Finland

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

The Finnish civil law legal system is based on statutory law and is supplemented by case law. Finland has been a full member of the European Union since 1995, and the body of European Community (EC) law is thus effective in Finland, either directly or by incorporation.

Finland adheres to a number of international treaties and conventions, including the UN Convention on the International Sale of Goods and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Nordic countries (Finland, Sweden, Norway, Denmark and Iceland) have historically cooperated in developing their respective legal systems and have achieved unified legislation in many areas. The Sale of Goods Act is considered to be one of the most important unified laws. As a result of this cooperation, the main rules and principles of contract and company law have significant similarities in the Nordic countries.

Acquisitions of private limited liability companies are not governed by any specific rules, save for the general rules under the Sale of Goods Act. However, many specific provisions of company, employment, tax, competition, accounting, real estate, intellectual property (IP), data protection, accounting and other laws become relevant in most private M&A situations. Also, certain specific legislation implementing relevant EU directives can play an important role.

If the acquisition is carried out in the form of a statutory merger, then the relevant merger rules of the Companies Act will become applicable.

Acquisitions may fall under Finnish national merger control, as stipulated in the Act on Competition Restrictions, provided that provisions on EC merger control are not applicable and that certain turnover-related criteria established in the Act on Competition Restrictions are met. The Act on Monitoring Foreign Corporate Acquisitions in Finland can in some cases also become applicable.

There are several public sources of information on companies available in Finland, including the public trade register maintained by the Finnish Patent and Registration Office, the Competition Authority, court records, the real estate register, etc. Information from these sources may often be obtained free of charge or for a minor administrative fee, and, for example, the trade and real estate registers are available to subscribers online. Moreover, even though not often available online, the share and shareholders' registers of all private and public limited companies are public information. However, such information must be requested directly from the company in question, which may charge an administrational fee for supplying said information.

As of the beginning of 2005, Finnish listed companies adhere to the International Financial Reporting Standards (IFRS). Many other non-listed companies also comply with IFRS.

2. STRUCTURE OF TRANSACTIONS

When planning to acquire a business in Finland, there are a few alternative basic structures for the transaction:

(a) an acquisition of the shares in the target company;
(b) an acquisition of all or part of the target company's assets; and
(c) a statutory merger or a share exchange.

2.1 Acquisition of the shares in the target company

When acquiring shares in the target company, the legal nature of the target business remains intact within the company's legal framework. In practice, this means that there will be no change in the company's business with regard to its contracts, employees, subsidiaries, or other assets (save for any effects of change of control clauses in agreements).

When acquiring shares, all liabilities are transferred with the acquired company, including tax and possible environmental liabilities. If the buyer would like certain existing liabilities not to be present in the target company after the transaction, such liabilities need to be settled by the target or assumed by a third party before the transaction.

If the ownership of the target company is diverse and 100 per cent is not obtainable in a single transaction, the minority may be squeezed out in accordance with the Companies Act. According to the squeeze-out rules, a shareholder which, either solely or jointly with certain related individuals and entities, holds more than 90 per cent of the target company's shares and votes is entitled to buy out the remaining shares in the company. Equally, in such a situation, the minority shareholders are entitled to require the majority shareholder to buy out their shares.

There is a 1.6 per cent transfer tax payable upon the purchase of shares in Finnish companies (other than housing and real estate companies, where the transfer tax is 2 per cent). Transactions where both the seller and the buyer are foreign entities are exempt from Finnish transfer tax (unless the target is a real estate company). The payment of the transfer tax is due within two months following the execution of the purchase agreement.

Additionally, the sales proceeds may be taxable income for the seller, depending on the character of the seller and the percentage of shares held. Generally, a transfer of 10 per cent or more of shares (where the shares constituted fixed assets of the seller and have been held over 12 months) is considered tax-exempt capital gains income. This exemption does not apply to firms that are characterised as 'private equity firms' within the meaning of the tax code.

The corporate resolutions required for executing the acquisition are normally board resolutions by the seller and by the buyer, which customarily include a stipulation as to the person(s) entitled to sign the acquisition agreement. No shareholder or other resolution is required to be adopted by the target company, unless such resolution (or consent to acquisition) is required, for example by the articles of association of the target company.

In addition, should the articles of association of the target company include a redemption or a consent clause triggered upon the transfer of shares to a third party, waivers to the right of redemption or consent for the transfer of shares may need to be sought.

2.2 Asset deal

In asset deals, only those assets specified by the parties are transferred as part of the acquired business. In Finland, as in many other jurisdictions, only those liabilities which are expressly assumed by the buyer are transferred to the buyer. This applies also to the seller's tax liabilities relating to the transferred business.

