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Corporate M&A 2022

Poland: Law & Practice
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POLAND

Law and Practice

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1. TRENDS

1.1 M&A Market

The M&A market in 2021 was affected by the COVID-19 pandemic. However, despite uncertainty and the intermittent imposition of COVID-19 restrictions, which affected various sectors of the economy, the number of M&A deals has increased, with over 40% more transactions compared to 2020, and the fourth quarter of 2021 being record breaking in terms of the number of M&A transactions in the Polish market.

Nevertheless, transactions still sometimes took longer to complete, in part due to the lack of face-to-face negotiations, but also because registration and administrative proceedings continued to be hampered by COVID-19 restrictions and, in some cases, because additional regulatory approvals needed to be obtained.

The average value of transactions in Poland continues to grow, and Poland remains a leading M&A market in the CEE region, with high degrees of fragmentation in many sectors, making them ripe for consolidation.

On the other hand, activity involving state-owned entities fell in 2021.

1.2 Key Trends

Despite the ongoing COVID-19 pandemic in 2021, the GDP of Poland increased by around 7.3% (on an annualised basis) in the last quarter of 2021. By contrast, GDP growth in the eurozone countries in the same period was 4.6%. The impact of the pandemic was buffered by, among other things, domestic consumption and exports, as well as factors which have underpinned Polish economic growth for some time, including the stable banking system and a well-regulated financial services sector, combined with a well-educated workforce.

In terms of transactions, there were no major disruptions, significant changes in deal terms, nor unexpected difficulties in obtaining debt finance.

Warranty and Indemnity Insurance

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, insurance is not always the ideal solution, especially given that many insurers have an extensive list of standard topics which they will not cover.

1.3 Key Industries

The sectors which experienced significant activity included TMT, FMCG, biotech/medical, as well as e-commerce.

Of course, not all sectors have fared so well during the COVID-19 pandemic, especially the entertainment, culture, retail and hotel industries. The construction industry was also affected due to constraints on supply of materials and workforce absences.

Some of the notable transactions included:

- the acquisition of insurance company Aviva's business in Poland by the German insurance company Allianz (EUR2.5 billion – the largest transaction in Poland last year);
- the acquisition of Mondial Relay (the second largest e-commerce parcel distribution platform in France) by InPost (a Polish logistics company) for around EUR513 million, which made InPost the largest e-commerce platform in Europe;
- the acquisition of UPC Polska by Play Communications for around EUR1.5 billion result-

ing in an increase of its user base by 17 million people; and
- the acquisition of ROBYG (Poland's largest residential developer) by TAG Immobilien (a German real estate company) for around EUR550 million.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

The Polish M&A market is dominated by negotiated acquisitions of shares. There are also some asset deals, including 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.

There are also acquisitions of shares in listed entities, with indirect acquisitions of such shares 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, it is highly regulated.

2.2 Primary Regulators

The primary regulators are the Polish Office of Competition and Consumer Protection (POOCP) and the Polish Financial Supervisory Authority (PFSA).

The POOCP is responsible for merger clearances. The key requirements relating to merger clearances are described in **2.4 Antitrust Regulations**. Recently, due to the COVID-19 pandemic, the POOCP was also entrusted with a new prerogative regarding foreign investment control (for further details, see **2.3 Restrictions on Foreign Investments** and **2.6 National Security Review**).

The 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, can affect 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 PFSA 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. Nevertheless, the COVID-19 pandemic saw the introduction of laws significantly expanding the state's control over M&A transactions in some strategic sectors of the economy including, among others, the electricity, gas, medical and

pharmaceutical, and food processing sectors (as 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, nor 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 law limits 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, 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 antimonopoly 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 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 assets 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 the case of an 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 stakebuilding.

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 POOCP 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, they have no decisive powers and cannot block or delay a transaction.

Collective Bargaining Agreements and Asset Deals

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

Conversely, 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 at least 30 days before the expected transfer date.

Negotiations, Blocking and Terminations

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) with the aim to conclude an agreement in that regard within 30 days. Nevertheless, neither the trade unions nor employees can block the transfer. However, within two months following the transfer, a transferred employee may terminate their employment relationship with only seven days' prior notification.

Partial Transfers

In the event of partial transfer of a working establishment, the buyer and the seller shall bear joint and several responsibility for pre-transfer liabilities under the transferred employment relationships, while all such liabilities are shifted entirely to the buyer if the whole working establishment is transferred.

2.6 National Security Review

Polish law requires notification to the relevant Minister (depending on the sector) on the proposed acquisition of control over a "significant participation" (at least 20% of the votes) in a company operating in certain strategic business areas, but only if such company is included on a list published by the Council of Ministers. The relevant strategic business areas include the energy, oil and gas, chemicals, defence and telecommunications sectors. The current list, which constitutes an appendix to the Regulation of the Council of Ministers of 7 December 2021 includes 13 companies. The threshold for notification is quite low, which needs to be taken into account during stakebuilding.

