Poland

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

Contacts

Pawel Zelich

Noerr, Warsaw

pawel.zelich@noerr.com

1. INTRODUCTION

Private M&A transactions have developed in Poland since the 1990s, first in the wave of privatisation – a process related to changes to the Polish legal system in the early 1990s, involving a series of transactions related to the biggest enterprises – and subsequently in relation to transactions carried out between private parties. At the beginning, documents were kept simple and rooted in Polish codified regulations. Over time, M&A standards were established by practitioners who followed and broadly adopted United Kingdom and United States practices. Nowadays, the concepts of representations and warranties, a specific regime of liability and related clauses are applied both in domestic and international transactions. However, jurisprudence regarding M&A transactions is not rich and common courts are not used to examining these kind of documents on a larger scale. Due to this, most sale agreements are subject to arbitration.

Covid-19 has impacted M&A transactions, mainly in relation to the contents of the representations and warranties provided by the sellers, which in many cases refer to employment and/or financing matters (workplace stoppage, financing provided by the state in relation to Covid-19, etc.). Buyers also tend to include material adverse change (MAC) clauses which may relate to certain aspects of Covid-19 (eg, decrease in EBITDA and cessation of certain business activities).

As a consequence of the Covid-19 crisis, and following the European Commission's communication and guidance concerning foreign direct investments (FDI) aiming at setting up a fully-fledged screening mechanism in all Member States, the investment screening regime in place in Poland since 2015 was amended and special rules regarding FDI were introduced. The new regulations will remain in force until 24 July 2022.

2. LEGAL FRAMEWORK

The Polish legal system is codified as in many other continental European jurisdictions. The principal statutory regulations governing private M&A transactions in Poland are:

a) the Civil Code;
b) the Commercial Companies Code;
c) the Act on Competition and Consumer Protection;
d) the Act on Agricultural System;
e) the Bankruptcy Law Act; and
f) the Restructuring Law Act.

Relevant EU regulations (eg, Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), which regulates anti-monopoly issues resulting from the acquisition of a company) are also applicable to this type of transaction.

Pursuant to the Act on Control of Certain Investments, foreign investors planning acquisitions of stakes in certain Polish entities are subject to an FDI screening.

3. TYPE OF TRANSACTIONS

As in most jurisdictions, an acquisition of a non-public company may take different forms under Polish law and may be structured as:

a) the purchase of shares in a limited liability or joint stock company, or rights and duties in a partnership;
b) the purchase of all of the assets of an enterprise, an organised part thereof, or separate assets;
c) a merger (being a transfer of all assets of the target company into another existing or newly formed company);
d) a demerger (division of a company into two or more companies, existing or to be formed, with or without the winding up and liquidation of the divided company).

4. POSSIBLE TARGETS OF A PRIVATE M&A TRANSACTION IN POLAND

The structure of an M&A transaction in Poland may depend, in part, on the nature of the target, be it a company, partnership or enterprise. This distinction in Polish law, within the context of acquisition transactions, primarily influences the form of transactional documents and their content, as well as the regulatory requirements, regime of liability of the seller, corporate filings, tax treatment and employment relations.

4.1 Companies

Polish law provides for three types of companies: partnerships, limited liability companies and joint stock companies.

4.1.1 Partnership

Under Polish law a partnership may have the form of a: (1) registered partnership; (2) professional partnership; (3) limited partnership; or (4) limited joint stock partnership. Although originally designed for the operation of smaller businesses, the booming economic activity in Poland, particularly in the early 1990s, has resulted in many large businesses being conducted in the form of partnerships.

In a partnership there is no share capital per se; partners hold rights and duties arising from the participation in a partnership. These rights and obligations may be transferred in private transactions, subject to some requirements.

4.1.2 Limited liability company

In a limited liability company, the share capital is divided into shares; however, shares are not securities and are not represented by certificates. Ownership of shares is registered in a book of shares that the management board has the obligation to keep, update, make available to any shareholder and, after each modification of entries (whether consisting of deleting or entering a shareholder), file a new list of shareholders with the competent registry court. Shares in a Polish limited liability company are not traded on the stock market and are always transferred in private transactions. The ownership of the shares is transferred on the basis of a sale agreement and usually as of the payment of the purchase price.

