Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering comparative analysis from top-ranked lawyers

Corporate M&A

Poland: Law & Practice

Jakub Jędrzejak, Marta Midloch,
Ben Davey and Katarzyna Kozak
WKB Wierciński Kwieciński Baehr

chambers.com

2020

POLAND

Law and Practice

Contributed by:
Jakub Jędrzejak, Marta Midloch,
Ben Davey and Katarzyna Kozak
***WKB Wierciński Kwieciński Baehr** see p.16*

Contents

1. Trends

1.1 M&A Market

The M&A market was fairly buoyant throughout 2019, although perhaps not as strong as 2018. However, transactions are sometimes taking longer to complete, due to drawn out negotiation processes or regulatory approvals being delayed, and more transactions than usual seemed to be abandoned at fairly late stages for a variety of reasons.

The average value of transactions in Poland continues to grow, and Poland has emerged as a leading M&A market in the CEE region, with some of the largest companies and an abundance of entrepreneurial spirit, not to mention high degrees of fragmentation in many sectors, making them ripe for consolidation. Private equity funds were involved in about one quarter to one third of the transactions in 2019, more often on the buy-side than the sell-side.

The largest transaction in Poland was the acquisition of the DCT Gdansk container terminal by PSA International, the Polish Development Fund and the IFM Global Infrastructure Fund for around EUR1.16 billion.

1.2 Key Trends

GDP growth in Poland, like other parts of emerging Europe, remains above the average for Western Europe, with increasing demand from local consumers offsetting some of the reduction in demand from key export markets in other parts of Europe. Also, Poland has a stable banking system and a well-regulated financial services sector, combined with a well-educated workforce.

These are some of the factors underpinning the defining trend, if you could call it a trend, that the M&A market in Poland remains steady. There were no major disruptions, no significant changes in deal terms, no major changes in multiples (apart from a slight decline against previous years), no unexpected difficulties in obtaining debt finance and, surprisingly, very little activity driven by Brexit. Also, after few years of a down-turn the renewable energy market came back to its best as of mid-2019, with many transactions both in wind and photovoltaic.

Over recent years, there has been a greater push by sellers to limit their liability for warranty breaches, with the expectation that buyers will seek warranty and indemnity insurance to provide the necessary protection, especially as regards higher monetary limits and longer claim periods, even if the cost of such insurance is chipped off the purchase price. However, warranty and indemnity insurance is not always the ideal solution, especially given that many insurers have an extensive list of standard topics which they will not cover which, in some cases, are precisely the warranties which the buyer is most keen to insure.

1.3 Key Industries

The sectors which experienced significant activity included industrial manufacturing, TMT, financial services and fintech, construction, renewable energy, biotech and healthcare, and FMCG. Some of the notable transactions in these sectors included:

- the sale by ARX Equity Partners of its investment in Anwis (a Polish manufacturer of internal and external custom-made sun shading systems) to Novaco Invest, a subsidiary of WAREMA Renkhoff;
- the acquisition by P4 (a subsidiary of Play Communication) of the 3S Group (a developer and owner of regional fibre optic infrastructure and data centres) from its founders and a fund managed by Enterprise Investors;
- the acquisition by Polskie ePłatności (a portfolio company of Innova Capital) of BillBird (a leader in Poland in the provision of innovative payment methods such as advanced solutions for mobile payments) from IGT Global Services Limited;
- the acquisition by the Czech energy company CEZ of a majority interest in Euroklimat (a Polish provider of installation services, including sanitary equipment, and the market leader in the heating, ventilation and air-conditioning sector) from the founders of the business; and
- the acquisition by Yifan Pharmaceuticals of a minority stake in Bioton (a company listed on the Warsaw Stock Exchange which produces insulin drugs and antibiotics).

2. Overview of Regulatory Field

2.1 Acquiring a Company

The Polish M&A market is dominated by negotiated acquisitions of shares. These include all types of share acquisitions, ranging from acquisitions of minority interests, through 50-50 joint ventures, to acquisitions of controlling stakes and/or 100% of the shares.

There are also some asset deals including, relatively infrequently, some pre-pack acquisitions out of bankruptcy. Under Polish law, there is a distinction between acquisitions of assets and liabilities which comprise an "enterprise" or "organised part of an enterprise", being an organised set of tangible and intangible assets used for a functionally and financially independent business, and acquisitions of assets which fall short of an "organised part of an enterprise", with each type of transaction usually requiring different kinds of corporate approval, and having different consequences for the seller and the buyer in terms of tax and exposure to pre-transfer liabilities relating to the enterprise.

There are also acquisitions of shares in listed entities, with indirect acquisitions of such shares (eg, by way of acquisition of a company which is a shareholder in a listed entity) bearing some similarities to negotiated acquisitions of shares in terms of process and flexibility of terms. However, in the event that the acquisition invokes the tender offer rules, the acquisition is highly regulated.

2.2 Primary Regulators

The primary regulators are the Polish Office of Competition and Consumer Protection and the Polish Financial Supervisory Commission.

The Polish Office of Competition and Consumer Protection is responsible for merger clearances. The key requirements relating to merger clearances are described in **2.4 Antitrust Regulations**.

The Polish Financial Supervisory Authority (PFSA) must be notified by both the seller and the buyer about intended transactions involving controlling or other sizeable interests in targets in the financial services sector, notably banks, national payment institutions, insurance companies and investment fund managers. The PFSA is entitled to object to the transaction within a statutory period of time, usually 60 business days from receipt of the complete notification together with the required information and documents.

The PFSA determines whether additional information or documents are needed and, as such, has significant influence over the timetable in practice. A purchase which is made before receiving a statement of no objection from the PFSA (or, in the absence of such a statement, the lapse of the time period for making an objection) results in the loss of the buyer's voting rights and may also result in forced disposal of shares, with failure to do so being subject to fines or revocation of target's permits to conduct activity.

The Polish Financial Supervisory Commission is also the regulatory body with primary responsibility for supervision of tender offers.

2.3 Restrictions on Foreign Investments

Poland is generally open to foreign investment. There are various laws that, while they are not explicitly aimed at controlling foreign investment, are probably most likely to be invoked in respect of transactions involving foreigners, particularly those from certain states which might be considered to pose a threat to Polish national interests or security. These are described in **2.6 National Security Review**.

