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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Latvia and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Contents

Finland

Fredrik Lassenius, Christoffer Waselius and Niko Markkanen

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

The acquisition of privately owned companies, businesses or assets is typically carried out by entering into either a share purchase or an asset purchase agreement, with share purchases being used more frequently. Buyers may also participate in auction processes arranged by or for the sellers. Auction processes are more common when the seller has engaged an M&A adviser and the target is likely to attract multiple purchase candidates.

The duration of the transaction process depends on, for instance, the size of the target, field of business of the target, possible regulatory aspects in relation to the closing of the transaction (such as merger control) or the number of buyer candidates involved in the process. The acquisition of a smaller or mid-sized target, which does not require any regulatory approvals prior to the closing of the transaction, usually takes no more than a few months to close from the start of the negotiations. For larger or more complicated transactions it is not that unusual that the whole process lasts for more than 12 months. A typical transaction process generally includes the following steps:

- the entry into various preliminary agreements, such as letter of intent and non-disclosure agreement with the buyer candidate who wish to receive more information on the target;
- an information memorandum regarding the target is delivered to the buyer candidate;
- the submission of an initial bid by the buyer candidate;
- due diligence performed by the buyer candidate;
- the submission of the final bid by the buyer candidate;
- final negotiations and conclusion of the relevant transaction documents (including the acquisition agreement); and
- signing and closing of the transaction, which may occur either simultaneously or separately should there be any closing conditions included in the acquisition agreement.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

In general, Finnish private M&A transactions are governed by national legislation and EU regulations. The main national legislation includes:

- the Contracts Act (228/1929, as amended);
- the Sale of Goods Act (355/1987, as amended);
- the Companies Act (624/2006, as amended);
- the Employment Contracts Act (55/2001, as amended), relating to the transfer of employees in asset purchases or transfers of undertaking in particular;
- the Competition Act (948/2011, as amended) with respect to merger control and non-compete agreements; and
- the Act on the Screening of Foreign Corporate Acquisitions in Finland (172/2012, as amended) (the Investment Control Act), which monitors foreigners' corporate acquisitions in Finland (only the Finnish language version is available).

The M&A market is not specifically regulated, except with respect to publicly listed companies and the regulation governing transfers of undertakings from an employment law perspective.

The parties may agree that the acquisition agreement is governed by foreign law. However, certain statutory Finnish laws apply in any event in relation to, for example, tax law, competition law, employment law and the legal transfer of ownership.

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

At the outset, the title to the shares, business or assets is transferred from the seller to the buyer upon completion of the acquisition agreement. In addition, for the buyer to get sufficient assurance regarding the title, the seller usually warrants in the purchase agreement that the seller lawfully owns and has transferable title to the target or the shares and that they are free from any encumbrances.

For the buyer to use the rights pertaining to the shares, the buyer must inform the board of directors of the target company about the acquisition of the target shares and be recorded as the lawful owner of the shares in the target company's shareholder register. The buyer can only be entered into the shareholder register after the transfer tax has been paid. In addition, it is advisable for the purchase agreement to clearly state, among other things, whether any share certificates have been issued regarding the shares. If share certificates have been issued, they must be physically transferred to the buyer and duly endorsed.

Finnish law does not generally recognise a difference between legal and beneficial title.

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

At the outset, unless a shareholder agreement is in place that stipulates otherwise, each shareholder must agree to sell the shares owned by it before a buyer may acquire all the shares in the company. However, the Companies Act offers a squeeze-out mechanism, according to which a shareholder owning more than 90 per cent of the target's shares and votes may redeem the remaining shares at a fair price. In such a squeeze-out situation, a minority shareholder is also entitled to require the majority shareholder to redeem his or her shares. The redemption price is the fair price preceding the initiation of the squeeze-out procedure, and is finally determined in statutory arbitration in the case of a dispute.

