

# Chapter 7

## Finland

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### 1. Introduction

The Cross-border Mergers Directive ('the Directive'), which was adopted by the Council of Ministers on 26 October 2005, was implemented 'on time' by Finland at the end of 2007. Indeed, implementation went further than required by the Directive; more types of companies were covered than specified. Furthermore, Finland also introduced rules covering additional types of cross-border restructuring, specifically, triangular mergers and cross-border divisions. Finally, Finland was one of the few Member States that introduced a right for national authorities to veto cross-border mergers on the grounds of public interest.

Rights for workers in Finland in cross-border mergers are stronger than required by the Cross-border Mergers Directive, but this is due to legal rights pre-existing implementation. The provisions concerning the worker participation system (Art. 16 Cross-border Mergers Directive) have been implemented in the Act on Workforce Representation in the Administration of Undertakings (Section 9b) in 2007. Based on the Workforce Representation Act, certain parts of the Finnish SE Employee Involvement Act (SE law) become applicable if at least one of the participating companies has organised a workforce participation system prior to the merger. The implementation of these provisions in Finland went beyond what was required by the Directive, in the sense that a threshold of only 150 employees (instead of 500 employees) covered by worker participation was needed to trigger negotiations on worker participation or implementation of the standard rules. This is also due mainly to the pre-existing Workforce Representation legislation. For worker involvement other parts of the already existing national *acquis* are important. On a critical note, however, overall employee rights in case of mergers and acquisitions have long been inadequate in practice.

### 2. National legal background on cross-border mergers

#### 2.1 General information

The Cross-border Mergers Directive has been implemented in Finland through the amendment of a number of laws, particularly the Companies Act. The rules apply to private and public limited companies and cooperatives, but also to credit institutions (savings banks in the form of a limited company) and mutual real estate limited companies.

Prior to implementation there were no company law rules on cross-border mergers. Interestingly, however, there were rules regarding taxation in the case of cross-border mergers (Bech-Bruun 2013: 402). Controls on mergers, aimed at ensuring business competitiveness, began in Finland in 1998, with intervention, where necessary, ex ante with regard to concentrations that might significantly impede effective competition. Chapter 4 of the Competition Act formulates the provisions on merger control. The provisions on the assessment of mergers enshrined in the Competition Act have been reformed in order to conform with EU law.

A Finnish limited liability company may participate in a cross-border merger only if the surviving company or the disappearing company qualify as a limited liability company within the meaning of the Cross-border Mergers Directive.<sup>1</sup>

As a result of the cross-border merger all assets and liabilities of the disappearing companies will be considered transferred without liquidation. The transfer of all rights and obligations shall also apply to contractual relationships in force, including employment contracts and employment relations existing on the date the cross-border merger comes into force.<sup>2</sup>

## 2.2 Common draft terms

The management or the administrative organ of each participating company (in Finland, usually the board of directors) must prepare *common draft terms* for the cross-border merger and this draft has to be sent in written form to the registration authorities (Commercial Register) within one month of its signing. The Commercial Register is to publish notice of this, together with a public notice for any creditors.

The draft terms should include the information according to the Directive 2005/56/EC and its Art. 5. Finnish law also requires that some additional pieces of information have to be provided, including reasons for the merger, amendment of the articles of association, rights of any option-holders, loans, amount of equity, the planned date of registration of the implementation of the merger and so on.

From these common draft terms the most meaningful items for the employees are the following requirements from Article 5 of the Directive:

- (d) the likely repercussions of the cross-border merger with regard to employment; and
- (j) when appropriate, information on the procedures by which arrangements for worker involvement and their rights to participate in the company resulting from the cross-border merger are determined (pursuant to Art. 16).

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1. There are some exceptions when it comes to parent-subsidiary mergers and cooperatives after which the foreign legal entity has to own all the shares of its Finnish subsidiary.

2. Also, the Transfer of Undertakings Directive (2001/23/EC) is applied and the clauses regarding it in the Employment Contracts Act apply, see below.