Certain transactions involving the direct or indirect acquisition of real estate may require the consent of the Minister for Internal Affairs. However, with the exception of agricultural and forest land, neither a direct transfer of real estate, or a sale of shares in a Polish entity which holds real estate, requires the prior consent of the Minister for Internal Affairs if the acquiror is incorporated in a European Economic Area country.

The rules for direct or indirect acquisition of agricultural and forest land are stricter. In particular, the Act on Shaping the Agricultural System seeks to limit the direct or indirect acquisition of agricultural land to natural persons who have relevant farming qualifications and who will actually use it for agricultural purposes. To that end, under the Act, the National Support Centre for Agriculture has a pre-emptive right over shares in companies which own or hold in perpetual usufruct at least five hectares of agricultural land.

A transaction will be invalid if it breaches the rules. For this reason, seeking confirmation that a target does not own any agricultural land is an important part of the due diligence exercise, especially given that many industrial companies in Poland hold some land formally classified as agricultural.

2.4 Antitrust Regulations

The merger control rules under the Polish anti-monopoly law apply if the transaction does not fall under the European Union merger rules set out in EU Merger Regulation No 139/2004.

The Polish merger control rules require notification of a concentration involving the acquisition of control if the combined turnover of the undertakings participating in the concentration in the financial year preceding the year of the transaction exceeds the equivalent of EUR1 billion worldwide or the equivalent of EUR50 million on the territory of Poland. However, a notification is not required if the turnover on the territory of Poland of the target undertaking or the assets to be acquired did not exceed the equivalent of EUR10 million in either of the two financial years preceding the transaction.

An acquisition of control can be regarded as taking place also in case of acquisition of a smaller stake where the factual circumstances make it tantamount to acquisition of control (eg, acquisition of a 30% or 40% stake in a listed company where there is significant fragmentation of votes among the other stakeholders). The expansive concept of control needs to be taken into account during stake-building.

A failure to notify may be subject to heavy fines, eg up to 10% of the turnover of the breaching entity (or, in theory, forced disposal, although such a measure has not yet been used). Fines may be also imposed on managers of such entity.

The Polish Office of Competition and Consumer Protection has one month to consider a notification under phase I proceedings (for relatively simple matters), but such period can be extended for another four months for phase II proceedings (for less straightforward matters eg market studies are required or relevant markets are affected, horizontally or vertically, by the proposed concentration). In each case, the clock stops ticking while requests for further information remain unaddressed.

2.5 Labour Law Regulations

There are no specific labour law requirements that apply in the context of a share deal. An employer is generally obliged to inform and/or consult with works councils in respect of:

- changes with respect to the activities and financial situation of the employer;
- changes in the level of employment; or
- significant changes in the organisation of work or the basis for employment.

However, such obligations are only occasionally invoked in the context of M&A. Moreover, works councils can only express their opinion, but have no decisive powers and cannot block or delay a transaction.

More extensive obligations that can be triggered in case of an M&A transaction can be included in collective bargaining agreements or other collective understandings with employees which can be seen especially in larger targets where trade unions are active.

On the other hand, an asset deal will often constitute a transfer of the whole or a part of a working establishment. In such case, the employees will automatically transfer to the buyer, with the employment terms and conditions unchanged. The trade unions or employees (if there are no trade unions) of both the buyer and the seller should be informed in writing about the planned transfer and its consequences (legal, social and otherwise) at least 30 days before the expected transfer date.

If either the buyer or the seller intends to undertake any actions affecting the employment conditions of their employees, information about this must be included in the notification, and such party should commence negotiations with the trade unions (if any) in order to conclude an agreement in that regard within 30 days. If the party and the trade unions cannot reach agreement, the employer may decide on further steps regarding the employment conditions, but shall do so taking into account the arrangements made with the trade unions in the course of negotiations.

Notwithstanding these obligations, neither the trade unions nor employees can block the transfer. However, during the period of two months following the transfer, a transferred employee may terminate their employment relationship with only seven days' prior notification. Also, in the event of the transfer of only part of a working establishment, the buyer and the seller shall bear joint and several responsibility for liabilities which arose from the employment relationships with the relevant employees prior to the transfer. However, in the event of a transfer of the whole of a working establishment, all such liabilities are shifted entirely to the buyer.

2.6 National Security Review

The Act on Control of Certain Investments requires notification to the Prime Minister or the Minister of Energy about (and, in some cases, prior consent for) the proposed acquisition of control over a "significant participation" (at least 20% of the voting rights) in a company operating in certain strategic business areas, but only if such company is included on a list contained in a particular regulation of the Council of Ministers. The relevant strategic business areas include the energy, oil and gas, chemicals, defence and telecommunications sectors. As of 1 January 2020, the list included nine companies, although it can be amended or extended at any time. The threshold for notification is quite low, which needs to be taken into account during stake-building.

The Act on Specific Entitlements of the Minister Competent for State Assets allows the government to prevent transactions relating to certain critical infrastructure and systems, including energy infrastructure, telecommunications infrastructure, financial systems, food and water supply systems, healthcare infrastructure and systems, transport infrastructure, rescue services and facilities for production, transport, storage, warehousing or use of chemical and radioactive substances. However, the government can only intervene if the relevant target company has been notified by the government that it is subject to the Act.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

There were two precedent-setting court decisions issued in 2019.

On 6 February 2019, the Appellate Court in Warsaw decided that Comp S.A., a shareholder of the public company Elzab S.A., was liable for damages towards a minority shareholder for its failure to announce a mandatory tender offer for shares in Elzab S.A. The court determined that the damages amounted to the difference between the price that the minority shareholder could have obtained within the tender offer and the price that it actually obtained in about 140 sale transactions, ie, damages of PLN2.2 million plus interest.

On 18 July 2019, the Supreme Court issued a decision which is contrary to the previous market practice according to which the price paid in an indirect acquisition of shares (ie, the price paid for shares of a company which in turn holds shares in a public company listed in Poland) did not impact on the price set within a mandatory tender offer resulting from the indirect acquisition. Following the decision, the price paid in an indirect acquisition will need to be taken into account while setting the price under any consequential mandatory tender offer.

