

THE TECHNOLOGY
M&A REVIEW

THIRD EDITION

Editors

Michael J Kennedy and Dana Kromm

THE LAWREVIEWS

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M&A REVIEW

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Editors

Michael J Kennedy and Dana Kromm

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PUBLISHER

Clare Bolton

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PREFACE

Welcome to the third annual *Technology M&A Review*. As was the case in prior editions, much of the comparative data we use is based on a ‘half-year’ convention, with liberal reference to calendar year over calendar year data. Although certainly not by design or foresight, this ‘half-year’ convention better highlights the ups and downs caused by covid-19 in 2020, the incredible tech M&A bounce-back in 2021, and 2022’s half-year bevy of negative factors – inflation, the Ukraine war, and their compounded effect on the supply chain and production and productivity.

Whereas 2021 demonstrated technology M&A’s ‘champions jog’ around the M&A track, the first half of 2022 revealed some porosity in the tech armour and its slowed pace. After at least 20 years of accommodating monetary policy (i.e., cheap money), the Federal Reserve (the US central bank) has been forced to raise interest rates to combat the highest US inflation since the 1970s. The geopolitical power calculus also changed in an instant with Russia’s invasion of Ukraine, China’s quasi-alignment with Russia and its more aggressive posture on the world stage. In addition, we should not downplay covid’s continuing effects on social and government relationships nor its and the invasion of Ukraine’s impact on global trade and increasing the appetite for protectionism.

In the United States, the public markets continue to deal with these issues and their weight (with an overall downward value slope from their peak). Depending on when one measures during the first half of 2022, large technology companies such as Facebook and Google lost roughly US\$1.5 trillion in value. This is from an all-time high base. However, by mid-August 2022, the Nasdaq had rallied and was up 20 per cent from its June 2022 low, and was ‘only’ down 16 per cent for the year.

Under the Biden administration, the US antitrust authorities have been and will continue to be aggressive in challenging M&A technology transactions under various theories, but other regulatory authorities, as well as individual states, also have technology in their cross hairs from a tax, content, ‘buy America’, privacy and patriotic perspective. For the first time since 2011, venture capitalists are cutting back on technology and growth investments. In addition to the publicly announced hiring freezes, it is common knowledge to those who practice in the technology area that other hiring freezes and lay-offs are underway. Despite these headwinds, technology still accounted for approximately 47 per cent of worldwide M&A value in the first half of 2022.

While the technology M&A sector shares its DNA with other sectors, it is a growth sector and is designed to be changeable. We all intuitively know one cannot change the design of a gas turbine on the fly, but one can change a lot in the technology space very quickly. For most technology applications that do not involve life or death functions, there is no competitive limit on the rate of change. There was, in effect, no social media industry in

2000, and now it is quite difficult to actually describe it – and yet it is huge. There have been unbelievable advances in, inter alia, food production and power plants since 2000, but no one considers these growth industries. These industries' advances are considered, consciously or unconsciously, recipients of technology but not creators.

This book's goal is to both highlight the similarities and differences between technology M&A and 'normal' M&A, without taking too much time to try to define what technology and 'normal' M&A are. One of its unstated premises is that because of technology's importance, effective M&A technology lawyering necessarily involves and requires a broad set of legal skills across many practice disciplines; that requirement will likely increase as governments and interest groups from all areas focus on the sector. The sector is critical because it is 'where the money is', where the anticipated growth is and where, at least in the Western world, the political battles are and will be waged.

At least in August 2022, technology M&A in the United States is robust compared to other sectors. Despite any further changes in regulation or monetary policy, compared to other sectors its prospects are, and will continue to be, relatively better.

Michael J Kennedy and Dana Kromm

Paul Hastings LLP
San Francisco
August 2022

FINLAND

Maria Carlsson and Marla Melin¹

I OVERVIEW

The Finnish technology M&A market has had yet another active year in 2022 following the covid-19 pandemic, but it is showing signs of cooling down. While investments have continued to stream into pandemic -aided digitalisation engines such as digital communication platforms, telemedicine and streaming technologies, the recent geopolitical and inflationary pressures have led to increased investor caution, with many investors opting for a wait-and-see approach in the current, uncertain investing climate.

While high value and leveraged transactions are not yet back to pre-pandemic levels, equity-financed industrial buyer activity has remained high. The pandemic has also provided new opportunities, for example, in the construction sector, which has seen a boom in acquisitions in the field of smart infrastructure.