The main exception to the abovementioned rule is that the obligation to provide continued employment benefits to employees, starting from the completion date, transfers automatically to the buyer as a result of mandatory employment law requirements.

Another exception is that the acquirer of real estate may become liable for previous environmental damage to the land in question if the compensation of such damages cannot be collected from the actual polluters. Where the seller is bankrupt or has ceased to exist, the liability may fall on a party to whom the activity which caused the environmental damage was transferred, if the transferee knew or should have known, at the time of the transfer, of the damage or the risk of it.

When a business is acquired through an asset deal, the target business's employees will follow the business to the acquirer. If there are more than 20 employees in the business being transferred, a cooperation procedure in accordance with the Act on Co-operation within Undertakings shall be held with employee representatives.

With respect to contracts connected to the assets being acquired, the main principle in Finland is that a transfer of a contract will always require the counterparty's consent. Therefore, the consent of at least the most important contracting parties should be obtained prior to the transaction.

In practice, the parties will try to obtain the most important contracting parties' consents before closing, while other contracting parties are often only informed of the transfer. If the contracting party does not object to the transfer after having received information thereof, the contracting party may, in most cases, be deemed to have silently consented to the transfer. Often provisions on how to deal with the consequences of a refusal of consent to the transfer of a contract are included in the acquisition agreement.

There is a transfer tax of 4 per cent of the purchase price payable on real estate and buildings included in the assets (the transfer tax is 2 per cent for shares in real estate companies). Most business transfers are VAT-exempt if the assets concerned will be used in VAT-deductible business after the transfer.

Moreover, if the assets include real estate, the municipalities in Finland have a redemption right which may be triggered if the real estate being included in the assets is large enough. The redemption right is fairly seldom exercised by municipalities and it is possible to request a waiver from the relevant municipality prior to the closing of the transaction.

As to the corporate resolutions required to execute a purchase of assets, a board resolution of the buyer of the assets will normally suffice. Also, for a sale of assets, a board resolution of the seller (the company that used to be the direct owner of the transferred assets) will normally be sufficient. If, however, all or a material part of the seller's assets are sold, a shareholder resolution approving the sale would normally be required.

2.3 Other alternatives

2.3.1 Statutory merger

One alternative when considering the acquisition of a Finnish limited liability company is to execute a statutory merger. This option may be more commonly used in internal group restructurings, but it can, in some cases, be preferred by the parties as a suitable option to combine two companies. Statutory mergers are governed by the Companies Act and are a fairly lengthy procedure in comparison to share or asset deals (approximately six months).

According to the Companies Act, a merger is the procedure by which all assets and liabilities of a company (the merging company) are transferred to another company (the surviving company). As a result of the procedure, the merging company is dissolved.

Under Finnish law, a merger may occur so that: (1) one or more merging companies merge into the acquiring company (absorption merger); or (2) at least two merging companies merge by way of creating a new company together (combination merger).

The presumption is that some kind of consideration is given to the shareholders of the merging company, either in the form of shares in the acquiring company or in the form of cash. It is, however, possible to carry out a merger without any consideration, provided that all of the merging company's shareholders have given their consent. This is of practical importance in the case where the merging and surviving company are owned by the same parent company. Finnish taxation generally limits the amount of cash consideration in mergers to 10 per cent of the nominal value of the shares given in consideration or of the amount recorded in the share capital in respect of the shares given in consideration (remaining part to be paid in shares of the surviving company) for the merger to be tax neutral.

The boards of directors of the companies involved in the merger are required to execute a written merger plan. The merger plan shall include information on the contemplated merger and what kind of result the combination of the merging companies will lead to. The boards of directors of the companies participating in the merger must appoint one or more chartered public accountants to issue a statement on the merger plan.

The merger plan must be registered within one month of its signing by notification to the Trade Register, together with the auditor's statement. The registration authority shall, upon request by the merging company and within four months from the registration of the merger plan, issue a public summons to the creditors of the merging company, who have the right to oppose the merger by delivering a written notice to the registration authority not later than on the date specified in the summons. The merging company must send written notification of the public summons to its known creditors not later than one month before the due date. The due date shall be at least three months from the issuing of the public summons.

After filing the merger plan and the issuing of the public summons, the companies shall approve the merger within four months from the registration of the merger plan. Depending on the type of merger, it is either the general meeting or the board of directors of each participating company that approves the merger. The companies involved in the merger must notify the registration authorities of the implementation of the merger within six months of the decision regarding the approval of the merger, or the merger will lapse.