3.2 Significant Changes to Takeover Law

The law in Poland is constantly changing, and recent changes in corporate and public takeover law have been extensive (although some of them have not yet come into force). The changes which are expected to have the biggest practical implications and scope include:

- mandatory dematerialisation of all shares in all joint stock companies and partnerships limited by shares (at present, only shares in joint stock companies which are public companies are dematerialised) and, starting from 1 January 2021, all issued (physical) share certificates (both for bearer and registered shares) shall lose their legal force, and all transfers will be effected by making the relevant entry in the register of shareholders;
- the obligation of joint stock companies and partnerships limited by shares to conclude an agreement with an entity that shall keep its register of shareholders (eg, a bank, brokerage house, or the National Depository for Securities) by 30 June 2020, and what results therefrom: the end of anonymous purchases of shares in joint stock companies, ie, all data on shareholders will be kept in the register of shareholders, and the company and its shareholders will have access to this register; and
- the increase of the threshold for squeeze-outs in public companies from 90% of the overall amount of votes to 95% (for further details on squeeze-outs, see **6.10 Squeeze-Out Mechanisms**).

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Stake-building strategies are limited by the disclosure obligations regarding major blocks of shares (see **4.2 Material Shareholding Disclosure Threshold**) and insider trading regulations, as well as the requirements for the minimum tender offer price (see **4.3 Hurdles to Stakebuilding**). In light of this, it is difficult for an acquiror to build a stake such that its moves remain unnoticed by the market participants (at least not after it reaches 5%). However, due to changes in law in the recent years, stakebuilding up to 32.99% of voting rights is, generally, permissible.

4.2 Material Shareholding Disclosure Threshold

Obtaining or exceeding, directly or indirectly (including through a third party), or crossing (in either direction) any of the following thresholds of the overall amount of votes in a public company triggers disclosure obligations: 5%, 10%, 15%, 20%, 25%, 33%, 33⅓%, 50%, 75% or 90%.

Further, a shareholder who already holds more than 10% needs to disclose any change in its shareholding by 2% (WSE Main Market) or by 5% (other markets, including NewConnect). Moreover, if a shareholder holds more than 33%, it needs to notify any changes by at least 1%.

The notification shall be made to the PFSA (ie, the relevant regulatory authority) and the company. The company needs to provide the information to the public, the PFSA and the WSE.

4.3 Hurdles to Stakebuilding

The main rules that apply to stake building are the statutory disclosure obligations described in **4.2 Material Shareholding Disclosure Threshold**. There is no known practice of introducing alternative thresholds for disclosure of shareholdings in company statutes or by-laws and, even if such existed, they could have an internal effect at the most.

Further, if an acquiror plans to build a stake before announcement of a mandatory tender offer (the thresholds are described in **6.2 Mandatory Offer Threshold**), it needs to take into account that the tender offer price may not be lower than the price which it or its affiliates or parties acting in concert have paid for shares within 12 months prior to the tender offer.

Under Market Abuse Regulation No 596/2014 (MAR), if a person gets to know some information within the process of a public takeover and uses such information only for the purposes of that takeover, and the information becomes public before acceptance of the takeover offer by the shareholders, this does not constitute insider trading. However, this exemption does not apply to stakebuilding.

4.4 Dealings in Derivatives

Dealings in derivatives are generally allowed in Poland to the extent they do not constitute market manipulation within the meaning of MAR (for instance, so-called "marking the close" by placing orders (also in concert with other investors) right before close of a trading session in order to maintain an artificially high closing price).

The closing price is usually the basis for settlement of derivatives, so attempts at such manipulation may potentially happen during "triple witching day" (the third Friday of every March, June, September and December) when three kinds of derivatives expire: stock market index futures, stock market index options and stock options.

4.5 Filing/Reporting Obligations

The same disclosure obligations, as described in **4.2 Material Shareholding Disclosure Threshold**, apply to derivatives. A list of instruments that are subject to those obligations has been issued by the Minister of Finance, and includes, among others, options, futures, swaps, forwards, subscription warrants and subscription rights.

For the purpose of determining whether the disclosure thresholds have been crossed, account is taken of the number of votes attached to the shares which the holder of a derivative is entitled or obliged to acquire (ie, only long positions are relevant). An updated disclosure may be required following the actual acquisition of shares on exercise, or following expiry without exercise, of the derivative if a relevant threshold is crossed.

4.6 Transparency

Up until mid-2016, an acquiror needed to disclose its purpose and intentions with regard to any further acquisitions in the next 12 months as part of its notification about crossing the 10% threshold, under the disclosure obligations described in **4.2 Material Shareholding Disclosure Threshold**. This obligation has been repealed and there is currently no such requirement. However, in the context of a tender offer, the offeror needs to provide information about the number of shares it intends to obtain within the tender offer, and details of its intentions towards the company.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Negotiated M&A deals do not require disclosure and the process is almost always kept confidential until singing/closing. However, public M&A deals require careful consideration as regards disclosure because of insider trading regulations and disclosure obligations on issuers of shares. In Poland, MAR and its quite comprehensive definition of inside information (ie, information which is precise, non-public, and directly or indirectly regarding an issuer of shares and/or financial instruments, and with the possibility of affecting the market price in a significant manner) is directly applicable.

The decision as to whether a given transaction step constitutes inside information and should be disclosed to the public (immediately, and not later than within 24 hours) is the responsibility of the target's management board members. A failure to properly perform the disclosure obligations is subject to severe fines (up to around EUR2.5 million or 2% of the yearly turnover for the company, or up to around EUR1 million for the management board members).

Unless there are permissible grounds for withholding disclosure, transaction milestones such as receipt of a binding offer, walking-away from negotiations (if there was previously information on their commencement), signing of an NDA, signing of a formal sale agreement, fulfilment of conditions to closing and closing itself should generally be disclosed.

The need for disclosure of other steps such as the first approach, receipt of a non-binding offer, the commencement of negotiations, the start of due diligence or filing motions to regulators is considered case-by-case, and the disclosure of information about such steps is quite often postponed. A slightly different approach that sometimes is being taken is to start the process with company's announcement that "it is considering its financing and investment options", which is generally deemed to allow the M&A process to run without further disclosures until just before the announcement of a tender offer.