Exclusion of assets or liabilities

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

At the outset, the parties are free to agree on which assets and liabilities that shall be transferred from the seller to the buyer as part of the business transfer. However, in an asset sale where the target is a going concern business, the buyer must provide continued employment to employees working for the transferred business. Consequently, employees are automatically transferred to the buyer as part of the purchased going concern business. From a tax point of view, tax liabilities remain with the transferor and cannot (in relation to the tax authorities) be assigned to the transferee. As to environmental liability, under the Act on Compensation for Environmental Damage (737/1994, as amended), a party that has purchased a business or company that caused environmental damage or loss can be held liable for the damage or loss if the relevant buyer knew or should have known, at the time of the assignment, about the damage or loss or the threat of it.

As opposed to share acquisitions, the continuance of agreements and other legal relationships requires, at the outset, third party consents in a business transfer, unless stated otherwise in the relevant agreements.

Consents

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Under the Investment Control Act, a foreign buyer must apply for prior approval from the Ministry of Economic Affairs and Employment (MEAE) for an acquisition resulting in the buyer holding more than one-tenth, one-third or one-half of the voting power (or corresponding actual influence) of a Finnish defence or security company. In addition, a foreign buyer may submit a notification to the MEAE for an acquisition resulting in the buyer holding more than one-tenth, one-third or one-half of the voting power (or corresponding actual influence) of a company or business holding a key position with respect to maintaining vital functions of the Finnish society.

When considering an application, the MEAE can transfer the matter to the Council of State if the acquisition may jeopardise key national interests. A foreign buyer is defined as a person, entity or trust that does not have a place of residence within the European Union or the European Free Trade Association (EFTA). The Investment Control Act also applies to an entity or trust that has a place of residence within the European Union or EFTA and in which a foreign buyer (as defined above) holds:

- at least one-tenth of the voting power, in the case of a limited liability company; or
- corresponding actual influence, in the case of another entity or business.

In addition, regarding acquisitions of Finnish defence companies, a foreign buyer is also defined as a person, entity or trust that has a place of residence within the European Union, apart from Finland, or within the EFTA. The same applies to a Finnish entity or trust in which a person, entity or trust, which has a place of residence within the European Union, apart from Finland, or within EFTA, holds:

- at least one-tenth of the voting power, in the case of a limited liability company; or
- corresponding actual influence, in the case of another entity or business.

The MEAE approves acquisitions resulting in the control of those companies unless the acquisition endangers key national interests. Such interests include:

- military national defence;
- functions vital to society (including safeguarding critical infrastructure and security of supply); and
- national security and public order.

Acquisitions endangering important national interests are reviewed by the Council of State. No approval by the MEAE is required where:

- the foreign buyer subscribes for shares in the company in connection with an increase of the share capital of that company in the same proportion as its current shareholding;
- the foreign buyer acquires the shares through inheritance under a will or by matrimonial right;
- another foreign owner has already acquired dominant control of the company under the Investment Control Act (not applicable to defence or security companies); or
- the company is acquired from another foreign enterprise that has already become the owner of the company under the Investment Control Act (not applicable to defence or security companies).

The MEAE may impose conditions on an acquisition if it is necessary to secure key national interests. The conditions must be accepted by the parties to the transaction.

If approval is not granted, the buyer must decrease its ownership to less than one-tenth (or less than one-third or less than one-half) of the shares in the company, and can only exercise the corresponding voting power at any general meeting of the company's shareholders or other relevant corporate body.

The Investment Control Act allows for rather wide interpretation possibilities with respect to its applicability; thus, it is not that unusual for contemplated transactions to be pre-notified to the MEAE under the Investment Control Act.

In addition, certain sector-specific notification requirements may also become applicable to a contemplated transaction, such as the requirement to notify the Finnish Financial Supervisory Authority about changes of ownership in credit institutions.

7 | Are any other third-party consents commonly required?

At the outset, the shares in a private limited liability company can be freely transferred from an existing shareholder to a new shareholder, unless otherwise set out in the articles of association or a shareholders' agreement regarding the target company.

The target company may have entered into, for instance, commercial agreements or received governmental funding, the terms of which might include change of control provisions. Hence, in such situation, the relevant counterparty of the target might be entitled to terminate the agreement or claw back the funding granted to the target company, unless prior consent to the transaction is obtained from such counterparty.

In a business transfer, at the outset, the continuance of agreements and other legal relationships requires third party consents, unless stated otherwise in the relevant agreements.