The law also allows the government to prevent transactions relating to certain critical infrastructure and systems, including energy, telecommunications, healthcare and transport infrastructure, financial systems, food and water supply systems, rescue services and facilities for production, storage or use of chemical and radioactive substances. However, the government can only intervene if the relevant target has been notified by the government that it is subject to the restrictions.

Interim COVID-19 Measures

Poland adopted an interim, COVID-19 related measure (in force until 24 July 2022, although there were rumours about the government's intention to extend this period) which expanded the state's control over M&A transactions

concerning public companies, entities holding assets listed as "critical infrastructure" and entities doing business in some strategic sectors of the economy. The new law imposes an obligation to notify, prior to consummation, certain planned transactions (ie, the direct or indirect acquisition of control or a "significant participation" by acquiring or crossing a 20% or 40% shareholding threshold) to the President of the POOCP, who may object to the transaction within 30 business days or, exceptionally, 120 calendar days in cases requiring review from a public security or public order perspective (moreover, the clock stops whenever the regulator seeks additional information).

An objection may be made for various reasons including a potential threat to public order, public security or public health in Poland. However, only those transactions where the purchaser (and/or its ultimate controlling entity) is from outside of the EU, the EEA and the OECD are potentially subject to the regime. Further, the new measure only applies if the target had turnover from Poland exceeding EUR10 million in either of the two preceding financial years.

An acquisition made in breach of the new measures shall be invalid, and may give rise to severe financial penalties, and potentially penal consequences.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

There were four precedent-setting court decisions issued in the last three years.

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 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, PLN2.2million plus interest.

On 18 July 2019, the Supreme Court issued a decision which, contrary to the previous market practice, required that the price paid in an indirect acquisition of shares needs to be taken into accounting in setting the price within the resulting mandatory tender offer.

On 20 November 2019, the Supreme Court (full panel of seven judges) issued a decision according to which it is not permissible to stipulate a contractual penalty that will apply if a party rescinds the agreement due to the lack of payment by the other party. As a result, another mechanism (a "guarantee payment") became more prevalent in M&A contracts to enhance deal certainty for the sell side.

On 9 December 2021, the Supreme Court (panel of three judges) issued a decision according to which it is permissible to stipulate a contractual penalty for a delay in performing an obligation in an amount comprising a certain percentage of the agreed contractual remuneration for each day of the delay, even if no deadline for the calculation of the contractual penalty or its maximum amount has been specified.

3.2 Significant Changes to Takeover Law

Recent changes in corporate law have been extensive, including the following.

- Full introduction of mandatory dematerialisation of shares in all joint stock companies

(not only public companies) and partnerships limited by shares; ie:
(a) all issued share certificates lost their legal force;
(b) all transfers shall be effected by a relevant entry in the shareholders' register; and
(c) all affected companies need to have a shareholders' register run by a certified entity.
- Amendments introduced due to COVID-19 aimed at facilitating day-to-day business, including distance meetings of corporate bodies as the default method for making resolutions.
- Prolongation of the statutory periods for taking various actions, including suspension of deadlines to file for bankruptcy where the insolvency results from the COVID-19 pandemic.
- Modernisation of registration proceedings before the National Court Register such that applications may be filed only via an online system.
- Introduction of a new legal form, the simple-joint-stock company, under the Commercial Companies Code, the main characteristics of which include:
(a) minimum share capital of PLN1;
(b) the ability to make a shareholder's capital contribution to the company constituting work or the provision of services; and
(c) a choice between a one-trier or two-trier board structure.

In 2022, further important amendments to Polish corporate law are planned, including the introduction of:

- an opt-in mechanism which will allow a holding company to manage its group in a uniform manner according to a common business strategy and give binding instructions to its subsidiaries, with liability arising from following such instructions shifting from the subsidiary's management board to the holding company (participation in such a group will need to be disclosed in a register);
- a mechanism for squeeze-outs in limited liability companies;
- a business judgement rule; and
- the reinforcement of the position of the supervisory board – eg, the right to request examination of a given issue by an external advisor at the company's expense.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

Stakebuilding 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 the Market Abuse Regulation (MAR); eg, so-called "marking the close" by placing orders (also in concert with other investors) right before the 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

Currently, there is no requirement to disclose the purpose of an acquisition and the bidder's intentions regarding control. 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. In Poland, MAR, including its quite comprehensive definition of inside information, is directly applicable.