5.2 Market Practice on Timing

The regulations do not provide clear-cut boundaries or an exhaustive list of inside information, so the practice in that regard had to be developed. Bidders are usually reluctant to reveal their intentions and the status of negotiations too soon. Further, reporting on every transaction step might be cumbersome for the target and, potentially, confusing to the market (ie, market manipulation). For that reason, disclosure of information about a transaction should be properly balanced and considered having regard to the specific circumstances. Usually, a company has its own disclosure policy and provides information in compliance with its own past practice.

In public M&A deals in Poland, disclosure of non-conclusive transaction steps is usually postponed in accordance with MAR. In that regard, inside information may be postponed if immediate disclosure is likely to prejudice the legitimate interests of the company, postponement is not likely to mislead the public, and the company is able to ensure confidentiality of that information. Jeopardising M&A negotiations may be considered as legitimate interests of a company.

As stated above, often, the company announces that it is considering its "strategic options" at the beginning of the M&A process and then postpones disclosure of specific information about subsequent stages. When the company eventually publishes the information in respect of which it postponed disclosure, it also notifies the PFSA about the postponement and explains the reasons in writing.

5.3 Scope of Due Diligence

The scope of due diligence depends on various factors, including the sector in which the target operates, whether the target is a private or a public company, and the expectations of the potential buyer. In bigger deals, vendor due diligence is also not uncommon. Bidders usually conduct legal, financial, tax and accounting due diligence, and sometimes also IT, commercial, insurance, technical or environmental due diligence.

Full descriptive legal due diligence reports are rare in M&A deals in Poland. Legal advisors usually prepare "red flag" reports which summarise main legal risks that were identified and provide recommendations in the context of the deal. Occasionally, more detailed summaries of specific issues or selected material contracts may be included. The areas that are usually reviewed include contracts, corporate matters, financing, regulatory issues (including environmental issues, permits etc), employment matters, intellectual property and IT, and real estate.

In public M&A, the scope of due diligence may be more limited due to the difficulty of gathering information without risking the market becoming aware about a potential deal, insider trading restrictions and the fact that most important information already ought to be public.

5.4 Standstills or Exclusivity

Exclusivity agreements are commonly seen in negotiated M&A transactions. Sometimes, they are concluded at the very beginning of the process. In other cases, especially in bigger deals, the seller might invite non-binding offers from various potential buyers, with a few among them being allowed to conduct due diligence, after which the formal sale agreement is negotiated in parallel with a few short-listed bidders, one of which might be able to secure exclusivity for a short period of time.

Standstill agreements are seen in deals regarding shares in public companies. Under such arrangements, the bidder undertakes not to acquire, directly or indirectly, any shares in the target on the public market before the main contemplated deal and/or otherwise than as part of an agreed tender offer.

5.5 Definitive Agreements

In negotiated M&A deals, the terms are always documented. Unless the signing and completion are simultaneous, this can occur in phases. Specifically, the full terms are usually set out in a preliminary sale agreement and, at closing, a short form document is used to actually give effect to the transfer.

In public M&A transactions which aim at taking control over a company or at least a majority stake, a tender offer needs to be announced (for details about the thresholds for mandatory tender offers, see **6.2 Mandatory Offer Threshold**). A bidder may, prior to announcing such tender offer, sign an agreement with a significant shareholder as to its participation in such tender offer as well as regulating such other matters as the parties may agree. However, shares may not transfer under such agreement, but rather should only be acquired through the tender offer (however, the regulations allow some flexibility for a bidder to agree with a holder of at least 5% of the shares that such shareholder will sell its shares at a price lower than the minimum price (but never higher)).

A tender offer is subject to a strict legal regime, especially as to the minimum price requirements. In particular, the price may not be lower than the average market price for the six months (and, with respect to tender offers for 100%, also the average market price for the three months) preceding the announcement of the tender offer or the highest price that was paid for shares in the company by the bidder or its affiliates or parties acting in concert within the last 12 months prior to announcement of the tender offer.

6. Structuring

6.1 Length of Process for Acquisition/Sale

In terms of negotiated M&A, from the seller's perspective, the process, including sounding out the market, preparation of an information memorandum, establishment and population of a data room, vendor due diligence, pre-sale reorganisations, initiating an auction process or entering into a term sheet, buyer due diligence, negotiation, signing, satisfaction of conditions precedent and closing, could take between six and 12 months.

However, from the buyer's point of view, since it is not involved in all the preparatory steps undertaken by the seller, the process might be more like three to nine months. Of course, there are always outliers, with some deals being done in a matter of weeks, and others dragging on for more than 12 months, especially if the negotiations break down for some time, or the buyer needs regulatory approval and the regulators have concerns.

As regards tender offers, those conducted on the Polish market in 2019 usually lasted two to four months from their announcement until the end of the subscription period. In terms of the subscription period itself, there are certain statutory requirements as regards its length. Generally, the subscription period cannot be longer than 70 days, however, it can be extended up to 120 days in justified circumstances, including in order to satisfy legal conditions (eg, to obtain regulatory approvals).

6.2 Mandatory Offer Threshold

Mandatory offer thresholds apply to the acquisition of shares in a public company. The exceeding of 33% or 66% of the total votes in a public company may only occur as a result of a tender offer to sell or exchange shares in such company. In the case of the 33% threshold, the bidder may announce a tender offer for the number of shares which confers the right to 66% of the total votes or, at the option of the bidder, 100% of the total votes. However, in the case of exceeding the 66% threshold, the tender offer must be for all the remaining shares (100%).

If crossing of a threshold was the result of a certain type of indirect transaction including, for example, an indirect acquisition of shares or a merger or demerger of a company, the acquiror is obliged, within three months after exceeding the threshold, to announce a tender offer or dispose of a sufficient number of shares to fall below the threshold.

6.3 Consideration

The purchase price may be a fixed amount or it may be defined by indicating a basis for its calculation. In most cases, the purchase price is cash. Transactions in which the seller shall receive shares as consideration are rare in the Polish market, both in negotiated M&A and tender offers.

Usually, in negotiated M&A, the price is established based on the locked box mechanism where the price is calculated having regard to the most recent financial statements of the company prior to signing (with any financial upside or downside since such accounts date accruing to the buyer) or with a post-closing price adjustment based on completion accounts (typically focusing on differences between actual net working capital and net debt as at closing compared to estimates prepared and agreed by the parties pre-closing).