Regulatory filings

8 | Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

Share acquisitions or business transfers do not, at the outset, require any regulatory filings.

However, M&A is subject to merger control under the Competition Act. An M&A transaction, or a concentration for purposes of the Competition Act, is subject to control if both the combined worldwide turnover of the parties to the concentration exceeds €350 million and the turnover generated in Finland of each of at least two parties to the concentration exceeds €20 million.

Further, certain foreign corporate acquisitions require the approval of the MEAE under the Investment Control Act. The purpose of the Act is to screen and, if key national interests so require, to restrict transfer of influence to foreigners and foreign organisations and foundations. Key national interests refer to national defence, functions vital to society (including safeguarding critical infrastructure and security of supply) and national security and public order.

Filing an application with the MEAE is compulsory in foreign acquisitions in the defence and dual-use products sectors, as well as the security sector. For other acquisitions subject to screening under the Act (ie, acquisitions of Finnish companies that are considered critical for securing vital functions of society), a notification may be submitted with the MEAE for advance approval.

As of 1 July 2019, it is mandatory for a broad range of businesses to register their ultimate beneficial owners with the beneficial owner register maintained by the Finnish Trade Register. Listed companies, housing companies and mutual real estate companies, among others, are exempted from this obligation. An ultimate beneficial owner is defined in the Money Laundering Act as a natural person holding more than 25 per cent of an entity's ownership or voting rights (or exercising control, for example, by virtue of by-laws or shareholders' agreement). If another legal entity holds a share of 25 per cent or more in the entity, the natural person who de facto has the right to make independent decisions in the holding entity must be identified.

The registration is free of charge and must, as a rule, be made electronically. The register is not public, but only parties that under the Money Laundering Act may need this information can apply for a disclosure of the contents of the register.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 | In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

In addition to the legal workstream, the transaction process usually includes several other workstreams comprising, for instance, financial, tax, technical or environmental advisers who usually carry out their own due diligence reviews of the target. Financial advisers or investment banks are often appointed to assist with the valuation and overall transaction process. The terms of appointment vary from one case to another, but it is rather customary that the financial adviser is entitled to a success fee of a certain percentage of the transaction value if the transaction is completed.

Duty of good faith

10 | Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

A party can be liable for pre-contractual misrepresentation, misleading statements or similar matters under the principle of *culpa in contrahendo*. In Finland, *culpa in contrahendo* usually refers to liability for the interruption of agreement negotiations at a very late stage or the invalidity of an agreement due to negligence. A party's liability for damage under *culpa in contrahendo* is usually connected to negative contract interest. If a party is held liable based on *culpa in contrahendo*, the other party is compensated so that its financial position equals what it would have been if no agreement negotiations had taken place with the other party. Therefore, a party can only be compensated for financial loss caused by the other party's negligent pre-contractual misrepresentation or misleading statements.

The board of directors must always act in the interests of the company. In practice, this entails an obligation to act in the best interests of all shareholders of the company by conducting activities, such as when negotiating a contemplated transaction, with due care and diligence. The actions taken by the board must comply with the objects of the company, and the members of the board of directors must act in the company's best interests as opposed to in the interests of their own, a particular shareholder's or a third party's interests.

Documentation

11 | What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

In a share purchase the main document is the share purchase agreement, whereas in an asset purchase the main document is the asset purchase agreement. There are also several other documents that are usually prepared in addition to the relevant purchase agreement. For instance, a transitional service agreement where the target company or business is dependent on services provided by the seller group after closing, or a shareholders' agreement where the seller remains a shareholder in the target, or if there are multiple buyers or certain financing agreements.

In addition, prior to entering into the relevant purchase agreement, the parties usually enter into certain preliminary agreements, such as letter of intent, exclusivity agreement and non-disclosure agreement.

12 | Are there formalities for executing documents? Are digital signatures enforceable?

As a general rule, there are no formal legal requirements as to the execution of documents under Finnish law. However, there are certain types of documents to which formalities apply, such as agreements on the sale of real estate, which must be entered into in writing between the parties in the presence of a notary public.