4.1.3 Joint stock company

In a joint stock company, the share capital is divided into shares, which may be bearer or registered shares, and have no material form. Shares must be registered as electronic entries in a shareholders' register maintained by brokerage houses entitled to maintain securities accounts or by public notaries (in practice such registered are kept by brokerage houses). The legal title to the shares passes upon the purchaser as of the moment the relevant entry is made in the shareholders' register. Shares in a joint stock company (bearer shares only) may be introduced into trading on a regulated market (stock exchange) and may be transferred in private transactions.

4.2 Enterprise

An enterprise, or an organised part thereof, is a complex structure of material and non-material components designed to pursue a business activity. It includes, in particular: (1) a business name; (2) ownership of real properties and moveable assets as well as other titles to such components; (3) rights from lease and tenancy agreements, as well as rights to use real properties resulting from other legal relations; (4) receivables and rights from securities and cash; (5) permits and licences; (6) intellectual property rights; (7) trade secrets; and (8) books and documents related to the conduct of business activity.

An enterprise, or an organised part thereof, may be the subject matter of a sale transaction. In such a case, the whole business unit – that is, some or all of the components listed above together with employees – will be transferred to the purchaser.

According to Polish law, the buyer of an enterprise is jointly and severally liable with the seller for obligations connected with its operations, unless at the date of transfer it was not and could not be aware of any such obligation. The purchaser's liability is limited to the value of the enterprise and cannot be excluded or limited without creditors' consent.

5. STRCTURE OF THE TRANSACTION

The structuring of the acquisition of a company under Polish law should be analysed on two levels. First, a business may be acquired: (1) through a share deal (the purchase of shares or rights and duties); or (2) by means of an asset deal (the acquisition of an enterprise, an organised part or separate assets).

Second, the acquisition agreement may be: (1) final and only subject to fulfilment of conditions precedent or (2) preliminary and require the execution of a second contract transferring the target. The choice between these forms will depend on the specific circumstances of each case and will be informed by the detailed business and legal analysis undertaken by the buyer. It is therefore vital that, prior to embarking on the transaction, the buyer and its advisers have made a thorough analysis of all aspects of the above structures and adopted a sound decision as to the choice of one of them.

The major differences between a share deal and an asset deal arise from: (1) the regime of liability of both the seller and the buyer; (2) the requirements for regulatory approvals and the transfer of permits and licences; and (3) the form of the acquisition agreement. In some cases, the choice between a preliminary and final agreement is limited for legal reasons. For example, the transfer of real estate under Polish law cannot be subject to conditions precedent and therefore a preliminary agreement must be concluded first, followed by execution of the document transferring title unless no conditions are required.

In most cases, the buyers and sellers prefer a share deal instead of an asset deal. In cases where shares cannot be sold for different reasons, both parties will seek to first transfer the assets to a special purpose vehicle and then conclude a share deal. This preference is because of the complexity and the risks related to an asset deal, especially where the subject matter of the transaction is an enterprise or its organised part. In the majority of cases, partnerships would be first transformed into limited liability companies and then shares therein would be sold (partners are liable for the partnership's obligations whereas shareholders of a limited liability company are not subject to such responsibilities). In respect of the preference between a final and preliminary acquisition agreement, sellers usually prefer to conclude a final contract, subject to conditions precedent (if any) unless excluded by law, and buyers will rather negotiate preliminary sale agreements.

5.1 Share deal

A share deal consists of the acquisition of an entity (company or partnership running an operational business) through the purchase of shares (in a limited liability company or joint stock company) or rights and duties (in a partnership). In principle, such type of transaction does not hinder the target from continuing its business activity after the closing, as conducted prior to closing.

With respect to the liability regime, usually the seller will be liable for the breach of representations and warranties provided in the share sale agreement (agreement on transfer of rights and duties).