The decision as to whether a given transaction step constitutes inside information and should be immediately disclosed to the public 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 delayed. 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. When the company eventually publishes the information in respect of which it delayed disclosure, it also notifies the PFSA about the delay and explains the reasons in writing.

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 delayed in accordance with MAR. In that regard, the risk of jeopardising M&A negotiations may be a premise for delay on the basis that the legitimate interests of the company may be prejudiced.

5.3 Scope of Due Diligence

The scope of due diligence depends on various factors, including the target's sector and the bidder's expectations. 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 the main legal risks and provide recommendations in the context of the deal. The areas that are usually reviewed include contracts,

corporate matters, financing, regulatory issues, employment matters, intellectual property and IT, and real estate. In public M&A, the scope of due diligence may be more limited.

Over the last year, in many cases it took a little bit longer to conduct due diligence, taking into account all the COVID-19 restrictions and remote working. The scope of due diligence did not change significantly, however, bidders started to pay special attention to the financial results and future business plans of targets having regard to the impact of the pandemic and related restrictions.

5.4 Standstills or Exclusivity

Exclusivity agreements are commonly seen in negotiated M&A transactions. In bigger deals especially, 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 occurs 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 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. However, shares may not transfer under such agreement, but rather should only be acquired through the tender offer (however, the regulations allow 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.

Tender offers conducted on the Polish market in 2021 usually lasted two to four months from their announcement until the end of the subscription period. 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, regulatory approvals).

Since the beginning of the pandemic, deals that have been broken, put on hold, or had their deal terms materially modified, usually concerned the sectors most affected by COVID-19 measures, including hotel and restaurant chains, and the wider retail sector.

6.2 Mandatory Offer Threshold

Mandatory offer thresholds (33% and 66% of total votes) apply to the acquisition of shares in a public company. In the case of exceeding 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 an indirect transaction, including 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. 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 by reference to the most recent financial statements of the company prior to signing 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).

In light of the COVID-19 situation, we would have expected greater than usual use of completion accounts rather than locked box mechanisms, as well as earn-out mechanisms, deferred payment or escrow accounts to hold back a portion of the purchase price until a certain issue is dealt with, or cherry-picking of assets. However, for now, there is no strong trend to that effect.

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. 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 (see

2. Overview of Regulatory Field) or the resolution of issues identified during due diligence.

Nevertheless, it is common that the parties seek to limit the number of conditions and, where possible, include post-closing obligations instead, rather than weaken the certainty of closing.

In tender offers, the scope of possible conditions is regulated by law. The most common conditions are regulatory consents and the minimum level of subscriptions, which cannot be higher than 66% of votes. Sometimes there are other conditions which are more in the hands of the key parties (eg, concluding certain agreements, and/or certain resolutions being 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.

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 **6.4 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. In the context of negotiated M&A, obtaining financing for the acquisition may be a condition precedent to closing but it is not very common. Rather, it is more common that a buyer is required to deliver proof that it has the necessary financial resources available or that it has already obtained bank financing.

Moreover, sometimes, sellers may require some sort of security for payment of the purchase price; eg, a parent guarantee, bank guarantee, or payment into an escrow account. However, such requirements are mostly 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 a given party fails to satisfy certain conditions precedent, 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, etc.

The COVID-19 pandemic had some impact on the choice of deal security measures. In the

absence of explicit contractual provisions to such effect, Polish law provides limited relief from contractual obligations in the event of an extraordinary change in circumstances. However, the precise circumstances and scope of such relief are not entirely clear. Consequently, since the beginning of the pandemic, it has become more popular for contracting parties to include MAC clauses and regulate force majeure events explicitly in their agreements.

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), and certain information and personal rights (eg, rights under the constituent document that are personal to the existing shareholder(s) and non-transferrable).

In addition, a buyer might be issued with privileged shares (allowing not more than two votes per share (in companies other than public companies), up to 150% of the usual dividends, or priority 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.

In the case of a public company, if a majority of three quarters of the votes approves, 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 (or, for a public company, potentially in electronic form).

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 nor 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. 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. Currently, squeeze-outs are not available in limited liability companies, but this may change soon.

Squeeze-outs in public companies are quite common in Poland, usually as a preliminary step to delisting. A squeeze-out is subject to minimum price requirements. 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 requires the establishment of 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 escrow accounts 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.

As such, a potential bidder may seek to secure an irrevocable commitment 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, the parties may wish to share some positive news with stakeholders, or manage the way in which their or the target's respective business partners learn about the transaction. Further, if a notification is required to the POOCP, the submission of such notification will be announced on its website within a few days.

As such, the public 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 (if less than EUR1 million) or an information memorandum (if 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.

