connection with the enforcement of interim orders and the reorganisation of the execution authorities.

### *Time-barring of debts*

According to the current rules, court decisions and arbitral awards are subject to a five-year limitation period (which can be interrupted by notice to the debtor) and become definitely unenforceable against private individuals after 15 years from the date of the decision. The time limit for definite unenforceability against private debtors is 20 years where the creditor is a private individual or the debt is based on a criminal offence for which the debtor has been sentenced to imprisonment or community service. In cases where the debtor has obstructed enforcement, a court may prolong the enforceability by 10 years.

Despite the unenforceability of a debt judgment against a private debtor, under the current rules the relevant debt itself does not become time-barred (provided that the limitation period is interrupted). The debt is, for instance, considered as a debt for which the estate of the debtor is responsible after the debtor's death. In order to avoid various difficulties in such a system, it is proposed that also the debt will become time-barred when the relevant judgment becomes unenforceable.

It is estimated that the proposal affects approximately 65,000 debts amounting to more than EUR 1,600 million currently subject to enforcement proceedings. Most of these debts date from the recession in the early 1990s which led to a large number of bankruptcies and greatly increased the number of individuals subject to debt recovery proceedings.

The proposal would not affect debts in respect of which no judgment has been rendered - whether the debtor is a private individual or a legal person. Those debts will continue to be governed by the current provisions of the Act on Time-barring of Debts, according to which the general three-year limitation period can be interrupted an unlimited number of times.

The proposal would also not affect recovery proceedings against legal persons. According to the Act on Time-barring of Debts, judgment debts

become time-barred after five years from the judgment date. Where the debtor is a legal person, the statute of limitation can be interrupted an unlimited number of times by notice to the debtor whereby the period starts to run again.

### *Enforcement of interim measures*

The proposed provisions regarding enforcement of interim measures only introduce minor adjustments and clarifications.

It is proposed to include in the legislation an express provision requiring the applicant to place a security for possible damage suffered by the respondent due to the enforcement of an interim injunction or mandatory order granted according to Chapter 7 Section 3 of the Code of Judicial Procedure.

Such an obligation has also in the past been considered central to the protection of the rights of the respondent and it forms part of current practice. An express provision in law would thus codify the obligation and entrench current practice. Security would be given to the Execution Officer, who would also decide on the appropriate amount of the security.

### *Reorganisation of the Execution Authority*

Finally, it is proposed that a new nationwide Execution Authority be established. It would be a central agency in charge of the supervision and operative management of local execution offices and would assume the supervisory and management tasks currently handled by State Provincial Offices.

## CORPORATE &amp; COMMERCIAL

## > SUPREME ADMINISTRATIVE COURT RULES ON DOMAIN NAME REGISTRATION

by Sakari Halonen

### *Relevance of prior rights*

In July 2006, the Supreme Administrative Court established an important judicial precedent concerning the relevance and interpretation of prior rights (in this case a registered trademark) in connection with domain name registration. The precedent (KHO 2006:41) is among the very first higher judicial rulings on the interpretation of the Finnish Domain Name Act (228/2003).

The domain name in question, "mb.fi", was initially granted to MB Rahastot Oy, a Finnish private equity firm. The domain name included the letters "MB", as did a prior registered trademark of Sanoma Magazines Finland Oy, a Finnish media company, which publishes, *inter alia*, a computer magazine called Mikrobitti, widely known in the IT-community as "MB".

Pursuant to Section 4(3) of the Domain Name Act, a domain name must not be illegally based on a protected name or trademark owned by another party. The trademark in question was applied for in August 1998 and was registered to Sanoma Magazines Finland Oy in February 2002. The domain name "mb.fi" was subsequently applied for and granted to MB Rahastot Oy in 2003.

As a result of an appeal by Sanoma Magazines Finland Oy, the Helsinki Administrative Court referred the registration back to the Finnish Communications Regulatory Authority (FICORA) ordering FICORA to revoke the domain name and transfer it to Sanoma Magazines Finland Oy. MB Rahastot Oy appealed on FICORA's revocation and transfer decision.