Indemnity clauses providing for seller's obligation to redress any losses incurred by the purchaser or the target on a PLN 1 to PLN 1 basis (referring to a situation in which a party undertakes to compensate certain claims in full amount, ie, each PLN 1 lost by a given party is compensated with PLN 1 paid to this party) have also become part of standard practice. However, most commonly the seller's liability is limited to specific instances described in detail in the transaction documents (eg, a seller would usually be obliged to indemnify the buyer of the target for losses incurred in connection with intragroup transactions which were not made on an arm's-length basis or due to the lack of transfer pricing documentation) rather than to relate to any liability that may arise in connection with taxes in general.

A share deal may require an anti-monopoly clearance (see section 9.1) and/or the approval of the Minister of Internal Affairs (see section 9.3). Also, in the event where the target is the owner or perpetual usufruct (*użytkownik wieczysty*) (ie, the user of a public land, usually for a period of 99 years) of agricultural land of a surface area of 5ha or more, the National Centre of Support to Agriculture (Krajowy Ośrodek Wsparcia Rolnictwa) may exercise pre-emption rights to acquire the shares.

In order to avoid undue postponing of the transaction, the buyer should always carefully analyse the target's corporate documents at an early stage of the process. This is due to the fact that, although shares in Polish companies are freely transferable, the articles of association of a particular company may provide otherwise (eg, require the prior consent of the management board or the other shareholders, or by establishing a right of first refusal or pre-emption right in favour of the remaining shareholders). In the case of partnerships, it should be noted that rights and duties are transferable only if the governing deed so provides and if all of the remaining shareholders have given their consent in writing, unless otherwise stated in the deed.

5.2 Asset deal

An asset deal may by structured in two ways: (1) as the acquisition of specific, separate assets not constituting an enterprise; or (2) as the purchase of an enterprise or its organised part. The sale of an enterprise or of its part is a complex transaction requiring various steps to be taken. For example, it is essential that the acquisition document defines, in detail, the components being sold that constitute the enterprise; otherwise, the acquisition will be merely an acquisition of separate assets. Prior to closing or in the period following, consents of third parties (creditors) should be obtained to effectively transfer rights and obligations under contracts which form part of the enterprise. In some circumstances, specific permits or licences may not be transferred (ie, in cases where such permits or licences provide so); in which case the buyer will need to reapply for such permits or licences.

In an asset deal, both the seller and the buyer will be liable for liabilities connected to the conduct of the enterprise by operation of law. In practice, buyers tend to contractually impose on the sellers the obligation to indemnify against any claims that may be brought in connection with the past activity of the enterprise.

As with a share deal, the acquisition of assets or of an enterprise or its part may require an anti-monopoly clearance (see section 9.1) and, in certain cases, the approval of the Minister of Internal Affairs (see section 9.3).

In cases where the assets under sale include agricultural land, the National Centre of Support to Agriculture may exercise pre-emption rights to acquire such land.

6. AGREEMENTS CONCLUDED PRIOR TO THE TRANSACTION

Often the parties to a negotiated M&A transaction in Poland first negotiate and sign documents to procure the confidentiality of information disclosed, and express their interest in executing the deal and defining the most important items of the transaction structure and the steps to be taken by the parties. Those documents are usually confidentiality agreements or non-disclosure agreements, and letters of intent and/or term sheets. It should be noted that these concepts are not regulated by Polish law and their 'implementation' is attributable to their introduction into Polish legal practice from the common law system.

Any of the abovementioned agreements (as well as purely transactional documentation) should be negotiated in good faith. According to the Polish Civil Code, a party that has conducted negotiations in breach of good practice (fair and honest conduct), in particular without the intention to conclude a legally binding agreement, has the obligation to pay damages incurred by the other party on the basis that such party relied on the fact that an agreement would be executed. The party seeking damages on the basis of bad faith negotiations will have to evidence: (1) the breach of law, consisting in particular of the lack of intention of the other party to sign a binding agreement; (2) damages resulting from the expenses incurred in connection with the failed transaction (which may include lost profits resulting from missed business opportunities); and (3) a causal link between such breach and the damage. Since Polish courts do not have much experience in this type of litigation, in practice it is rare that parties raise these claims unless they have solid proof.