As to market trends, environmental, social and governance (ESG) is high up on the list, with most Finnish acquirers taking ESG seriously when making acquisition decisions. Finland has also seen its first establishment of special purpose acquisition companies (SPACs), although their use in the Finnish market is predicted to be low, a sentiment further impacted by recent interventions by the US regulator in regard of what have been considered 'SPAC misuse' scenarios. The past couple of years have seen a welcome increase in initial public offering (IPO) activity on the Finnish market also impacting the tech space, but continued stock market volatility is likely to impact this development in the coming year.

II YEAR IN REVIEW

Below is a summary of some interesting Finnish technology M&A deals of the past year:

- a* Listed Indian Cyient Limited acquired engineering group Citec Group from PE investor Sentica. Cyient is a leading global technology solutions company and Citec's expertise is in industrial plant and product engineering. The combined portfolios of Cyient and Citec will be one of the largest independent plant engineering capabilities globally, and the transaction is the largest outbound acquisition by an Indian engineering services company to date.
- b* Oura Health Oy, a Finnish health tech company that manufactures sleep-tracking rings raised US\$100 million in a Series C funding led by the Chernin Group and Elysian

¹ Maria Carlsson is a partner and Marla Melin is an associate at Bird & Bird.

Park, Temasek, Square, JAZZ Venture Partners, Eisai, Forerunner Ventures, MSD Capital, Lifeline Ventures, Marc Benioff, Metaplanet Holdings and Next Ventures also joined the round.

- c* Wolt Enterprises Oy was acquired by KKR & Co Inc, EQT Partners AB, Goldman Sachs (private equity operations), Tiger Global Management, LLC, DST Global, Coatue Management, LLC, 83 North Ltd, Vintage Ventures Management Ltd, ICONIQ Capital, LLC, Highland Europe (UK) LLP and Prosus Ventures. Wolt is a Finland-based provider of food delivery tech solutions.
- d* Aiven was acquired by Earlybird Venture Capital GmbH & Co KG, Institutional Venture Partners, Atomico, Salesforce Ventures and World Innovation Lab. Finland-based Aiven is a provider of managed open-source data technologies, like PostgreSQL, Kafka, and M3, via the cloud. Aiven helps developers develop applications and manage cloud data infrastructure.
- e* The assets of Verto Analytics Oy were acquired by US-based DISQO, Inc, a notable media measurement service provider. Verto Analytics's solutions have been used by media companies around the world to understand behaviour and measure consumer journeys.

III LEGAL AND REGULATORY FRAMEWORK

The general legal framework for technology M&A in Finland is flexible, although the basic market practice is firmly grounded in common law agreement structures. However, when compared to US-style M&A documentation or UK-based contractual documentation, the Finnish counterparts tend to be much shorter in style in accordance with the principles of civil law and statute-based contracting.

While statutes relevant to M&A are sometimes mandatory (such as the principles of equity set out in the Contracts Act, as amended),² the main statute relevant for private M&A in Finland is the Sale of Goods Act, as amended,³ which is dispositive in nature and often contracted out of in the relevant transactional documentation.

Another relevant source of law is the Companies Act.⁴ The Companies Act sets out general principles and provides the regulatory framework for corporate reorganisations (mergers and demergers) and redemption proceedings.

The legal framework for public M&A transactions differs considerably from the legal framework for private transactions. Finnish public transactions are regulated in the Securities Markets Act, as amended.⁵ Regulations and guidelines on takeover bids and the obligation to launch a bid are separately issued by the Finnish Financial Supervision Authority. Finally, the revised Helsinki Takeover Code issued by the Takeover Board of the Securities Market Association provides insight into corporate takeovers. However, it is good to note that technology M&A in Finland rather overwhelmingly tends to be private M&A by nature and, therefore, securities market regulation is seldom relevant for technology M&A transactions.

2 Contracts Act (228/1929).

3 Sale of Goods Act (355/1987).

4 Companies Act (624/2006).

5 Securities Markets Act (746/2012).

Finnish merger control rules are set out in the Finnish Competition Act.⁶ If the EU Merger Regulation does not apply, a transaction must be notified to the Finnish Competition and Consumer Authority if the aggregate worldwide turnover of the acquirer and the target exceeds €350 million and each of the parties has a Finnish turnover of at least €20 million.

Finally, the Act on Monitoring of Foreign Corporate Acquisitions⁷ in Finland is relevant where there is a national interest or defence interest involved (there is more about this in Section IV.vi).