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## 2.3 Management report

As part of the merger proceedings, the management body of each merging company must prepare a *written report* regarding the implications of the cross-border merger for the company and its stakeholders, including its employees. The report shall be made available to shareholders and the employee representatives or, in absence thereof, to the employees directly no later than one month before the date of the general meeting (of shareholders) is scheduled in order to approve the merger.

The cross-border merger implementation study reports that Finland has included additional requirements for the information content of the management report regarding the merger's impact on shareholders, creditors and employees.

In the event the employee representatives issue an opinion on this management report, this opinion must be attached to the report.

## 2.4 Certificate granting permission to merge

If no creditor has objected to the merger or if it is affirmed by a court, the registration authority (the Commercial Register) shall register the draft terms mentioned above. The registration authority must also be provided with evidence of worker participation in the acquiring company in a manner corresponding to that provided in Art. 16 of the Cross-border Mergers Directive. As far as the trade unions are aware, this requirement has mainly been fulfilled through a short sentence from the management side, and the employees' opinion is seldom attached. This is mainly due to the fact that, even though the provisions are fairly good on paper, the sanctions are virtually non-existent and the employees are kept in the dark until the very last moment.

As the cross-border merger implementation study states, the registration authority (the Commercial Register) has to check whether all measures related to the merger have been taken and whether all formalities required by the law have been fulfilled. This check can be characterised as formal rather than substantive in nature (Bech-Bruun and Lexidale 2013: 414).

Only after the above-mentioned criteria are fulfilled can the registration authority issue the merging company with a certificate granting permission for the Finnish companies to participate in the merger.<sup>3</sup> After this, within the next six months, implementation of the merger can take place and its other legal effects will enter into force only upon final registration.

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3. But given only if the acquiring company is a foreign one, as already mentioned.

### 3. Legal background on worker involvement

#### 3.1 Legal basis

The Cross-border Mergers Directive was implemented in Finland in the Act on Workforce Representation in the Administration of Undertakings (the Finnish BLER law) in 2007 (Section 9 b). Based on the Workforce Representation Act, also certain parts of the Finnish SE Employee Involvement Act (SE Act) become applicable if at least one of the participating companies has organised a workforce participation system. Workforce *participation*, as defined in the Finnish SE Act, is

‘considered to be organized if the employees have a right to elect or appoint some of the members of the company’s supervisory or administrative organ or such management groups or equivalent bodies which together cover the company’s profit units, or if the employee representatives have a right to recommend or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ.’ (SE Act)

But if this means taking part in, for example, management appointments in the company or appointing trade union members to company positions – as it is usually imagined – there appears to be little evidence of it happening in Finland (the latter is not even possible according to Finnish legislation). Rather it seems to indicate some sort of copy/paste approach to implementing these clauses in Finnish law.<sup>4</sup> Also, Council Regulation (EC) No. 2157/2001, 12 Article 2-4 is applied in these cases.

If at least one of the merging companies *already provides for* worker participation, the company resulting from the merger shall be governed by the system in place and said participation must take a legal form that allows the exercise of the relevant rights. These matters shall also be negotiated with the workforce and usually an SNB is established to that end.

If *no corresponding employee participation system* has been implemented in any of the companies involved in the cross-border merger, there is no obligation under the Finnish law to organise such a system following the merger.<sup>5</sup> The participating companies may, however, decide to *apply the secondary (standard) rules* on organising worker involvement (representation or some form of participation) provided for in the SE Act as of registration of the merger and even without negotiating with the employees on these matters first.

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4. The applied clauses are §2.1, §4–12, §14, §16.1 ( 7–9), §16.2, §18.1, §19, §28.2, §28.3, §29 and §30 and also §18.2 (2) of the Workforce Representation Act is applied, so that instead of the abovementioned 25 per cent rule the one-third rule will be applied

5. SE Directive, Annex, part 3, b.

## 3.2 SNB

Unless a decision to apply the secondary (standard) rules for organising workforce participation has been made pursuant to the SE Act – very rare in Finland – the management or administrative organs of the participating companies shall, as soon as possible after publishing the merger proposal, take the necessary steps to start negotiating with the employees on the arrangements for worker involvement.