Although lock-up (or voting) agreements with major shareholders are not very common in private company sales in Poland, certain transactions, specifically where the investment is a multi-step process (eg, acquisition of the shares in a number of portions) do provide for such limitations and appropriate clauses are introduced to the relevant documents.

6.1 Confidentiality agreement/non-disclosure agreement

A confidentiality agreement or non-disclosure agreement is executed in order to protect the confidential information regarding the target (and in some cases the seller) disclosed to the potential buyer and its advisers or other representatives. Under such agreements, the potential purchaser undertakes to keep confidential, and not disclose to unauthorised parties, any information disclosed during due diligence. Such confidential information may be used solely for the purpose of evaluating the intended transaction. The agreement may also provide that negotiations regarding the contemplated transaction will be confidential and may contain non-solicitation clauses and contractual penalties for their breach.

The comfort for the sellers regarding such confidential agreements may be questionable, as damages resulting from the breach must be proven. Even if such agreements provide for contractual penalties, those can be challenged on the basis of inadequacy to the damages incurred. Irrespective of the above, it is common practice to conclude such type of contracts.

Sometimes the potential purchaser will deliver a confidentiality letter instead of an agreement. In most cases, confidentiality agreements/non-disclosure agreements are governed by Polish law. However, in cross-border transactions practice shows that parties sometimes agree to subject such arrangements to a neutral law.

6.2 Letter of intent

Under a letter of intent, the parties express their interest in performing the transaction and undertaking measures that will allow its conclusion, provided certain criteria are met. However, a letter of intent is not binding and does not create any obligation on the parties, in particular, to conclude any agreement pertaining to the transfer of shares. Some clauses in a letter of intent may be designated as binding, such as those regarding: (1) confidentiality of any information disclosed by any of the parties; (2) the applicable governing law; and (3) dispute resolution.

It may also provide for binding provisions under which: (1) the potential buyer and/or the seller will not be allowed to withdraw from negotiations without a material reason; and/or (2) the seller will grant to the buyer exclusivity as to discussions regarding the deal.

The purposes of a letter of intent are to: (1) provide comfort to the parties by evidencing their common intention at a point in time; and (2) describe the milestones of the transaction and its financial terms. Nevertheless, the parties should be careful in wording such a document to avoid the risk of its requalification as a preliminary agreement for the sale of shares (or rights and duties in a partnership). Under Polish law, an agreement under which one or all of the parties commit to conclude a specific agreement (the final agreement) and provide for the fundamental terms of such final agreement (*essentialia negotii* – ie, terms and conditions which are legally required to give effect to a civil law act, such as a sale), will be considered as a preliminary effective and binding agreement. As a result of such requalification, any of the parties would be entitled to request the execution and performance of the final agreement. It is therefore very important that the letter of intent makes clear that it reflects only the parties' intentions with respect to the potential transaction and that it should not be construed as a binding agreement containing fully determined elements of the deal.

A letter of intent will be a preferred type of document for: (1) potential buyers only generally acquainted with the target company and prudently approaching the transaction, ie, acting on the basis of findings from due diligence (covering at least financial, business, tax and legal issues) and expecting more flexibility as regards their acquisition decision; and (2) sellers conducting parallel negotiations on the deal or still considering different ways of disposing of the company (eg, by means of dual track, such as through a private M&A transaction or through an initial public offering). The vast majority of letters of intent are governed by Polish law.

6.3 Term sheet

Although more commonly drafted for the purposes of financing transactions, term sheets are also negotiated and drawn up in M&A deals. Such documents usually contain clauses comparable to those included in a letter of intent (other than the expression of intent), but with the intention to constitute a more detailed map of the transaction to conclude.