Digital signatures are binding and enforceable as evidence of execution. In cross-border transactions, in particular, it is common that the signed signature pages are exchanged electronically in scanned PDF files among the parties to evidence the signing of the agreement. Electronic signatures are also increasingly common. This is something that could increase in popularity also going forward as a consequence of the prevailing covid-19 crisis.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

At the outset, legal due diligence is conducted on an issues-only or red-flag basis. It is increasingly rare to obtain detailed reports, even in insured transactions (ie, where a warranty and indemnity insurance policy is obtained). The applicable materiality threshold and scope of the due diligence vary from time to time, depending on, among other matters, industry-specific aspects and the size of the target, as well as whether or not the transaction is insured. The key areas of focus are usually agreed separately between the buyer and the legal adviser, and typically cover areas such as corporate documentation, commercial agreements, financing, tax (unless there is a separate tax adviser), employment, disputes, regulatory aspects, real estate, environment, intellectual property rights and data privacy. The buy-side legal adviser typically provides the buyer with reliance on the buy-side legal due diligence report, and, on a less frequent basis, to the buyer's warranty and indemnity insurer or lenders.

Vendor due diligence has become a common feature especially in transactions involving private equity sellers and in auction processes. The vendor due diligence report is typically given on a non-reliance basis to the buyer and its advisers. Hence, separate release and non-reliance letters are typically entered into in connection with the disclosure of the vendor due diligence report.

Liability for statements

14 | Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller usually seeks to limit its liability to the warranties given under the transaction agreement and such limitations should under normal circumstances be enforceable. That said, a party may not, under general principles of Finnish contract law, refer to a limitation of its liability if the party has caused the loss intentionally or by gross negligence. Thus, a seller may become liable for misleading statements given before the contract if the seller fails to correct the statement or otherwise address the underlying fact or risk.

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

The buyer can obtain relevant information available in the public databases regarding the target, such as the information that is available in the Finnish trade register. The trade register database includes, for instance, the articles of association and the annual accounts of the target company, information about the composition of the management of the target company and possible floating charges registered against the movable assets of the target. In addition, the registries of the Finnish Patent and Registration Office include, for instance, information on any registered trademarks and patents of the target company.

For the purpose of transactions involving real estate, the title and mortgage register contains information on, for example, ownership of real estate, mortgages and rights over property.

Impact of deemed or actual knowledge

16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

Under Finnish law, a buyer cannot claim for compensation for a matter or circumstance that the buyer was aware of, or should have been aware of, at the signing or closing of the transaction. It is market practice in Finland that a buyer's right to make a claim under the acquisition agreement is limited by information that has been 'fairly disclosed', meaning that the buyer's ability to present a claim against the seller for a warranty breach is limited to the matters or risk not sufficiently disclosed in the data room (or in other disclosure material).

PRICING, CONSIDERATION AND FINANCING

Determining pricing

17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Both closing accounts and locked-box consideration structures are used in Finland, depending on the type of transaction and the parties involved. Usually the seller prefers the locked-box structure instead of closing accounts, which tend to be more popular on the buyer side, especially in transactions that do not involve private equity investors. For the purpose of compensating the seller for the target's anticipated cash flow during the period between the locked-box date and completion, it is rather common for the locked-box price to be subject to an interest mechanism, which is calculated from the relevant locked-box date until completion. Buyers may be more reluctant to accept locked-box structures, especially if the time between the locked-box date and closing is excessively long. That said, locked-box structures seem to be more frequently used than they had been in the past.

Form of consideration

18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash consideration is the most common form of consideration and is usually funded by retained earnings, debt or equity financing. Shares in the buyer are also offered as consideration, or even a mix of cash and shares.

When shares are exchanged for other shares and certain conditions are met, the exchange is not treated as a disposal of the original shares for the seller. The application of this roll-over relief generally requires that no more than 10 per cent of the purchase price be paid in cash (although, the cash element will always be subject to capital gains taxation). Similar relief is also available in mergers.

There is, as such, no overriding obligation to pay multiple sellers the same consideration; thus, certain sellers may, for instance, be compensated with shares in the buyer, and other sellers may be compensated in cash.