IV KEY TRANSACTIONAL ISSUES

i Company structures

The most typical forms of incorporation in Finland are the private limited liability company (*Osakeyhtiö* (Oy)) and the public limited liability company (*Julkinen Osakeyhtiö* (Oyj)).

Transactions, including technology M&A transactions, which involve private equity investors, are usually structured through one or more Finnish holding companies organised as limited liability companies, as driven by taxation and debt finance requirements or to help facilitate management ownership.

In technology M&A, buyers are often industrial companies rather than private equity companies, whereby acquisition structures often tend to be relatively simple, typically with no more than one holding company, or a buyer acquiring a target company directly because of the lack of external finance.

ii Deal structures

Share and asset deals are the most typical deal structures in Finnish technology M&A transactions mainly because of tax reasons, as elaborated upon further below. Typical US structures such as triangular mergers are not contemplated by Finnish law; nor do they bring any tax or corporate law advantages.

Finnish technology M&A transactions tend to be based on one-on-one negotiations or, more seldom, structured auction processes, in which case corporate finance counsel typically leads the process.

iii Acquisition agreement terms

Documentation in share acquisitions typically follows the framework of common law agreements with certain amendments to better fit the Nordic legal environment. In general, the documentation does not differ materially from the UK or US market standard, although the documents tend to be slightly shorter and certain legal concepts are interpreted differently as a result of civil law statutory reasons. Examples of differing interpretations include, for example, disclosure mechanics: in Finland, if a buyer has specific knowledge prior to closing, based on due diligence or otherwise, that a representation or warranty is inaccurate, it will usually not be able to claim for breach of that warranty after closing.

The conclusion of a definitive purchase agreement between the parties may be preceded by a letter of intent that outlines the contemplated acquisition. A Finnish-style letter of intent is typically not binding, except with regards to exclusivity and confidentiality terms.

⁶ Finnish Competition Act (948/2011).

⁷ Act on Monitoring of Foreign Corporate Acquisitions (623/1999).

While Finnish transactional documentation has generally been averse to broad conditions precedent, there are a few notable exceptions. Most technology companies in Finland have received Business Finland funding (state aid), meaning that clawback provisions always need to be taken into consideration in foreign acquisitions. Business Finland is typically able to claw back funding granted to a company retroactively in if an acquisition has not been granted consent by Business Finland, whereby the repercussions may be considerable. Because of this, the requirement of Business Finland consent is typically included as a condition precedent. Other typical conditions precedent include waivers of redemption or consent clauses contained in the articles of association of the target, as well as the requirement for consent for the transaction of the most important clients of the business.

As a result of the covid-19 pandemic, there has also been a rise in the popularity of the material adverse change (MAC) clause. While this clause is frequently used in mergers and acquisitions in the US to provide a way out in cases where something materially unexpected happens in relation to the business being acquired, MAC clauses have been exceedingly rare in Finnish M&A. However, with the rise of global economic uncertainty, MAC clauses have started to be used more frequently, along with break clauses, force majeure clauses and other clauses catering to the decision-makers wishing for ways out in the event of rapidly escalating adverse circumstances.

As to preferred purchase price mechanics, in share deals locked box mechanisms are a typical seller's preference, whereas on the buyer's side the preferred choice tends to be completion accounts. Earnout elements are also often seen in Finnish technology M&A transactions. In recent years, technology M&A transactions have generally been share acquisitions against cash or cash and share consideration, and this seems to also be the trend in 2021.

In recent years, warranty and indemnity insurance has started to be seen also in technology M&A transactions, although it is still relatively rare. It is also not a standard option for mid-market transactions because of pricing considerations and underwriters' often stringent due diligence requirements in order for IP warranty cover to be given.

iv Financing

Technology M&A transactions in Finland tend to be overwhelmingly financed through equity, which is also a reason for the high share of industrial (non-private equity) buyers in this sector.

In the rare cases where external financing is used for a technology M&A transaction, senior secured bank debt is the most common source of debt funding. Small and medium-sized transactions are usually financed by Nordic banks.

v Tax and accounting

There are various kinds of Finnish tax aspects that should be taken into consideration in relation to technology M&A transactions. The relevant tax considerations also vary depending on the structure and financing of each transaction and the scope of a transaction; for example, whether a transaction concerns a share deal or an asset deal and the status of the parties either as individuals or corporations. In addition to the Finnish domestic tax legislation, the relevant income tax treaties concluded by Finland should be taken into account.