As in the case of a letter of intent, if the parties do not want to make it binding, special care should be taken when drafting a term sheet. Remarks presented above, regarding the risk that a letter of intent providing all the fundamental and legally required terms of an acquisition agreement may be construed as a preliminary sale agreement, also apply to the term sheet.

The advantages of a term sheet usually are seen in its more detailed nature and straightforward wording (a term sheet usually takes the form of a two-column document with less formal wording than an agreement).

It is a preferred document in one-to-one transactions for sellers wishing to have a document setting out a roadmap of the transaction, and for buyers already possessing certain knowledge about the target company and who have decided to acquire the target.

In some cases, especially when a term sheet includes provisions expressly providing for its non-binding nature, the preparation and conclusion of a term sheet, instead of a letter of intent, may be questionable.

As with the letter of intent, a term sheet is governed by Polish law.

7. DUE DILIGENCE

Part of the essential preliminary action usually undertaken by the potential buyer is the due diligence investigation, aimed at identifying major risks related to the investment from a business, financial, tax, legal, technical and other perspectives.

Legal due diligence is usually conducted on the basis of a questionnaire provided by the advisers of the potential purchaser, unless the seller arranges a data room with documents and information it has selected. However, even in such cases, the buyer’s advisers often have the right to ask complementary questions and request additional documentation. Corporate documents such as articles of association, important shareholders’ resolutions and financial statements are publicly available in registry courts. However, it should be noted that only excerpts from the commercial register are available in electronic form. Land and mortgage registers are also public (and the land and mortgage books are available online).

Due diligence usually covers the following areas:

a) corporate;
b) commercial contracts;
c) employment;
d) financing/securities;
e) movable assets;

f) real estate;
g) data protection;
h) intellectual property/information technology;
i) disputes/administrative proceedings;
j) regulatory issues;
k) environment; and
l) insurance.

Depending on the type of activities carried out by the target, the scope of the due diligence may include additional matters or exclude certain of the abovementioned.

The use of a virtual data room is quite common, particularly in larger or cross-border acquisitions. In larger transactions, it is also standard practice for the seller to undertake seller's due diligence in order to identify possible legal risks connected with the target and prepare for the negotiation of the acquisition agreement (in particular as regards the scope and content of the representations and warranties and provisions regarding indemnity).

8. ACQUISITION AGREEMENT

The content of an acquisition agreement may vary significantly from one transaction to the other and will depend on the circumstances of each case. However, especially in cross-border transactions, the structure of agreements for the sale of a company will be similar. The essential provisions of an acquisition agreement relate to:

8.1 Price, price adjustment, holdbacks and escrows, and earn-out

In the event the price agreed between the parties is not fixed but is to be calculated on the basis of specific financial ratios (eg, working capital, cash-free debt-free formula, or earn-out), the acquisition agreement will provide for: (1) a base price and a detailed mechanism to calculate and pay any price adjustment; and (2) the use of experts in case of discrepancies in the parties' calculations.

The use of locked box or completion accounts schemes is statistically approximately equal; foreign investors, specifically those from the UK or US, tend to show a preference for locked box. Covid-19 has contributed to a slight increase in the application of completion accounts.

Acquisition agreements may also provide for part of the price to be retained by the purchaser for an agreed period after the closing, either as security for any potential claims arising under the agreement or as an amount to be paid once specific post-signing or post-closing obligations are performed.

Part of the purchase price, securing possible claims of the buyer for breach of the seller's representations and warranties, may be held in an escrow account and released after an agreed period and on agreed terms.

There has been increased application of earn-out mechanisms in acquisitions carried out following the Covid-19 outbreak.

8.2 Conditions precedent

The usual conditions precedent relate to:

a) regulatory or corporate approvals or submissions (ie, anti-monopoly clearance, consent of the Minister of Internal Affairs, notification of the Polish Financial Supervision Authority, non-execution of pre-emption rights by the National Centre of Support to Agriculture, consent of corporate authorities of any of the parties);
b) lack of material adverse change (ie, a material deterioration of the business, operations, assets, liabilities, financial condition or results of the target); and
c) other contractually agreed conditions precedent (eg, meeting agreed profitability ratios, termination of specific agreements by the target, resignation of indicated members of the target's management or supervisory board, handover of the target's books).