Generally, the purchase price may be established by the parties under principles of freedom of contract. However, the tax authorities may question a purchase price which appears to deviate extensively from the perceived market price. Also, as noted in **5.5 Definitive Agreements**, there are minimum price requirements with respect to shares sold within tender offers.

6.4 Common Conditions for a Takeover Offer

Offers may be conditional both in negotiated M&A and public transactions.

In negotiated M&A, a variety of conditions are used, the most common of which concern the obtaining of necessary regulatory consents (discussed in more detail in **2. Overview of Regulatory Field**) or corporate approvals. Other conditions quite often require various issues identified during due diligence to be addressed.

Nevertheless, it is common that the parties seek to limit the number of conditions, because they are perceived as weakening the certainty of closing, and some of the issues identified during due diligence are left to be resolved post-closing.

In tender offers, the scope of possible conditions is regulated by law. The most common conditions are regulatory consents and the level of subscriptions under the tender offer reaching a specified minimum number of shares (which, however, cannot be higher than 66%). In recent years (due to setting the aforesaid threshold, which was not there in the past, allowing acceptance thresholds to be as high as 90%) there is a practice to add additional conditions, which are more in the hands of the bidder, concerning certain agreements having to be entered into by the target and/or between the target and the bidder, and/or certain resolutions having to be passed by target's corporate bodies.

6.5 Minimum Acceptance Conditions

A bidder may set a minimum acceptance condition. However, the number of shares taken together with the number of shares already held by the bidder may not be more than 66% of the overall votes. In other words, there can be no minimum acceptance condition between 66% and 100%.

The thresholds for triggering a tender offer and the permissible levels for a minimum acceptance condition do not necessarily align with the levels at which control is acquired, whether legally or in practice, or the ability to a decisive voice in all matters.

Certain matters require a qualified majority according to the law (eg, three quarters of votes for shareholders of a joint stock company to approve the sale of its enterprise or change its statute, or two thirds to approve a material change of business activity). Further matters may require a qualified majority according to a company's statute. Moreover, higher thresholds are required in order to facilitate a delisting or a squeeze out (see **6.10 Squeeze-Out Mechanisms**).

For these reasons, certain additional conditions are being set in the tender offers, to side pass the aforesaid limitation (see **6.5 Common Conditions for a Takeover Offer**).

6.6 Requirement to Obtain Financing

Obtaining financing by the bidder is not named among the possible conditions to a tender offer under the relevant regulations. However, in the context of negotiated M&A, obtaining financing for the acquisition may be a condition precedent to closing but, such a condition is not very common. Rather, it is more common that a buyer is required to deliver proof (eg, a bank account statement) that it has the necessary financial resources available or that it has obtained bank financing (eg, by way of an official statement of the bank).

Moreover, sometimes, sellers may require some sort of security for payment of the purchase price, eg, a parent guarantee, bank guarantee, payment into an escrow account, etc. However, it is not a common practice to require such security from entities of good financial standing or institutional buyers. Rather, such requirements are imposed with respect to natural persons, SPVs or entities whose financial resources are not certain.

6.7 Types of Deal Security Measures

Break-up fees are not uncommon in Poland in negotiated M&A. These usually take the form of contractual penalties and/or guaranteed amounts payable in case given party fails to procure satisfaction of conditions precedent within its reasonable control or responsibility, and/or in case of non-attendance at closing or a failure to perform a closing action. Such rights are usually combined with a right of the non-breaching party to rescind the sale agreement.

A buyer typically seeks to further protect its interests through MAC clauses, non-solicitation or non-compete obligations imposed on the seller, warranties, indemnities for certain identified risks, contractual penalties (functioning as risk-based flat-rate damages), etc.

6.8 Additional Governance Rights

In the context of negotiated M&A, if the buyer is acquiring less than 100% ownership of the target, it usually seeks to enter into a shareholders' or investment agreement with the remaining shareholders. Such agreements may include a variety of mechanisms protecting the buyer's interests, eg, a catalogue of matters that the target cannot undertake without its approval, restrictions on the sale of shares by other shareholders (such as pre-emption rights, lock-ups, put/call option rights, or tag/drag-along rights), rights for the buyer to appoint one or more members of the management or supervisory board, and certain information rights.

In addition, a buyer might be issued with privileged shares (as to votes, but not more than two votes per share and not in the case of public companies, or as to dividends, but no more than 150% of the dividends due in respect of regular shares, or as to division of assets). Any rights relating to privileged shares or specific board appointment arrangements need to be introduced to the company's constituent document, and some of the other rights have greater strength if they are also incorporated in the company's constituent document.

In the case of a public company, if the requisite majority of shareholders approves (ie, three quarters of the votes), the statute may be amended to confer board appointment rights that are personal to a particular shareholder.

6.9 Voting by Proxy

A shareholder may vote by proxy subject to certain restrictions. In particular, a power of attorney needs to be granted in writing (although, in the case of a public company, it may also be in electronic form). In the case of a limited liability company, the company's articles of association may provide for further restrictions, but that is not permissible in a joint stock company.

In the case of a non-public company, a management board member or employee of the company may not be a proxy at a shareholders' meeting. Further, if a matter on the agenda concerns a shareholder's liability towards the company, neither the shareholder or its proxy may vote on such matter. Those restrictions do not apply to public companies, but in such case the power of attorney under which the proxy is appointed may be granted only for one shareholders' meeting.

In the case of a joint stock company, a shareholder may appoint multiple proxies. For example, a shareholder holding shares credited to various brokerage accounts may appoint separate proxies to vote the shares credited to each account. Further, one proxy may represent many shareholders and vote differently for each shareholder.

6.10 Squeeze-Out Mechanisms

A squeeze-out may be performed in respect of a public company within three months after reaching or exceeding 95% of the total number of votes A similar threshold applies to a private company, but without any three-month time limit. Furthermore, with respect to private companies squeeze-out is only available with respect to joint stock companies, and cannot be implemented with respect to a limited liability company.