For this purpose an SNB should be formed representing the employees of the participating companies. There are no specific provisions in the law(s) regarding these elections, but the representatives from Finland are likely to be shop stewards, according to Finnish national custom.

The management or the administrative organs of the participating companies shall, as soon as possible after publishing the merger proposals, take the necessary steps – including providing information about participating companies, concerned subsidiaries and establishments and the number of their employees – in order to start the negotiations with the representatives of the companies’ employees on the arrangements with regard to worker involvement.<sup>6</sup> In reality and as far as the trade unions are aware the same worker involvement model that has been in use before – at least in Finnish acquiring companies – is simply transferred to the new company, perhaps with a few additional board seats, and no specific and longer-term negotiations take place on the subject.

## 3.3 Application of the Workforce Representation Act where there are more than 150 employees

Nevertheless the Workforce Representation Act must always be applied to limited liability companies with 150 or more employees (regardless of what was mentioned above<sup>7</sup>) and at least when the merged company *in the future* reaches the threshold of 150 employees.

The purpose of the Workforce Representation Act is to:

- improve enterprise functioning;
- intensify cooperation between the enterprise and its employees;
- increase the employees’ possibilities for exerting influence in the enterprise.

To achieve this the workers shall have the right to participate in decision-making in the executive, supervisory or advisory bodies of the undertaking, when these bodies are handling matters of importance to the business operations, finances and/or to the workers’ position. All in all, the worker involvement (representation) shall be arranged as provided for in the Workforce Representation Act. Unfortunately, the loose legal provisions allow a wide range of ‘employee involvement models’, which are all

6. SE Act, section 4.

7. SE Directive, annex, part 3, b.

deemed valid according to the law, even though they differ greatly in their levels of real importance and degree of influence in the company. They vary from a coffee with the CEO twice a year to a full-fledged place on the board of directors.

It should also be noted that this threshold is considerably below that required in the Cross-border Mergers Directive. The Directive specifies that negotiations on worker participation, or alternatively the unilateral imposition of the standard rules on worker participation by management, is to be triggered if one of the merging companies already has a system of worker participation and at least 500 employees.

## **4. Other applicable legal provisions**

### **4.1 Act on Cooperation within Undertakings**

In Finland, matters affecting the workforce that are caused by the transfer of the undertaking to another place or by other similar changes in business operations can in principle be covered by cooperation negotiations (at companies that employ more than 20 persons). However, these negotiations are triggered only by potential substantial changes for employees. The relevant issues can include changes in duties, working methods, work arrangements and work premises, transfers from one duty to another, but not matters that are expected to result in termination of employment contracts or temporary lay-offs.<sup>8</sup> In cases of cross-border restructuring it is often claimed by management that there will be no substantive implications for workers; therefore these negotiations are not triggered.

However, in cases where there will be lay-offs, employment contracts reduced to part-time work or temporary lay-offs, first the employer has to issue a proposal five days prior to commencement of the negotiations.

Second, the employer is supposed to provide the representatives of the employees concerned with any information available, in writing, concerning:

- the reasons for the intended measures;
- initial estimates of the amount of terminations, lay-offs and transformation of employment contracts into part-time contracts;
- the principles used to determine which employees shall be served notice of termination or laid off or which ones will have their contract of employment reduced to a part-time contract; and
- an estimate of the time needed to implement the said terminations or lay-offs and the introduction of the said part-time contracts.

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**8.** This is a Finnish instrument for addressing a temporary lack of money or available work in the company. A person is put out of work for a certain period of work during which he/she is receiving unemployment benefit instead of salary. After this crisis is over in the company, the employee has to be called back to work. The employment contract stays in force during this whole period.