The use of MAC clauses has increased as a result of Covid-19. However, in most cases the events or occurrences resulting in a material adverse change would be rather specific than general.

Usually the conditions precedent regarding obtaining regulatory approvals will be fulfilled by the buyer, whereas all of the other conditions will fall to the seller.

8.3 Pre-closing and post-closing covenants of the parties

In most cases pre-closing covenants are structured in such a way that they mainly fall on the seller and constitute its general commitment to ensure that the target carries on its business in its ordinary and proper course and preserves its business. Such covenants will restrict:

a) increasing or decreasing the target company's share capital and changing the articles of association/founding deed;
b) paying out dividends;
c) incurring liabilities exceeding an agreed amount;
d) disposing of the target's assets, except in the ordinary course of business;
e) establishing any encumbrances on the target's assets;
f) increasing employment costs;
g) initiating court and/or arbitration proceedings which might be material to the target
h) changing of accounting and/or tax practices.

In many cases the seller also agrees to give the buyer's representatives access to the target, its books and any other information relevant to the target's business, and to keep the buyer informed of all material developments in the operation of the target. The list of pre-closing covenants may be much broader and will always depend on what is to be transferred and the results of the due diligence carried out by the potential buyer.

Post-closing covenants will vary depending on the specific circumstances of each case, and may include different obligations on the seller's and buyer's side. Irrespective of the above, it is common practice to include the seller's post-closing right to access information and documents necessary to fulfil statutory obligations (such as for instance tax filings). In many cases, the sellers expect that the purchaser will procure the discharge of members of the target's corporate bodies (management board or supervisory board) for the pre-closing period.

8.4 Closing

The closing clause sets forth the actions to be performed on an agreed closing date, which will cause the transfer of the shares/assets from the seller to the buyer. Typically, such

provisions will require delivery by each party of relevant documents evidencing: (1) fulfilment of the conditions precedent; and (2) that the representations and warranties of the seller are true and correct, as at the closing date.
Other steps usually taken during a closing will include:

(a) evidence by the buyer of the receipt of all regulatory approvals;
(b) payment of the purchase price;
(c) entry of the purchaser in the shareholders' registry (only in relation to the acquisition of shares in a joint-stock company);
(d) notification to the target of the sale of the shares; and
(e) delivery of corporate books regarding the target.

In the event of an acquisition of an enterprise, its part or separate assets, it is advisable that the seller delivers tax and social security certificates confirming that the target has no outstanding tax and social security payments. This will protect the buyer from potential claims in this respect. If the transaction includes the use of escrow accounts or the delivery of certain collateral, the closing will include execution of required legal documentation.

If the acquisition is structured as a two-step transaction (the first step being the preliminary acquisition agreement), the closing will include the execution of the final agreement transferring the shares/assets. However, because Polish registry courts sometimes request to be provided with the sale agreement as evidence of the shares' transfer, it is not uncommon to conclude at signing a simple share transfer agreement structure that does not disclose all details of the transaction.

8.5 Representations and warranties

Most acquisition agreements concluded under Polish law contain extensive seller's representations and warranties relating to title to the shares and the business of the target. According to standard practice, the representations and warranties will refer to the following issues (not being an exhaustive list and which may, from case to case, significantly vary depending, in part, on the buyer's due diligence):