The register authority is under duty to register the merger if the creditors have not opposed the merger. The legal effects of the merger will enter into force upon the registration of the implementation of the merger.

2.3.2 Share exchange

A share exchange is a transaction where all or a part of the target company's shares are contributed by the target's shareholders to the acquiring company against consideration in the form of shares in the acquiring company. The acquiring company thus becomes a shareholder in the target and the previous shareholders in the target become new shareholders in the acquiring company.

From a transfer tax point of view, a share exchange is considered to be two separate acquisitions. Therefore, transfer tax is payable on both transactions.

2.4 Buyer and seller structure preferences

When contemplating the structure for an acquisition, and especially if the choice is between a share or an asset deal, the following elements should be considered:

SHARE DEAL	
BUYER PROS	**SELLER PROS**
+ The continuance of contracts and other legal relationships is secured (save for change of control clauses)	+ Buyer takes over all risks and liabilities
+ Unchanged company identity	+ Seller's sale of shares may in certain situations be tax-free
BUYER CONS	**SELLER CONS**
- Unidentified liabilities will also transfer with the company	- Not possible to retain part of the business without selling the relevant part to a third party before closing
- Transfer tax of 1.6 per cent is payable (2.0% in case of real estate companies)	

ASSET DEAL	
BUYER PROS	**SELLER PROS**
+ Only the identified liabilities will transfer with the assets	+ Possibility to retain part of the business
+ Possible to agree on what specific assets shall be taken	
+ Begin operations in a new company	
+ Buyer can depreciate the purchase price for part of the assets (machines, equipment, goodwill)	

Furthermore, when considering the financing of a transaction, the restrictions on financial assistance must be considered. According to the Companies Act, a limited liability company may not grant a loan or provide other assets or guarantees in order for the recipient to use them to acquire shares in the company or its parent company.

3. PRE-AGREEMENT

3.1 Letter of intent

The parties may prepare a letter of intent or other similar pre-agreement before an acquisition. These documents commonly contain provisions regarding the negotiation of the transaction, as well as exclusivity and confidentiality clauses.

Normally, most provisions in letters of intent are not meant to be legally binding. As in any jurisdiction, it is advisable to be very specific concerning which provisions are and are not intended to be legally binding.

The letter of intent is also used from a process management point of view, as it is fairly common to include an indicative timetable concerning the due diligence and agreement drafting process. Moreover, from the buyer's point of view, it is convenient to include provisions on exclusivity. The length of the exclusivity obligation can be freely negotiated and agreed upon by the parties. It is possible to agree on liquidated damages to be paid if any of the binding obligations of the letter of intent are breached.

There are no strict rules on breaches of a non-binding provision of a letter of intent or similar, but the liability of a party which intentionally breaches the agreement is discussed in connection with the general principles on contracts in Finland. General principles of good faith and reasonability might also have an effect on a situation where a party is negotiating or concluding a letter of intent without any real intention to complete the transaction.

3.2 Lock-up (or voting) agreements with major shareholders

Normally, no shareholder vote is required in the target, seller, or buyer in M&A relating to private Finnish companies (except in situations where an acquisition is carried out in the form of a statutory merger). Therefore, lock-up or voting agreements with shareholders are seldom used in connection with private transactions in Finland. However, in situations where there is a large number of shareholders and a shareholder approval is needed for some reason, there may be a need to agree, in advance, with at least a majority of the shareholders that they will support the deal.

In connection with transactions where part of the consideration is paid as shares in the buyer, the buyer might suggest an agreement under which the party receiving the shares undertakes not to sell the shares within a specific term.

4. ACQUISITION AGREEMENT

4.1 Holdbacks and escrows

As in other countries, an escrow arrangement is typically agreed upon in Finland in situations when the seller is a holding company, private equity fund or private individual(s), or in other situations where there might be special reasons for securing the seller's ability to perform on possible claims.

A retention of a part of the purchase price may also be an alternative, especially in cases where the buyer is in a strong relative position compared to the seller. In larger leveraged deals, such retention would typically be made in the form of a vendor note.

4.2 Representations and warranties

4.2.1 Meaning of representations and warranties in Finland

There is no significant difference in Finnish law between representations and warranties. According to Finnish law, a seller is strictly liable to compensate the buyer for any losses based on specific statements regarding the target that turn out to be untrue. This is derived from the Sale of Goods Act, according to which goods are defective if they do not conform with information relating to their properties that was given by the seller and the information can be presumed to have affected the buyer. Consequently, statements about the target company are considered to be this kind of information, irrespective of whether they are called warranties or representations.