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

Earn-out structures have been used but to a lesser extent, and particularly in smaller transactions to bridge a potential gap in the valuations of the seller and the buyer. The use of earn-out structures is rather limited due to the challenges relating to the operation of the target during the earn-out period and the fact that it may be difficult for the parties to reach a consensus with respect to the earn-out calculation mechanisms.

Deferred or additional purchase price mechanisms are also sometimes used and are often conditional on the occurrence of a future event agreed between the parties.

Given the covid-19 pandemic and the related market challenges, it was anticipated that earn-out structures would become more popular, but no significant changes have occurred.

Escrow arrangements have to some degree been replaced by the use of warranty and indemnity insurance, which has become increasingly common for the parties to take out to provide cover for losses arising out of warranty breaches.

Financing

20 | How are acquisitions financed? How is assurance provided that financing will be available?

The type of acquisition financing varies from case to case depending on, for instance, whether the buyer is a private equity or industrial player. Private equity deals are commonly financed through a combination of debt and equity financing, in line with international practices. Equity commitment letters as well as commitment letters from banks are commonly used to provide contractual certainty of funds, particularly in deals involving international sponsors. In highly competitive transactions with high-value targets, certain funds requirements can go further, and fully executed loan documentation may be required for submitting a valid bid. Most private equity deals are majority-owned by the private equity fund, but there are private equity funds whose strategy it is to acquire minority stakes only. Occasionally, the buyer may represent and warrant in the acquisition agreement that financing is available for the contemplated transaction.

Limitations on financing structure

21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

As a rule, a Finnish limited liability company cannot grant a loan or provide other assets or guarantees for the recipient to use to acquire shares in the company or its parent company.

This restriction does not apply to measures that are taken within the limits of the distributable assets of the limited liability company for the purpose of funding relevant shares for its own employees or the employees of a company that is considered a related party (as defined in the Companies Act). If such an arrangement leads to the subscription of shares of the limited liability company, this must be clearly identified in the company's annual accounts.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 | Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

The level of conditionality in acquisition agreements depends on the target characteristics and the industry in which the target is involved, among other matters. Save for regulatory conditions, such as relevant competition law approvals or approvals under the Act on the Screening of Foreign Corporate Acquisitions in Finland, other closing conditions have been rare during the past few years with high deal activity. However, closing conditions are still agreed on in deals where the specifics of the case have called for them, such as necessary third-party consents from key contractual counterparties or relevant financing providers of the target due to change of control provisions and alike.

Material adverse change or effect provisions as closing conditions have been very uncommon in the Finnish market.

23 | What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

The acquisition agreement usually includes a mutual requirement for both parties to cooperate in good faith with each other to enable each party to fulfil the closing conditions set out in the acquisition agreement. Similarly, the acquisition agreement may include an obligation for the parties to use their best endeavours to take all actions necessary to fulfil the closing conditions. The obligation to satisfy the closing conditions is usually the same for all the closing conditions.

With respect to necessary competition law approvals, the buyer is generally obliged to submit the necessary notification to the Finnish Competition and Consumer Authority (FCCA) as soon as possible, within an agreed number of business days, after the signing of the acquisition agreement. Break-up fees are used from time to time in competitive auctions in connection with, for instance, antitrust approval related closing conditions.

Pre-closing covenants

24 | Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

In addition to mutual cooperation requirements, where the signing and closing of the transaction have been separated from each other, the acquisition agreement usually includes a provision regarding the conduct of the target business between signing and closing. For instance, the buyer usually requires that the seller covenant that the target operate its business in the ordinary course and that the target not make any dividend payment or other distribution (whether in cash or in kind) to the seller between signing and closing. A breach of such covenants is usually subject to the same remedies as potential warranty breaches (ie, typically a reduction of the purchase price corresponding to the loss arising out of the breach) under the acquisition agreement but not necessarily the same limitations of the seller's liability.

Further, the covenants should take into account the restrictions under the Competition Act for the time between signing and closing. Until closing, the target and the buyer are considered separate companies, and the provisions regarding prohibited restraints on competition between undertakings apply. Additionally, should the merger be subject to the approval of the FCCA, the parties may not take any measures to implement the merger prior to the approval unless otherwise ordered by the FCCA.