(a) the seller's capacity to conclude the acquisition agreement including:
   i. the legally binding and valid nature of the acquisition agreement upon the seller; and
   ii. no infringement of any provisions of law, agreements or administrative decisions by which the seller is bound through the execution and performance of the transactional documentation;
(b) corporate matters covering:
   i. full title to the shares and capacity to sell them;
   ii. no encumbrances and no third parties' rights to the shares;
   iii. due incorporation and valid existence of the target;
   iv. no adopted amendments to the articles of association that have not been registered with the competent registry court; and
   v. no bankruptcy proceedings or similar proceedings instigated against the target;
(c) holding of permits, licences and consents necessary or required by relevant legislation to carry out the target's business;
(d) matters regarding financial statements for the last financial year (or other period) and finances such as:
   i. preparation of financial statements according to requirements of Polish law

and with generally accepted accounting principles applied in Poland;
  ii. fair presentation of the financial condition of the target and the results of its operations in such financial statements;
  no material adverse change in the general affairs, management, financial position, shareholding structure or results of the target's operations;
  lack of payment of dividend or other distribution of profits; and
  lack of liabilities other than those disclosed in the financial statements;

(e) full legal title to assets including:
  i. lack of encumbrances;
  ii. sufficiency to carry on the target's business on a basis consistent with the manner in which it was carried prior to the closing; and
  iii. satisfactory working order;

(f) pending or threatened claims, disputes, administrative or other proceedings against the target which may have material adverse effect on its activities;

(g) validity and effectiveness of commercial agreements, contracts and other arrangement material to the business of the target;

(h) validity of licences to intellectual property rights required to carry on the target's business;

(i) compliance with regulations pertaining to personal data processing;

(j) environmental aspect of the target's activity such as:
  i. holding of permits and licences required for observance of the Polish environmental law;
  ii. no breach of any provisions regulating protection of environment; and
  iii. no contamination of the environment;

(k) employment relations including:
  i. employee pension programmes;
  ii. collective bargaining agreements; and
  iii. payment of social security contributions; and

(l) taxes including:
  i. due payment of any taxes;
  ii. timely submission of all tax notices, returns, computations, documentation, declarations and registrations; and
  iii. transfer tax-related matters.

Private equity funds acting as sellers tend to increasingly limit the scope of their representations and warranties to those regarding capacity and title. In such cases, operational representations and warranties are given by the target's management which, specifically in larger transactions, is connected with the use of warranty and indemnity (W&I) insurance. Such insurance has become more popular in the last years in transactions not only involving private equity players, as the scope of representations and warranties insured is broadening.

According to standard practice, an acquisition agreement will provide that the representations and warranties listed in such document are the only representations and warranties which can be relied upon by the buyer in entering into and concluding the agreement.

Often representations and warranties are qualified by the best knowledge of the seller, which is commonly interpreted as the knowledge the seller has or should have after due inquiry of the management board and senior officers of the target.

8.6 Indemnification

As a general rule, the seller is liable for any loss incurred by the buyer and/or the target as a result of any misrepresentation. However, the standard practice is to provide for various limitations, either financial or in time or both. Also, often the parties agree to:

a) a floor amount of damages resulting from a single breach of a representation and warranty which, only if exceeded, entitles the buyer to recovery;
b) a basket (or aggregate) amount of damages enabling the buyer to claim indemnification (and in such case it is advisable to determine whether the buyer will have the right to claim for the whole amount or only the excess over the basket amount [so-called tipping or deductible basket]);
c) a maximum aggregate amount of the seller's liability (typically defined as a percentage of the purchase price); and
d) the exclusion of liability for loss of profits and other indirect damages (although in transactions where goodwill is the essential value of the target, the buyer might expect that a mechanism regarding recovery of lost profits be set out in the acquisition agreement).

It is also possible to include clauses excluding liability to the extent that: (1) the damage is the result of a voluntary act or wilful omission of the buyer; (2) occurred after closing; (3) the damage is recovered (eg, from an insurance company); or (4) the breach is remedied within an agreed period.

In terms of time limits applying to the seller's liability, it is generally agreed that representations regarding title to the shares and taxes remain in full force and effect until respectively a period between 610 years and the lapse of the statute of limitations (which is five years after the end of the year in which the tax liability has arisen). Shorter periods may apply for the remaining representations and warranties.

The most common indemnification mechanism adopted by Polish legal practice consists of securing buyer's claims for breach of the seller's representations and warranties by: (1) retaining a portion of the purchase price; and/or (2) using an escrow amount. A notarial deposit is also applied, however rather in smaller transactions.