4.2.2 Customary representations and warranties in Finland

The representations and warranties in Finland are to a very large extent comparable to those that would be included in any other continental European deal. The scope and detail of the warranties are naturally negotiated for each case individually, but the warranties that are agreed upon in most purchase agreements include the following:

- the seller has ownership and title to the shares being sold and has power and authority to execute the sale;
- no encumbrances are restricting the target company or its assets;
- the accounts of the target company are reliable;
- the target company has no undisclosed liabilities;
- there is no litigation pending against the company; and
- the company is in compliance with laws (including employment, tax and environmental laws).

Warranties regarding the following areas are often seen in larger transactions where the buyer has a strong negotiating position:

- the acquisition agreement is valid and enforceable;
- the target group is lawfully incorporated and organised;
- the shares of the company are lawfully issued and the share capital has been fully paid;
- the corporate books of the company are in order;
- the company’s assets are in order;
- the company’s real property is in good condition;
- the stock of the company is current;
- the receivables of the company are current;
- the company owns its intellectual property rights and IT licences;
- the company has no unpaid taxes;
- the company has not received any subsidies from the state;
- the company has all necessary permits;
- the company’s contracts are binding and valid;
- no employees have been unlawfully made redundant;
- certain events such as dividend payments have not taken place;
- the company’s insurance coverage is sufficient; and
- the real property of the company is not polluted, and the seller has not withheld any material information.

It is fairly customary that the buyer also gives certain limited warranties to the seller. Such buyer's warranties may include warranties on power and authority, sufficient financing and authority approvals.

4.2.3 Disclosure material, disclosure letter and qualification

Under Finnish contract law, there is a principle rule according to which the buyer is restricted from making claims for losses related to issues or circumstances which the buyer knew or should have reasonably known about at the time of the contract.

Moreover, if the seller gives the buyer an opportunity to conduct a due diligence investigation, the buyer shall, under the Sale of Goods Act, seize this opportunity. According to the Sale of Goods Act:

> 'If the buyer, before the conclusion of the contract, has examined the goods or, without acceptable reason, has failed to comply with the seller's recommendation to examine the goods, he may not make claims based on a defect that he ought to have discovered in the examination, unless the seller's conduct was incompatible with honour and good faith.'

The Sale of Goods Act is not mandatory law in Finland, and the parties are free to agree that its provisions are not to be applied to the purchase agreement. However, as the provisions of the Sale of Goods Act are considered to reflect fundamental legal principles of Finnish contract law, many judges and arbitrators may, to a certain extent, apply such fundamental principles when resolving a dispute relating to the purchase.

As a result, it is advisable to be very specific when drafting the so-called 'sandbagging' provisions in the purchase agreement, ie provisions that try to exclude due diligence findings from the matters that limit or qualify the warranties.

A separate disclosure letter may also be used to effectively disclose certain matters to the buyer. Under Finnish law there are no formal requirements for a disclosure letter.

4.2.4 Other qualifications

Other fairly common qualifiers of the warranties are qualifications based on (1) the seller's knowledge, so that a warranty actually only covers what the seller knew about a certain circumstance and (2) a material adverse effect, so that the warranty is given only to the extent that a breach of the warranty will not cause a material adverse effect.

4.2.5 Survival of warranties

All or a part of the warranties may be agreed to be deemed to be repeated at the closing of the transaction. The claim periods can be freely agreed upon by the parties and they can be calculated to start either from the closing date or the execution date or from any other agreed date.

4.3 Buyer's and seller's covenants

4.3.1 Pre-closing covenants

The contents of pre-closing covenants typically agreed upon in Finnish acquisition agreements do not significantly differ from those typically agreed upon in other jurisdictions.

Such covenants may contain, *inter alia*, the following obligations:

(a) The parties must use their best or reasonable efforts to complete the transaction as set out in the acquisition agreement. However, it should be noted that there is no established practice on the specific interpretation of, and difference between, 'best efforts' and 'reasonable efforts' in Finland.
(b) Obligations of a party to obtain authority approvals prior to closing of the transaction. This includes stipulations on timing for submitting filings and taking other necessary actions. The filing party often is obligated to submit copies of the documentation to the other party.
(c) Depending on the situation, a party may undertake to file certain applications, execute certain agreements, or complete other actions prior to the closing of the transaction.
(d) The conduct between signing and completion of the target company is also customarily agreed upon, especially regarding what the ordinary course of business entails for the target company. A list of prohibited actions and/or decisions is quite often inserted as a covenant between signing and closing.