The capital gains in relation to a transaction are generally taxable in Finland for Finnish tax-resident individuals and corporations, but also for those non-resident corporations that have a permanent establishment for income tax purposes in Finland. Taxable capital gains in

Finland on shares and assets are generally subject to the normal income tax rate (currently 20 per cent for corporations, and 30 or 34 per cent for individuals depending on the amount of the capital gain). However, capital gains realised on the shares of a Finnish company are, in general, not taxable income for non-resident corporations or individuals in Finland because of the various applicable tax treaty provisions. Capital gains realised on various assets other than shares might be taxable in Finland for non-resident individuals or corporations depending on the nature of the asset.

Certain capital gains arising from the sale of shares that are classified as fixed assets for Finnish tax-resident corporations are, in certain circumstances, tax-exempt under the Finnish participation exemption. For the participation exemption to apply, there are preconditions regarding the status of the seller, the nature of the ownership and the nature of the shares in question. If the preconditions are fulfilled, the respective capital losses are non-deductible in taxation.

Transfers of shares, securities and real estate in Finland are generally subject to transfer tax in Finland. The transfer tax is generally paid by the buyer. The transfer tax base consists of the purchase price and certain other contributions in connection with a transaction. The transfer tax rate for the shares of a Finnish company is 1.6 per cent. Despite this, no transfer tax is payable in Finland for Finnish shares if both the buyer and the seller are not Finnish tax residents. Further, no transfer tax is generally payable on the transfer of securities that are subject to trading on a regulated market or on a multilateral trading facility, subject to certain preconditions.

In general, the Finnish Accounting Act, as amended,⁸ and the related Accounting Decree are followed in Finland. However, the use of accounting standards as defined in the international accounting standards and the international financial reporting standards is mandatory for corporations whose securities are subject to trading on a regulated market in a country belonging to the European Economic Area and may also be used voluntarily by other corporations.

vi Cross-border issues

A large number of Finnish technology M&A transactions have a cross-border element, and foreign ownership of Finnish technology companies continues to increase.

While the government generally views foreign ownership positively, the Act on the Monitoring of Foreign Corporate Acquisitions in Finland sets certain limits for foreign direct investment. The purpose of the Act is to monitor and, if deemed necessary, restrict the transfer to, or influence of, foreign organisations and foreigners. Such restrictions are, however, applicable only if key national interests, such as national defence, security of supply or other core functions of society, so require.

Under the Act, a corporate acquisition is deemed to occur when a foreign owner gains control of at least 10, 30 or 50 per cent of the aggregate number of votes conferred by all shares in a Finnish company. In sectors other than defence and dual-use sectors, the Act applies only to foreign owners residing outside the EU or the European Free Trade Association. Matters concerning the monitoring or approval of corporate acquisitions are handled by the Finnish Ministry of Economic Affairs and Employment.

⁸ Finnish Accounting Act (1336/1997).

V IP PROTECTION

Finland has a high level of IP and trade secret protection. The new Trade Secrets Act⁹ implementing the EU Trade Secret Directive came into force in 2018 and provides a clear set of civil regulations, including developed civil remedies, relating to trade secrets. Patents are regulated under the Finnish Patents Act, as amended,¹⁰ as well as under the Patents Decree.

Finland has adhered to all of the main international agreements concerning intellectual property, including the Paris Convention, the Berne convention, the WIPO Copyright Treaty and the Patent Cooperation Treaty. Finnish copyright legislation is based on international copyright treaties and EU directives. Further, Finland is bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is an Annex to the Agreement establishing the World Trade Organisation.

Copyright to software is regulated in Finland under the Copyright Act, as amended.¹¹ The Copyright Act implements the EU Council Directive on the legal protection of computer programs. Copyright to software transfers automatically to an employer company under Section 40b of the Act as long as the software has been created as part of the duties of the employee. Software (e.g., a computer program) is not patentable in Finland in itself, but an invention that solves a technical problem in a new and inventive way and relates to software is patentable as a starting point, even if the problem is solved using a computer.