Termination rights

25 | Can the parties typically terminate the transaction after signing? If so, in what circumstances?

The acquisition agreement usually provides very limited possibilities for either party to terminate the agreement. Such termination rights often relate to unsatisfied closing conditions, such as a party's failure to fulfil a closing condition by an agreed date. In addition, the acquisition agreement may include a long-stop date according to which either party may terminate the agreement, unless the closing of the transaction occurs on or before a specific date that has been agreed in the acquisition agreement.

26 | Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees are rarely used in the Finnish market except for in competitive auctions where sellers frequently ask for break-up fees, for instance in relation to breaches of 'hell or high water' undertakings. With respect to public takeover bids, the Helsinki Takeover Code provides that a break fee (or reverse break fee) may be justifiable in some situations if (1) the acceptance of the arrangement and receiving the bid is, in the opinion of the board of directors of the target company, in the interests of the shareholders; and (2) the amount of the break fee is reasonable, taking into consideration the costs incurred by the offeror in preparing the bid, among other things.

A break fee to be paid by the target company owing to a reason arising from the offeror is, on the contrary, not deemed justifiable.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 | Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

As warranty and indemnity insurance has become more common, deals where a seller gives very limited warranties or fundamental warranties only are increasingly rare.

The acquisition agreement usually includes specific language regarding the seller's warranties and indemnities. The type and detail of the warranties included in the acquisition agreement depend on, among other things, the size of the transaction and whether the relevant transaction is negotiated with only one buyer candidate. Consequently, the warranties tend to be less extensive in an auction than when negotiating only with one buyer candidate. In Finland, there is no clear distinction between a representation and a warranty.

Typically, the warranties given cover the following main areas:

- fundamental warranties, such as corporate organisational matters and ownership of shares (or assets, in an asset deal);
- financial matters, including the correctness of the accounts;
- agreements;
- employees and employee benefits;
- intellectual property rights;
- data privacy;
- litigation;
- tax;
- real estate; and
- environmental matters.

Generally, specific indemnities are rather limited and restricted to specific risks that have already been identified by the buyer during the due diligence. Typically, the specific indemnities are not subject to the various limitations of the seller's liability under the acquisition agreement and are, thus, paid out on a euro-for-euro basis.

Limitations on liability

28 | What are the customary limitations on a seller's liability under a sale and purchase agreement?

Typically, the seller strives to limit warranties other than the fundamental warranties, such as the ownership of shares in a share sale, in various ways. Such limitations may, for instance, be structured in the following ways:

- qualifying warranties by the seller's knowledge so that the buyer assumes the risk for unknown breaches of warranties (less so in insured transactions);
- materiality qualifiers excluding the seller's liability for minor breaches in the form of monetary de minimis and basket caps; or
- time limitations for the indemnity obligation (or a specific survival period for warranties, but the former is preferable).

It is further market practice in Finland that a buyer's right to make a claim under the acquisition agreement is limited by information that has been 'fairly disclosed', meaning that the buyer's ability to present a claim against the seller for a warranty breach is limited to the matters or risk not sufficiently disclosed in the data room (or in other disclosure material).

The time limit for presenting a claim usually varies between 12 and 24 months, with increased periods for presenting claims under fundamental warranties as well as tax and environmental warranties. The max liability of the seller is typically somewhere between 10 per cent and 30 per cent of the enterprise value. As a general rule, the larger the enterprise value, the lower the percentage. The basket cap is typically approximately 1 per cent of the enterprise value, and the monetary de minimis cap is typically approximately 0.1 per cent of the enterprise value (except for deals where the enterprise value is based on exceptionally high multiples of the target's earnings and a standard de minimis cap could bar a significant portion of relevant warranty claims).

Transaction insurance

29 | Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Warranty and indemnity insurance that limits the seller's liability under the warranties and reduces the need for postponed consideration under escrow or holdback arrangements has become increasingly common. Although the warranty and indemnity insurance may be put in place

either on the seller side or the buyer side, 'stapled' warranty and indemnity insurance is increasingly being used in auction processes, whereby a seller-nominated insurance broker pre-packages an indemnity and warranty insurance policy that the buyer is expected to sign (policies actually signed by the seller are very rare or non-existing).