Squeeze-outs in public companies are quite common in Poland, and are usually linked to (and constitute a preliminary step to) delisting. A squeeze-out is subject to minimum price requirements (similar to those regarding the minimum tender offer price). If the 95% threshold is reached or exceeded within a tender offer for all the remaining shares, the minimum price in the squeeze-out may not be lower than the tender offer price.

A squeeze-out in respect of a public company is announced and carried out by a brokerage house, and it is not permissible to revoke a squeeze-out once it has been announced. A squeeze-out may only be commenced after the shareholder provides security for the price for 100% of the shares subject to squeeze-out. The form of security is not regulated by law, except that a bank or other financial institution must provide the security or intermediate in its establishment, and it should be easily enforceable, so bank guarantees or blocking-of-funds in a bank account are typically used.

6.11 Irrevocable Commitments

In public tender offers, all disclosure obligations and requirements as to the conduct of the tender offer apply to parties acting in concert, ie, parties that have concluded an understanding (irrespective of whether written or not, but excluding transient ad hoc understandings) as to the acquisition of shares in a public company, concurring on voting at a general meeting or pursuing a stable policy towards the company, even if only one of them takes actions triggering the disclosure of tender offer obligations. However, the extension of the obligations does not apply to understandings merely on the sale of shares.

As such, a potential bidder may seek to secure an irrevocable from principal shareholders that, if it launches a tender offer, such shareholders will subscribe. These are negotiated prior to announcing a tender-offer and the shareholders would typically seek an opt-out option in case a better tender offer is announced in due course.

7. Disclosure

7.1 Making a Bid Public

In private M&A transactions, the parties are not generally legally obliged to disclose that a deal has been signed and/or closed. However, there are various reasons that the parties may wish to do so. For example, the parties may wish to share some positive news with stakeholders, or manage the way in which their respective business partners (including the business partners of the target) learn about the transaction. Further, if a notification is required to the Polish Office of Competition and Consumer Protection, the submission of such notification will be announced on its website within a few days.

As such, the public (or, at least those who monitor such websites) will learn about the transaction relatively soon. For these reasons, the parties often discuss disclosure in the lead up to signing such that announcements can be made shortly after signing. The same applies to closing.

On the other hand, public M&A deals are subject to MAR restrictions and disclosure obligations with respect to purchases and sales of major blocks of shares (see **4.2 Material Shareholding Disclosure Threshold**). Also, the target company is required to provide information about signing/closing the deal on its website in the form of a current report, but often with respect to other transaction steps too (see **5.1 Requirement to Disclose a Deal**).

7.2 Type of Disclosure Required

The issuance of new shares in a Polish company always requires registration of the increase of the share capital in the National Court Register (KRS).

For public companies, the issuance of new shares needs to be communicated to the public. If the new shares are to be the subject of an "offer of securities to the public" within the meaning of EU Regulation No 2017/1129, which is directly applicable in Poland, the issuer must prepare and publish a prospectus in electronic form and have it approved by the PFSA.

Of course, there are certain exemptions or qualifications with respect to this rule, eg, small offers only require a more limited information document (in the case of an offer of less than EUR1 million) or an information memorandum (in the case of an offer of more than EUR1 million but less than EUR2.5 million) instead of prospectus.

7.3 Producing Financial Statements

Bidders are not required to provide or disclose their financial statements in connection with either a negotiated M&A deal (unless required by the seller) or a tender offer. However, the most recent annual financial statements of a Polish company are publicly accessible in the National Court Register.

The situation is different in respect of a public offering of shares in a listed company. In such case, the issuer is generally obliged to prepare a prospectus and have it approved by the PFSA, and a prospectus is required to include financial statements of the issuer prepared in accordance with IFRS. Further, listed issuers are required to regularly inform the public about their financial results under the disclosure regime.

7.4 Transaction Documents

In the context of a negotiated M&A transaction, the target company is required to file motions to the National Court Register (KRS) for the purpose of updating its data in the public register. For such purpose, certain documents need to appended to the filing including, in particular, a new list of shareholders (in the case of a private limited liability company) or documents evidencing the transfer of the shares (in the case of a joint stock company the disclosure applies only in case there's one sole shareholder in that company, whereas in private limited liability company each shareholder holding at least 10% of shares shall be disclosed).

In the event that documents evidencing the transfer of the shares need to be provided, this can usually be satisfied by providing a short form share transfer document or a notarised extract of the relevant parts of the main sale agreement (in order to limit disclosure of sensitive commercial terms).

In the context of a public tender offer, the terms of the transaction are publicly disclosed in the tender offer document, subject to the possibility of negotiating special terms with certain significant shareholders as mentioned in **5.5 Definitive Agreements** (such agreements do not need to be made public).

8. Duties of Directors

8.1 Principal Directors' Duties

The management board of a Polish company manages the affairs the company, provided to the extent such matters do not lie within the competence of another corporate body (ie, the shareholders' meeting or supervisory board), and represents the company before third parties.

There are various bases for liability of a management board member including, among other things, liability towards the company, liability towards the company's creditors if enforcement proceedings instigated against the company prove to be ineffective (certain protections exist, eg, filing a motion for declaration of bankruptcy within the statutory deadline), criminal liability (eg, criminal offences of abuse of trust or frustration of creditors), or liability for infringement of binding regulations (eg, MAR) which may give rise to severe fines.

In general, a management board member is liable if they failed to perform his/her duties with due diligence and shall also be liable to the company for damage inflicted through an action or omission contrary to law or the company's constituent document, in each case, provided that there is an adequate causal link between the damage done and such action or omission, unless they are at no fault (ie, they performed their duties with due diligence characteristic of the professional nature of their activity).

After closing of a M&A transaction, the management board is obliged to update the company's share register and file motions to the National Court Register as described in **7.4 Transaction Documents**.

Also, in the context of public M&A, the management board of the target has various obligations relating to disclosure of inside information and in connection with the announced tender offer. For example, it must present to the public and the PFSA its position on the tender offer including, among other things, its opinion on the fairness of the price, the strategic plans of the bidder towards the company, and the expected impact on the company's interests.

Under Polish law directors' duties are owed to the company, and the company's interest shall be viewed as independent from that of the company's shareholder(s) and/or affiliates.