VI EMPLOYMENT ISSUES

In Finland, non-competition agreements are regulated in the Employment Contracts Act, as amended.¹² Non-competition agreements may be made only for weighty reasons that relate to an employer's operations or position. A non-competition agreement may be entered into for a maximum duration of six months after the termination of the employment, or, if the employee receives reasonable compensation, for up to 12 months after the termination of the employment. The Finnish legislation on post-employment non-compete undertakings was recently revised, and new rules became applicable in January 2022. The new amendments provide that compensation shall be mandatory for all non-competition agreements regardless of their length. For a non-competition period up to six months the compensation shall be 40 per cent of the employee's normal salary, and for a period of over six months (the maximum length being one year) the compensation shall be 60 per cent of the employee's normal salary for the entire restrictive period.

Regardless of the above, in a technology M&A transaction, a buyer can always restrict the selling shareholders' rights to compete with the acquired business for up to three years without separate compensation under applicable competition law rules.

In asset deals, a transfer of assets under the Finnish Employment Contracts Act corresponds to a transfer under the Acquired Rights Directive. In other words, in the case of an asset acquisition, the employees of an acquired company are automatically transferred by

9 Trade Secrets Act (595/2018).

10 Finnish Patents Act (550/1967).

11 Copyright Act (404/1961).

12 Employment Contracts Act (55/2001).

law to the receiving company along with the business. Neither of the parties to the transaction have the right to terminate any employment contracts solely based on the transfer (although the employees themselves have the right to do so in connection with the transfer).

To terminate an employment contract, there must be either an individual reason related to the employee's person, or a collective reason related to financial or production factors. The Act on Co-operation within Undertakings, as amended,¹³ imposes a joint obligation on the parties to an asset acquisition to inform employees of the acquisition as well as the legal, economic and social consequences of the acquisition. If there is a possibility of terminations, layoffs or reorganisations as a consequence of the asset acquisition, the relevant party (transferee or transferor, as the case may be) must fulfil the applicable co-determination negotiation obligations pursuant to the Act on Co-operation within Undertakings.

Under the Act on the Right in Employee Inventions, as amended,¹⁴ an employer has the right, under certain conditions and subject to reasonable compensation, to obtain the rights to a patentable invention made by an employee. The Act is mostly non-mandatory and is applicable only insofar as an employer and an employee have not agreed otherwise. A significant mandatory provision to be noted, however, is an employee's right to reasonable compensation for an invention obtained by his or her employer. Finnish technology companies also typically implement employee invention policies through which employees are incentivised to notify and transfer any employee inventions to their employer.

One thing to keep in mind is that the founders or shareholders of a company may not always be employees, which is why buyers in technology M&A agreements would typically seek to receive assurance that the relevant IP transfers from founders and shareholders to the company have been made (as well as transfers from strategic suppliers and other external cooperation parties) through the use of explicit covenants or specific indemnities.

VII DATA PROTECTION

The data protection regulation in Finland includes the Data Protection Act,¹⁵ which implements and supplements the EU's General Data Protection Regulation, and its national application. Among other things, the Data Protection Act provides for the appointment, organisation and powers of the supervisory authority on data protection matters. The Data Protection Act also provides for the processing of special categories of personal data and personal identity codes, and restrictions of the rights of data subjects.

When planning a technology M&A transaction, careful consideration should be given to when and on what grounds employees' personal data can be disclosed to an acquiring company. The Finnish Data Protection Ombudsman has concluded that detailed salary information of employees and performance appraisals should not be disclosed to a potential acquirer before a transaction has taken place. In other words, it is often preferable to conduct due diligence on a template or summary basis when it comes to documents containing personal data.

13 Act on Co-operation within Undertakings (334/2007).

14 Act on the Right in Employee Inventions (656/1967).

15 Data Protection Act (1050/2018).

VIII SUBSIDIES

Business Finland is the government organisation for innovation funding and trade, travel and investment promotion. It offers funding for research, product development and many kinds of business development needs, primarily for small and medium-sized Finnish companies. Large companies and research organisations can also receive funding for joint projects together with smaller companies.

As mentioned above, most technology companies in Finland have received Business Finland funding. The funding terms typically contain clawback provisions in the case of foreign acquisitions, given that in such cases a transaction can be seen to endanger the intended purpose of the financing. For this reason, consent is typically sought from Business Finland for most technology M&A transactions, and such consent is often included in purchase agreements as a condition precedent.

In 2020, the government adopted an amendment to the Decree on Funding for Research, Development and Innovation Activities. The amendment permits the provision of funding for research, development and innovation activities under the temporary state aid scheme established in the context of the covid-19 pandemic as approved by the European Commission. The pandemic financing terms contain even stricter clawback provisions than typical Business Finland research and development financing. Buyers should take care in evaluating the possible effects of an M&A transaction on any such granted financing and aim to seek consent well in advance of the intended closing of a transaction.