Customary exclusions from warranty and indemnity insurance coverage include, for instance, warranty breaches caused by intentional misconduct, fraud or known risks as well as forward-looking statements, criminal liability, tax and environmental liability. In addition, unless separate new breach coverage has been obtained, warranty breaches that have occurred and become known in the interim period between signing and closing are usually excluded from the warranty and indemnity insurance coverage.

The insurance process, which generally starts with mandating an appropriate insurance broker and lasts until the entry into an insurance policy, usually takes around one month in total. Lately, in the Nordic countries, the total cost for the insurance has been between 1.2 per cent and 1.5 per cent of the limit of the coverage that has been purchased. Given the covid-19 pandemic and increased competition between insurers, there has been downward pressure on the premiums and underwriter fees.

A more recent development in the warranty and indemnity insurance space is the occurrence of synthetic warranty and indemnity insurance. For synthetic warranty and indemnity insurance, the warranties are not given by the seller; instead, a synthetic set of warranties is attached to the insurance policy. The wording of the warranties is, therefore, not dependent on negotiations between the seller and the buyer, but, assuming that it is a buy-side policy, between the buyer and the insurer.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

It is common for the parties to agree on post-closing covenants such as non-compete and non-solicitation undertakings, confidentiality undertakings and announcements. Non-compete obligations imposed in the context of mergers are considered exempt from the prohibitions of the Competition Act if their duration, their geographic field of application and their subject matter are reasonable and if they do not restrict competition more than what is considered necessary for the implementation of the merger and to guarantee the transfer of the full value of the assets transferred. Non-compete clauses are only considered necessary to the implementation of a merger where the merger involves a transfer of know-how, goodwill, or a customer base to the purchaser. Where only the tangible assets of an undertaking are transferred, restrictions imposed on the vendor cannot usually be considered necessary for protecting the purchaser against competition.

For non-compete clauses to be considered permissible, they must be limited to the vendor, the vendor's subsidiaries or such representatives of the vendor that could, based on customer loyalty and know-how, quickly establish competition against the transferred undertaking. As a rule, non-compete obligations may, thus, be imposed only on controlling shareholders, and proposed non-compete undertakings on minority shareholders must be assessed in the light of this limitation.

The maximum duration of non-compete clauses that can be considered permissible depends on the circumstances. Usually, non-compete clauses may be considered justified for periods of up to three years, where the transfer of the undertaking includes the transfer of goodwill, a customer base and know-how. When only a customer base and goodwill are included, non-compete clauses are, generally, justified for periods of up to two years.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transfers of shares in ordinary Finnish limited liability companies are subject to transfer tax at a rate of 1.6 per cent of the purchase price, while transfers of shares in real estate companies, housing companies and real estate holding companies are subject to transfer tax at a rate of 2 per cent. No transfer tax is payable if both the seller and the buyer are non-Finnish tax residents (except for transfers of shares in a real estate or housing company or a real estate holding company designed for such purposes).

The transfer tax base also includes debt or liabilities of the acquired entity (towards the seller or a third party) assumed by the buyer based on the transfer agreement, provided that the assumption of the debt or liabilities accrues to the benefit of the seller. However, the Finnish Supreme Administrative Court has recently held that the purchase of a shareholder loan receivable in connection with a share deal should not be included in the transfer tax base when the buyer has not financed the acquired entity for the purpose of enabling repayment of the shareholder loan or given any other guarantees in the share purchase agreement with respect to the repayment of the loan.

Additionally, the acquisition of shares in real estate companies and mutual real estate companies is subject to specific rules for determination of the transfer tax base, which must include certain loans that under law, corporate resolutions or articles of association can be held to be directly allocated and connected to the shares in these companies.

The sale of real property, including land plots and buildings located on them, is in turn subject to transfer tax at a rate of 4 per cent of the purchase price and payable by the buyer. There are no exceptions to this particular rule. Assets, other than real property (and shares), are not subject to transfer tax.

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Income received from the disposal of shares constitutes part of a Finnish limited liability company's business income, taxable at the rate of 20 per cent, unless the participation exemption applies. The purchase price and any sales-related expenses are generally deductible for tax purposes on disposal. Any loss on disposal of the shares is deductible from the taxable business income, unless the participation exemption applies to the sale.