8.2 Special or Ad Hoc Committees

There are no obligations for the management board to form any special or ad hoc committees in the context of M&A, and doing so voluntarily is not common. However, issues relating to a transaction may be considered by existing committees, usually of the supervisory board, such as audit, remuneration, corporate governance, strategy and development, or CSR committees.

8.3 Business Judgement Rule

There is no explicit equivalent of the business judgment rule in Poland, however, the courts often accept that some reasonable level of economic risk is normally connected with management of a business. The circumstances in which a management board member may be liable are briefly described in **8.1 Principal Directors' Duties**. In terms of the exercise of judgement, a management board member is expected to act with due diligence. In that regard, a management board member should perform their duties with the diligence characteristic of the professional nature of their activity including, for example, making the effort to obtain sufficient information to make a particular decision and to analyse its business consequences.

8.4 Independent Outside Advice

The scope of independent advice sought in the context of M&A transactions varies depending on the party to the transaction.

Sellers usually seek advice from external advisors, law firms, corporate advisory firms, and financial and tax advisors, especially for the purpose of finding potential buyers, running a sale process, setting up a data room, assisting with responding to queries from potential buyers, analysing offers, preparation and implementation of transaction documents.

Buyers usually seek comprehensive advice from a similar array of external advisors. Such advice usually relates to due diligence, advice on strategy, advice on financial or tax implications and structuring, and preparation and implementation of transaction documents. In the context of a tender offer, the advice will also cover the obligations and strategy regarding the implementation of the tender offer. Moreover, the conduct of a tender offer requires the intermediation of a brokerage house.

The management board of a target may also seek external advice, especially if some arrangements between the potential buyer and the target's management board members are part of the transaction (eg, new management contracts or management stock options plans). In the context of a tender offer, the management board of the target would also usually seek external advice with regard to disclosure obligations, and the management board's opinion regarding the tender offer. If the management board consults an external expert on the tender offer price and its fairness, the target shall disclose such expert's fairness opinion to the public, the PFSA and the WSE.

8.5 Conflicts of Interest

The regulations which seek to prevent conflicts of interest in respect of Polish companies include:

- the obligation of a management board member not to participate in decisions on matters constituting conflicts of interest (including where the interests in conflict with those of the company are interests of family members or persons in a close relationship with the management board member);
- statutory non-compete obligations applicable to management board members (such as the ban on engaging in a competitive business or with a competitive company, ie, being a member of a corporate body or holding more than 10% of the shares or having a right to appoint management board members in a competitive company without consent);
- the ban on overlapping of functions (eg, a management board member may not also be a supervisory board member, registered proxy, chief accountant or legal advisor of the company);
- the ban on other corporate bodies giving binding instructions to the management board with respect to the management of the company's affairs (however, the shareholders may always dismiss the management board members);
- various mechanisms that protect minority shareholders (eg, minimum price requirements in a tender offer or the right of minority shareholders holding at least 5% of the shares in a public company to have certain matters analysed by an expert); and
- the obligation for a public company to adopt a transparent remuneration policy for members of its corporate bodies.

The management of conflicts of interest is subject to meticulous scrutiny by the PFSA with regard to companies under its supervision, including investment funds, investment fund managers, brokerage houses and other investment firms, and there are detailed regulations aimed at the prevention of conflicts of interests in respect of such companies. The PFSA has imposed some severe fines for conflicts of interest in the past.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile takeovers are permitted on the Polish M&A market. However, taking into account that many listed Polish companies are controlled by a particular investor or group of related investors who also usually nominate the members of the management board and/or supervisory board, and that the free-float is often quite small, "friendly" takeovers are significantly more common. Nevertheless, hostile takeovers do happen from time to time (eg, the well-known hostile take-over of the jewellery company Kruk S.A. in 2008 by Vistula & Wólczanka S.A.).

9.2 Directors' Use of Defensive Measures

The management board of a target may take defensive measures against a hostile takeover. However, such actions are taken by the management board at its own risk having regard to the potential liability as described in **8.1 Principal Directors' Duties**.

Defensive measures do not require any consent of the shareholders or the supervisory board as a general matter. However, consent may be required for particular actions under the law (eg, the sale of the company's enterprise requires shareholder approval) or under the company's statute (eg, the statute may require that the management board and supervisory board must obtain shareholder approval for any actions aimed at frustrating a tender offer for 100% of the shares). If consent is required under the law, any action taken without such consent is invalid. However, the failure to obtain consent required under the statute only results in potential liability for the management board members.

9.3 Common Defensive Measures

Common preventive measures include:

- personal rights for existing shareholder(s) to appoint some of the management board members and/or supervisory board members (ie, rights written into the statute that are personal to the existing shareholder(s) and non-transferrable);
- matters being listed in the company's statute which require approval by a specific majority of shareholders or even a specific shareholder to vote in favour; and
- limitations included in the statute on transferability of shares (see **6.8 Additional Governance Rights**), however, this is only really applicable to private companies.

In terms of reactive measures, the most common in Poland are:

- seeking an alternative bidder (ie, a "white knight" defence);
- issuance of new shares within the target capital (issue of new shares under a simplified process based on powers conferred on the management board);
- the sale of valuable assets (ie, the "crown jewels"); and
- placing an offer for take-over of a hostile investor (ie, the "Pac-Man defence") used, for instance, by Wojciech Kruk, the main shareholder of Kruk S.A., after the successful hostile take-over of his company by Vistula & Wólczanka S.A.

9.4 Directors' Duties

In the case of a "friendly" take-over under a tender offer, the principal duty of the management board is to provide its opinion as described in **8.1 Principal Directors' Duties** and **8.4 Independent Outside Advice**.

In the face of a hostile take-over, defensive measures are generally within power of the management board, which needs to consider whether it is properly discharging its duties as discussed in **8.1 Principal Directors' Duties** and **8.3 Business Judgement Rule**, avoid any possible conflicts of interest as discussed in **8.5 Conflicts of Interest**, and seek shareholder approval if required as discussed in **9.2 Directors' Use of Defensive Measures**.

9.5 Directors' Ability to "Just Say No"

The management board of a Polish target has no powers under Polish law to block a hostile take-over by a single discretionary decision, ie, it needs to resort to any available defensive measures (see **9.3 Common Defensive Measures**). However, as mentioned in **9.1 Hostile Tender Offers**, many listed Polish companies have a large or majority block of shares held by a shareholder or group of related shareholders who also nominate the members of the management board, so there may be sufficient alignment between the management board and key shareholders in order to block a hostile take-over in any event.