IX DUE DILIGENCE

Legal due diligence for technology M&A transactions is typically conducted on more or less the same level as for other sectors, although there is a particular focus on ownership of intellectual property rights, data protection and innovation (Business Finland) aid.

Technical due diligence is also common in high-value technology M&A transactions and is a staple in any transactions where warranty and indemnity insurance is contemplated, as without it, underwriters are usually unwilling to provide broad coverage for IP warranties.

As to due diligence reporting formats, the red flag due diligence format has almost become the standard in technology M&A transactions in Finland in the past few years. A more streamlined approach to due diligence in combination with strategic insight as opposed to purely legal reporting is also gaining ground, although traditional legal, financial and tax due diligence is still the rule in addition to commercial and technical reviews, which are more typically performed in-house by buyers.

X DISPUTE RESOLUTION

The standard dispute resolution mechanism for M&A transactions in Finland is arbitration in accordance with the Finland Chamber of Commerce rules. Arbitration has many advantages over litigation in court. Common arguments used in favour of arbitration are confidentiality, speed and flexibility.

While typically more expensive, arbitration is a faster and more flexible process than litigation, and the arbitrators can be chosen based on prior experience in the field. The parties can also tailor the arbitral proceedings to best suit their needs within the framework of the chosen rules. Furthermore, arbitration is a confidential method of settling business disputes,

which is one of the major benefits of the process when compared to standard litigation in the common courts. Finland has broad publicity legislation, which often in itself makes arbitration the preferred choice for dealmakers.

XI OUTLOOK

As a small, open and digitalised economy, Finland is able to offer technology companies conditions that allow them to research, test and scale new technology in a welcoming environment. Market resilience will play a key role in how the technology M&A deal-scape develops in Finland in the immediate future. The current market uncertainty may delay transactions in the next year or so as a result of parties not being willing to take on additional risk or able to settle on valuations.

Despite the continued market uncertainty following recent geopolitical and financial events, there is still a lot of capital to be invested from the shelved and delayed transactions during the first years of the pandemic. As organic growth has decelerated for many technology companies, M&A activity will be an increasingly significant source of growth for these companies in the future. Even more so, bigger industrial players are intent on accelerating their digital growth in the post-pandemic area through strategic acquisitions in the technology field, which paints an optimistic picture of a likely upswing in technology M&A in the not-too-distant future.

ABOUT THE AUTHORS

MARIA CARLSSON

Bird & Bird

As head of Bird & Bird's corporate and M&A practice in Finland, Maria Carlsson has in-depth experience of complex M&A transactions and corporate and commercial work. Specialising in M&A, she has over 20 years' experience of structuring and negotiating complex transactions, with a focus on private M&A deals and both inbound and outbound cross-border work.

In recent years, a large part of her work has revolved around mergers and acquisitions with a technology sector angle, as well as advisory in the fields of mobility and infrastructure. She also has a background in technology licensing and intellectual property, with previous responsibilities including steering group work with Business Finland.

In addition to M&A, Maria has long-standing experience in strategic contracting, advising clients on matters including joint ventures and cooperation contracts. A special interest area of hers is civil versus common law contracting, and how the small but intricate differences play out in practice.

Maria enjoys lecturing and writing and is a regular speaker on topics including M&A and commercial contracts, as well as being the author of four books in her areas of interest.

MARLA MELIN

Bird & Bird

Marla is an associate in the corporate and M&A group in Helsinki, where she works with international clients on corporate law and M&A matters.

BIRD & BIRD

Karolinská 707/7
186 00 Prague 8 – Karlín
Czech Republic
Tel: +420 226 030 500
vojtech.chloupek@twobirds.com
lubomir.brecka@twobirds.com
radomir.pivoda@twobirds.com
martina.waliczkova@twobirds.com

Mannerheimintie 8
Helsinki 00100
Finland
Tel: +358 09 622 6670 / 6677
maria.carlsson@twobirds.com
marla.melin@twobirds.com

Bird & Bird (International) LLP and Siegler Bird & Bird Law Office
Kapás utca 6-12
1027 Budapest
Hungary
Tel: +36 1 301 8900
Fax: +36 1 301 8901
pal.szabo@twobirds.com
eszter.gal@twobirds.com
barnabas.simon@twobirds.com

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