Non-residents are generally not subject to any tax in Finland on capital gains arising from the sale of shares in Finnish companies.

Income received from the disposal of assets constitutes part of a limited liability company's business income taxable at the rate of 20 per cent. The purchase price and any sales-related expenses are generally deductible for tax purposes on disposal. Any loss on disposal of the assets is therefore in practice deductible from taxable business income.

Value added tax can be payable on an asset sale if the transfer is not considered as a transfer of a going concern.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

At the outset, the employees of the target are automatically transferred to the buyer when the buyer acquires a business or assets from the seller, in which case such employees retain their existing terms of employment.

In a share acquisition, there is no change in the employment relationship between the relevant employee and the target company, which means that the relevant employee, at the outset, continues to be employed by the target company on existing terms and conditions.

Notification and consultation of employees

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

The employees do not need to consent to an acquisition of shares in a company or to a sale of a business or assets. However, with respect to a sale of business or assets, the seller or the buyer must inform the employees or their representatives of the business or asset sale, if the seller or the buyer have 20 or more employees in Finland.

Transfer of pensions and benefits

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

In a share acquisition, there is no change in the employment relationship between the relevant employee and the target company, which means that the relevant employee, at the outset, continues to be employed by the target company on existing pension and other benefits.

If an employee is transferred as a part of a business or asset transfer, such employee retains its existing terms of employment. Thus, the buyer must arrange equivalent pension benefits for such transferred employee.

UPDATE AND TRENDS

Key developments

36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

The outbreak of the covid-19 pandemic shook the Finnish economy in the beginning of 2020, plunging the markets into deep uncertainty with deals postponed or put on hold. Prior to the outbreak, private M&A remained strong in Finland owing to, for instance, the low interest rates and the fair amount of capital available.

While the volume of the Finnish gross domestic product increased by 1 per cent in 2019 (according to Statistics Finland), the gross domestic product contracted by nearly 3 per cent in 2020 (although this is less of a decrease when compared with the EU average of approximately 6.4 per cent).

In respect of M&A deal activity, the shock was temporary, and factors such as quantitative easing, government stimuli and the available capital to spend on acquisitions contributed to a rather quick rebound of deal activity levels in the second half of 2020. The increased activity continued and grew in the first half of 2021, both in respect of private and public deals.

In addition to continued activity within the energy and infrastructure sectors, M&A activity within the IT services, fintech and other technology-related businesses has remained strong. The Finnish weekly business magazine *Talouselämä* was notified of 547 deals in 2020, which was a moderate decrease of approximately 12 per cent compared with the figures in 2019. In respect of Finnish business angel investments into start-ups, after the record year in 2019, business angel investments into start-ups decreased, with business angels having invested €36 million into 321 start-ups – a 33 per cent and 25 per cent reduction, respectively.

In addition, according to statistics published by the Finnish Venture Capital Association (FVCA), Finnish start-ups and growth companies received in total €1.35 billion in investments in 2020. A survey made by the FVCA and Business Finland Venture Capital in April 2020 indicated that the covid-19 pandemic is negatively impacting 50 per cent of venture capital portfolio companies and 62 per cent of buyout portfolio companies.

The accelerating distribution of and shown effectiveness of covid-19 vaccines has raised hopes of a return to normal and has fuelled optimism that the current positive deal flow will continue in the third and fourth quarters of 2021. However, uncertainties regarding the pandemic, rising inflation levels and the fear of overheating markets make it difficult to predict the direction of M&A activity towards year-end.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The government and other regulators and authorities have taken various actions to address the concerns arising out of the covid-19 crisis. For instance, the Finnish Competition and Consumer Authority (FCCA) has stated that it will take into account the state of emergency caused by the pandemic when applying the Competition Act.

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In respect of merger control, the FCCA asked market participants in 2020 to postpone notification where possible and to agree separately with the FCCA on any filing submissions.

The government has increased business financing to ensure that companies may continue to operate profitably during and after the current covid-19 pandemic. The extension of the temporary state aid rules will be in force until 31 December 2021.

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