4.3.2 Post-closing covenants

Post-closing covenants are also commonly agreed upon between the parties. As such, the contents of the covenants do not significantly differ from other jurisdictions. Customarily agreed upon covenants include, *inter alia*, the following obligations:

(a) The buyer undertakes to hold a general meeting at which a new board of directors and a new auditor is elected. According to the Companies Act, the powers of the new board members are effective beginning upon their election, and the new board members shall be registered with the trade register without delay after their election. It is fairly common for the buyer to undertake to release the members of the board of directors, as well as the managing director from liability, provided that the auditor of the target company does not recommend otherwise.
(b) The seller might wish to retain the trade name of the target company being sold, in which case, the name of the company will be changed in connection with the closing of the transaction. The change of name may be prepared prior to the closing, and the specific date for changing the name can be agreed upon with the trade register prior to the closing, provided that there is sufficient time for the trade register to handle the application (customarily one to two weeks).
(c) Customary covenants on publicity and confidentiality.
(d) The seller may agree to a non-solicitation and/or a non-competition obligations, the length of which should comply with relevant competition law provisions.

4.4 Buyer's and seller's closing conditions

In relation to closing conditions, Finnish market practice does not significantly differ from other jurisdictions. The following is a list of some of the most common conditions:

(a) the receipt of authority approvals, especially competition authority approvals, to execute the transaction;
(b) the buyer's financing has been secured;
(c) the consent of the counterparties to crucial business agreements containing a change of control clause has been obtained;
(d) no material breach of the warranties has taken place prior to the closing; and
(e) no material adverse effect has taken place.

In addition to the abovementioned, conditions such as satisfactory due diligence and satisfactory arrangements with management may be included in the acquisition agreement.

A definition of a material adverse effect is advised to be included in the acquisition agreement, especially as there is no established practice on the interpretation of a material adverse effect in Finnish law and there might be significant differences in how individual judges or arbitrators understand the concept.

4.5 Indemnification provisions

4.5.1 General remarks

Typical indemnification provisions in Finnish acquisition agreements will address the following:

(a) the main principle that the seller will compensate any losses the buyer might suffer due to a breach of the warranties;
(b) limitations of the seller's liability, both with monetary caps and time limits;
(c) the process for dealing with third party claims; and
(d) possible specific indemnities which have been agreed upon.

Compensation for losses is often stated to be a reduction of the purchase price as this will enable the buyer to apply for a refund of part of the transfer tax paid on the transaction. The purchase price will later be shown lower than originally paid due to the warranty breach.

Often the parties agree that only the indemnifications specified in the agreement will apply, and that all other statutory or implied remedies (including the right to rescind the agreement) are excluded.

4.5.2 Liability limitation

The limitation of the seller's liability is often executed through establishing an overall cap with regards to liability, as well as agreeing upon a *de minimis* amount for each loss and a basket amount which the sum of the individual losses shall exceed prior to being able to claim for losses from the seller.

In addition to the monetary limitations agreed upon, the parties may also agree on the term during which claims may be presented. The claim period depends on the transaction at hand, but 12–24 months is fairly common in Finland as a general claim period. Specific claim periods may be agreed upon concerning certain warranties, especially regarding tax and environmental warranties, as well as so-called 'fundamental warranties' regarding the ownership of shares and due existence of the company. One element which might affect the length of the claim period is the timing of the next audit of the target company's financial accounts.

In some cases, the parties agree not to have any time limitation on certain fundamental warranties, such as ownership and authorisation. The time limit concerning taxes may be agreed to be the statutory limitation period for tax authorities plus one or two months. In addition, the parties may also agree on separate time limits relating to employment and environment claims.

In addition to the time and monetary limitations, an agreement may contain provisions on how to handle tax deductions regarding losses, insurance proceeds and other issues.

4.5.3 Specific indemnities

If there are certain identified risks in the company that may lead to costs or losses, the parties may agree that the seller will take such risks and indemnify the buyer or the target for any cost or losses arising from such risks.

When drafting specific indemnities in an agreement governed by Finnish law, it is advisable to be as detailed as possible so as to make sure that the buyer’s possible awareness of such risks will not limit its right to indemnities. If it is intended that the liability limitations relating to the warranties should not apply to the indemnities, then this should also be clearly stated.

4.6 Dispute resolution

A typical solution is to agree to settle any disputes in arbitration under the arbitration rules of the Finland Chamber of Commerce. It is also possible to agree upon an ad hoc arbitration based on the stipulations of the Finnish Arbitration Act. It is less common in Finland to agree to submit M&A disputes to be settled by the courts.