These matters have to be handled in the cooperation negotiations and in a spirit of cooperation to obtain consensus.<sup>9</sup>

If the employer is considering actions of the kind mentioned that are likely to affect fewer than ten employees (or temporary lay-offs of less than 90 days) the employer shall be considered to have fulfilled his duty to negotiate referred to above once 14 days have elapsed since commencement of the merger. If the employer is considering actions that will affect at least ten employees (or temporary lay-offs of more than 90 days) six weeks must elapse before negotiations.

#### 4.2 The Employment Contracts Act, assignment of business (transfer of undertaking)

Assignment of the employer's business refers to assignment of an enterprise, business, corporate body, foundation or an operative part thereof to another employer, if the business or part thereof to be assigned, disregarding whether it is a central or ancillary activity, remains the same or similar after the assignment. When an enterprise is assigned as referred to above, rights and obligations and employment benefits related to them under employment relationships valid at the time of the assignment devolve to the new owner or proprietor.

The assignor and the assignee are jointly and severally liable for the employees' pay or other claims deriving from the employment relationship that have fallen due before the assignment. The assignee may not terminate an employee's employment contract merely because of assignment of the enterprise as referred to above.

But when an employer assigns its enterprise in the manner prescribed above employees shall be entitled to terminate their employment contracts as from the date of assignment, regardless of the period of notice otherwise applied to the employment relationship or of its duration, if they have been informed of the assignment by the employer or the new proprietor of the enterprise no less than one month before the date of assignment.

### 5. Assessment and conclusions

All in all, it seems that the employee rights are much better safeguarded in the event of cross-border mergers than in other restructuring situations, such as takeover bids, but they frequently do not seem to be used in practice. This may be due to the way cross-border mergers are used in Finland, namely to 'devour' competitors rather than to eliminate unprofitable subsidiaries.

Even the wording in the Finnish legal provisions seems quite unclear after numerous copy/paste exercises and it is hard to say what is really meant by some of the clauses: are

9. Not a co-decision procedure, as in Sweden or a codetermination procedure as in Germany.

they meant to be applied only to SEs<sup>10</sup> and only to their worker involvement practices or are they to be applied also to other limited liability companies with some other kind of worker involvement? Cross-border mergers are few and far between in Finland, so there has not been time to form any case law yet. But it has to be said that analogically all the clauses on cross-border mergers seem to refer to all kinds of company forms with all kinds of worker involvement practices. This also seems to be the meaning of this regulation in general and also at the European level. These issues have been brought to the Finnish Cooperation Ombudsman's attention<sup>11</sup> and he is expected to issue a statement on these matters at some point. It is also evident that the work of the trade unions on these matters has to be strengthened and made more visible.

There are hardly any SEs in Finland at the moment so these rights are not generally known nor by trade union officials for that matter. Particularly the employee rights in these situations have been something of a 'sleeping beauty' for a long time, but more attention will be drawn to these issues in the future.

The Finnish Workforce Representation Act is weaker than those in some other EU countries, because it does not confer a right to a place on, for example, the board of directors: a seat can be allocated where deemed 'appropriate' by the management and, as already mentioned, even a private meeting with the CEO can be enough and fulfil the letter of the law.

The handling of confidential matters in these cases often hampers the rights of the employees to proper information and consultation at an appropriate level. Even though the Finnish Cooperation Ombudsman has stated that such confidentiality does not give the employer the right to omit information and consultation at any level, unfortunately that is regularly the case.

## References

Bech-Bruun and Lexidale (2013) Study on the application of the Cross-border Mergers Directive for the Directorate General for the Internal Market and Services, European Union. <http://dx.doi.org/10.2780/96404>

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10. The wording of the Finnish law, as these clauses are very rarely applied, if at all, is very unclear, but seems to refer only to this aspect.

11. [https://www.tem.fi/en/ministry/organisation\\_of\\_the\\_ministry/co-operation\\_ombudsman](https://www.tem.fi/en/ministry/organisation_of_the_ministry/co-operation_ombudsman)