10. Litigation

10.1 Frequency of Litigation

Disputes concerning M&A transactions are quite rare in Poland. In the context of negotiated M&A, if any disputes arise, they usually relate to more complicated matters, such as mechanisms for price adjustments, breaches of warranties or indemnification, or breaches of non-competition undertakings.

In terms of jurisdiction, arbitration is generally considered a better choice than proceedings before the commons courts, especially for foreign investors. Arbitration may be conducted in English (or other languages if the parties so determine), arbitrators usually have experience in and a solid understanding of M&A deals and commercial issues in general (while the level of commercial expertise in the common courts is less reliable), and arbitration is considered to be a much quicker process. Arbitration is usually before one of the prominent permanent arbitration courts in Poland, or the ICC International Court of Arbitration, or LCIA.

Litigation in respect of tender offers is not especially common in the context of tender offer processes.

10.2 Stage of Deal

In the context of negotiated M&A, litigation would typically arise post-closing, and concern the sorts of maters referred to in **10.1 Frequency of Litigation**.

In the context of tender offer processes, litigation may arise at virtually any stage, depending on the circumstances, including the tactics of and opportunities available to the litigant. For example, a party may allege that various other parties have been acting in concert in breach of the tender offer rules, have misused inside information, or have failed to inform the market as required. Later, a party might question the validity of certain steps relating to fulfilment of tender offer conditions or, after completion of the tender offer, challenge the validity of shareholder resolutions related to the de-listing of the company.

11. Activism

11.1 Shareholder Activism

Shareholder activism has not been very common in Poland. The separation of roles into ownership, management and supervision is still quite strong in Polish companies. Nevertheless, there is a developing view that shareholders, especially institutional investors, should participate more in exerting influence over the business of public companies', and recent legislation should contribute to facilitating this process.

A recently adopted amendment to the law on public companies aims to implement, among other things, SRD II (2017/828). The act imposes:

- an obligation on public companies to have a remuneration policy approved by the shareholders and periodic reports on realisation of such remuneration policy;
- an obligation for institutional investors and asset managers to prepare and disclose their policies on engagement in public companies and their methods for its realisation; and
- new rules for processing of data of shareholders for the purpose of facilitating contact between shareholders and the company, together with related obligations on intermediaries running brokerage accounts (eg, banks, brokerage houses, etc).

To the extent there has been shareholder activism on the Polish market, it has usually focused on the appointment of the right people to the supervisory board which keeps watch on the actions of the management board, taking a position on the remuneration of the management board members (ie, "say on pay"), the dividend to be paid to the shareholders, or voting against or challenging resolutions of shareholders for various reasons.

11.2 Aims of Activists

For the reasons discussed in **9.1 Hostile Tender Offers**, **9.5 Directors' Ability to "Just Say No"** and **11.1 Shareholder Activism**, there has been visible little encouragement by shareholder activists of M&A transactions.

11.3 Interference with Completion

For the reasons discussed in **11.1 Shareholder Activism** and **11.2 Aims of Activist**s, if there are examples of interference with completion of M&A deals on the market, they are the exception rather than the rule.

WKB Wierciński Kwieciński Baehr is a leading Polish independent law firm advising both domestic and international clients across all areas of business law. Located in Warsaw and Poznań, a team of more than 100 lawyers assists clients on the most complex transactions and cases. WKB's M&A team, led by hands-on partners, offers full support on transactional and corporate matters. Recent engagements include a number of high-profile cross-border and domestic transactions, notably for private equity funds and blue-chip companies, including in the energy and payment services industries. One of the most significant was the acquisition by Polskie ePłatności (a portfolio company of Innova Capital) of BillBird, a leader in Poland in the provision of innovative payment methods such as advanced solutions for mobile payments, from IGT Global Services Limited. The team also advises private and public clients from both local and foreign capital groups on restructuring projects and day-to-day matters.

Authors

Jakub Jędrzejak is a partner at WKB and co-heads the M&A team. He specialises in M&A transactions, assisting leading Polish and international corporations and investors, notably private equity funds, on sales, acquisitions and post-transactional integrations of businesses. Within his broad M&A practice, Jakub is experienced in public takeovers and distressed M&A. He also advises on restructurings and insolvency processes, and he is experienced in banking and finance projects. His transactional, restructuring and financial capabilities are reflected in international directories, such as Chambers Global, and appreciated by clients, who praise Jakub as their "go to lawyer in Poland".

Ben Davey is a partner in WKB and a member of the M&A team, with particular expertise on transactions involving investments or disposals by institutional investors such as private equity funds, infrastructure funds and other alternative assets funds. Prior to joining WKB, Ben was a partner at Freehills, a leading Australian law firm. He has substantial experience on a range of international transactions, having acted for some of Australia's most active and prominent investors with international investment programmes. Ben is a keen participant in activities of the private equity and venture capital investment communities.

Marta Midloch is a partner at WKB, co-leads the infrastructure and PPP practice, and closely liaises with both the M&A and Public Procurement teams. She provides advice at all stages of infrastructure projects to clients operating in a variety of sectors, including energy, oil and gas, chemical, road, rail and public transport. She supports both contracting authorities and contractors, and renders legal advisory services to consortium partners. Marta also specialises in M&A transactions, including in transactions involving elements of capital markets law. She also provides advice to public companies regarding their disclosure requirements.

Katarzyna Kozak is a member of the M&A team and capital markets team. She specialises in M&A transactions, including public market transactions, company law, and corporate governance. In the past, she also participated in banking and finance transactions, including corporate finance, acquisition finance, project finance, and the issuance of high-yield bonds. Katarzyna completed the University of Warsaw's Inter-Departmental Individual Studies in the Humanities, where she graduated with a law degree, as well as completing studies at the Institute of Applied Linguistics. She also completed postgraduate studies in law and economics of capital markets at Warsaw School of Economics.

WKB Wierciński Kwieciński Baehr

Plac Małachowskiego 2
00-066 Warsaw

Tel: +48 22 201 00 00
Fax: +48 22 201 00 99
Email: office@wkb.pl
Web: www.wkb.pl