For public offerings of shares, the issuer is generally obliged to prepare a prospectus, including financial statements of the issuer compliant with IFRS, and have it approved by the PFSA. 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 purposes, documents evidencing the transfer of the shares need to be appended to the filing; eg, an updated list of shareholders for limited liability companies. Documents submitted to a company's registration files since 1 July 2021 are available for viewing by any interested party via an online system (while documents submitted before such date have to be physically viewed at the relevant registration court). Further, under newly introduced provisions described in **3.2 Significant Changes to Takeover Law**, the valid transfer of shares in a joint stock company requires an entry to the shareholders' register run by a brokerage house or another certified entity.

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 of the company, provided that given matters do not lie within the competence of another corporate body, and represents the company before third parties.

There are various bases for liability of a management board member, including liability towards the company, liability towards the company's creditors if enforcement proceedings instigated against the company prove to be ineffective (certain protections exist, for example, 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).

In general, a management board member is liable if they failed to perform their duties with due diligence and 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 an 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**.

In addition, in the event of a change of the beneficial owner of a company, which is usually the

case in the context of an M&A transaction, the management board of the target is required to make proper notification of such change to the Central Register of Beneficial Owners under the Polish Anti-Money Laundering and Counter-Terrorism Financing Act. Failure to make such notification may result in fines being imposed on the target.

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; eg, disclosure of 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 currently no explicit equivalent of the business judgement rule in Poland, however, the courts often accept that some reasonable level of economic risk is normally connected with management of a business.

The formal introduction of a business judgement rule to Polish corporate law is planned for 2022, as mentioned in **3.2 Significant Changes to Takeover Law**.

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 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 replies to bidders' Q&A, 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, strategy, financial or tax implications, deal 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 concerning matters which directly affect them such as new management contracts or management stock options plans. In the context of a tender offer, the management board 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;
- 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 (however, the shareholders may always dismiss the management board members);
- various mechanisms that protect minority shareholders (eg, minimum price requirements in a tender offer); 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 detailed regulations and meticulous scrutiny by the PFSA with regard to companies under its supervision, including investment funds, brokerage houses and other investment firms. 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.).

The new law on investment control, described in more detail in **2.6 National Security Review**, aims at preventing hostile takeovers of public companies and other companies from industries that may be considered strategic for the Polish economy, public security or public health.

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;
- matters being listed in the company's statute which require approval by a specific majority of shareholders or a specific shareholder(s); 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 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 in the above-mentioned case of Kruk S.A.

Also, in response to the COVID-19 pandemic, hostile takeovers of public companies and in certain strategic sectors have been made a little bit more difficult, as described in **2.6 National Security Review**.

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 takeover in any event.

10. LITIGATION

10.1 Frequency of Litigation

Disputes concerning M&A transactions are quite rare in Poland. If any disputes arise, they usually relate to matters like mechanisms for price adjustments, breaches of warranties or indemnification, or breaches of non-competition undertakings.

Arbitration is generally considered a better choice than proceedings before the commons courts, especially for foreign investors. Arbitration may be conducted in a foreign language, arbitrators usually have a better understanding of M&A deals than common court judges, and arbitration is considered to be much quicker. 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.

10.2 Stage of Deal

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

In tender offer processes, litigation may arise at virtually any stage, 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.

10.3 "Broken-Deal" Disputes

After the initial lockdown in the first quarter of 2020, there was some degree of mobilisation to close on-going deals. This was followed by a slight slow-down as investors displayed more cautiousness and scepticism.

However, as regards public deals, the market was very active in 2020, including the IPO of Allegro with a transaction value exceeding EUR2 billion, which made it the second biggest in Europe in the third quarter of 2020 and one of the biggest in the history of the WSE.

The last quarter of 2020 brought a significant revival of M&A transactions in general, which continued throughout 2021, giving rise to a record number of M&A transactions.

In this context, "broken deal" disputes were not especially frequent. Withdrawals from deals happened mainly in sectors which were most adversely affected by COVID-19 restrictions, but they were not a rule, particularly because many investors started looking for bargains while, at the same time, other players looked for divestment opportunities for a variety of reasons, including cost-cutting.

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. Laws introduced in 2019 to implement SRD II (2017/828), including, among others, an obligation of public companies to have a remuneration policy approved by shareholders, are aimed at reinforcing shareholder activism.

Shareholder activism on the Polish market 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, etc.

In the course of the COVID-19 pandemic, shareholder activism concentrated on measures to help companies survive in difficult times, including promotion of disinvestments and cost cutting.

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 little visible encouragement by shareholder activists of M&A transactions, except to the extent the contemplated transactions would

aim at saving or gaining resources by companies especially affected by the COVID-19 situation.

11.3 Interference with Completion

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

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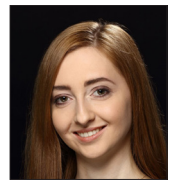

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