### *Justified reasons*

MB Rahastot Oy argued in the Supreme Administrative Court that there were justified reasons for the domain name registration at the time of the initial grant. According to MB Rahastot Oy, the domain name is derived from the registered trade name MB Rahastot Oy and forms a dominant part of that trade name. Secondly, MB Rahastot Oy argued that "MB" had become the company's trademark, established through use (MB Rahastot Oy had not registered "MB" as its trademark until October 2004). Hence, the company considered that the domain name was not illegally based on Sanoma Magazines Finland Oy's trademark but formed a part of MB Rahastot Oy's trade name.

Sanoma Magazines Finland Oy, on the other hand, argued that the trademark "MB" was registered to MB Rahastot Oy only after the domain name was granted to MB Rahastot Oy and that there was no evidence that

"MB" had become a trademark established by use. Furthermore, there were other trade names beginning with the letters "MB" within the same industry where MB Rahastot Oy was active. Accordingly, Sanoma Magazines Finland Oy considered that it was in this case impossible to establish a trademark by use because the dominant part of the trade name had lost its distinctiveness. Hence, Sanoma Magazines Finland Oy considered that it had an exclusive right to the trademark "MB" at the time the domain name was first granted to MB Rahastot Oy, and therefore Sanoma Magazines Finland Oy also held a prior right to the domain name.

### *Trade name vs. trademark*

The Supreme Administrative Court found that MB Rahastot Oy had, already prior to being granted the disputed domain name, used the letter combination "MB" in its business activities. At the same time, it was undisputed that a trademark embodying the letters "MB" had been registered to Sanoma Magazines Finland Oy prior to application for and granting of the disputed domain name.

The Supreme Administrative Court found that "MB" was the dominant part of MB Rahastot Oy's trade name. According to the Court, that constituted a justified reason and a legally relevant basis for MB Rahastot Oy's use of the domain name.

In addition, the Supreme Administrative Court held that FICORA had no authority to revoke a domain name if the revocation was based on an evaluation of different forms of protected names (such as trademark vs. trade name). Pursuant to Section 12(1)(3) of the Domain Name Act, the authority of FICORA to revoke a domain name is limited to cases where it is obvious that the domain name is illegally based on a protected name or trademark.

### *Decision*

The Supreme Administrative Court consequently decided that FICORA should not have revoked the registration and transferred the domain name to Sanoma Magazines Finland Oy. The case was referred back to FICORA in order for the authority to re-grant and transfer the domain name back to MB Rahastot Oy.

## > IT OUTSOURCING AND PROTECTION OF PERSONAL DATA

by Jukka Lång

Outsourcing of information systems may provide considerable economic benefits for companies. Information systems, however, almost always contain personal information on employees or customers of a company. As a result, the requirements of applicable data protection legislation must be taken into account in virtually all outsourcing projects.

### *New instructions*

As outsourcing of information systems and personal data files has increased, the Data Protection Ombudsman has issued new instructions concerning such arrangements. The instructions stress the importance of careful planning of the arrangements and precise definition of the obligations of the parties involved.

### *Specification of contractual duties*

The main rule under Finnish data protection legislation is that the buyer of outsourcing services is, as the original controller of the data file, primarily responsible for the use of the data. This responsibility cannot be contractually assigned to another party. Hence, the buyer of outsourcing services should in a contract require the seller to adhere to the same standard of data protection. Through careful and precise defining of the service supplier's contractual obligations, the buyer may seek to minimise the risk of violations and ensure adequate remedies against the supplier.

### *Notification obligations*

The supplier of IT outsourcing services is obliged to notify the Data Protection Ombudsman when starting to provide services. Likewise, the buyer of the services is required to notify the Data Protection Ombudsman on the use of the services after entering into an outsourcing contract.

### *Cross-border data outsourcing*

Outsourcing of information systems is more complicated when data is transferred outside the European Economic Area. In many cases, a practical solution is to use the standard contractual clauses for cross-border data transfers published by the European Commission. Where the standard contractual clauses are incorporated into a contract between the exporter of personal data and the supplier of outsourcing services, personal data can be transferred outside the EEA without consent from the registered individuals. In practice, the standard contractual clauses often become an integral part of the outsourcing contract.

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