8.7 Non-compete and non-solicitation

Very often the acquisition agreement provides a non-compete clause restricting the seller, for an agreed period from closing (in share deals, up to three years), from operating or being involved in, either directly or indirectly, business activities that would be competitive to those of the target.

According to the same principle, in many cases the seller is not entitled to solicit for employment any of the target's key personnel. Such obligations are most commonly secured by contractual penalties.

8.8 Dispute resolution

In cross-border transactions, it is advisable that the acquisition agreement provides for arbitration rather than the jurisdiction of the common courts to resolve disputes. This is mainly due to the complex nature of the acquisition agreements and the fact that arbitrators may be chosen from among legal practitioners. Civil courts may also be chosen by the parties (and practice shows cross-border deals where such clauses were agreed), but if disputes are to be submitted to a common court the buyer should ensure that the acquisition agreement contains clauses explaining the method of calculating any damage incurred from the breach of representations and warranties. Otherwise, there is a risk that common courts will apply general rules of determining the loss as laid down in the Polish Civil Code, which might limit it only to invalid title to the shares. It should also be noted that common courts will hold hearings in Polish and that all documents submitted will have to be translated into Polish.

The parties are free to choose the language of arbitration (the most common being English) and the venue, as well as the rules of arbitration. In many cases the venue is the Arbitration Court at the National Chamber of Commerce in Warsaw (Sąd Arbitrażowy przy Kra-jowej Izbie Gospodarczej) and the Court of Arbitration at the Polish Confederation Lewiatan Sąd Arbitrażowy przy Konfederacji Lewiatan) and the rules are those of these courts. London, Vienna and Paris are also a choice in terms of venue, and the International Chamber of Commerce (ICC) rules as the rules to govern the arbitration process. However, if the seller is Polish, practice shows that foreign venues are less preferred.

Apart from the above clauses, a typical agreement for the sale of a company will also provide for such provisions as:

a) An interpretation clause providing for definitions of the terms used in the agreement.
b) A subject matter provision defining the object of the transfer under the agreement (shares versus rights and obligations versus enterprise or its organised part versus separate assets). The object of transfer, in the case of the sale of an enterprise or its part, should be very specific.
c) A confidentiality clause imposing on each party the obligation to keep confidential any and all information disclosed to the other in connection with the agreement; in some cases this provision may also define the rules regarding public announcements pertaining to the transaction.
d) A provision determining the allocation of costs and expenses related to the preparation and negotiation of the acquisition agreement. It should be noted that under Polish law taxes (stamp duty) payable with respect to the acquisition of shares, enterprise or assets are always borne by the purchaser.
e) A miscellaneous clause.

9. OTHER ISSUES RELATED TO THE ACQUISITION OF A COMPANY

9.1 Merger control

Subject to specific exemptions, the intention to combine businesses by one entity acquiring control over another must be notified to the President of the Office of Competition and Consumer Protection (the OCCP).

The types of transactions subject to the control of the President of the OCCP are: (1) merger of two or more entities; (2) takeover of control (whether direct or indirect) by means of acquisition or subscription of shares; (3) formation of a joint business or (4) acquisition of a part of another undertaking (if the turnover achieved by such part exceeds a certain amount in a given period of time, ie, €10m during any of the two years preceding the acquisition).

It should be noted that the Polish Act on Competition and Consumers Protection (the Act), broadly defines a takeover of control and indicates that it is any form of direct or indirect acquisition of rights, which, individually or jointly, taking into account all legal or factual circumstances, allow for exerting a decisive influence upon another entity or entities. Control will be deemed to exist in, for example:

a) holding directly or indirectly a majority of voting rights;
b) having the right to appoint or recall a majority of members of the management board or supervisory board;
c) members of one management board or supervisory board constituting more than half of the members of another undertaking's management board;
d) holding directly or indirectly a majority of voting rights in the dependent partnership or in the dependent cooperative;
e) the ownership of all or part of the property of another undertaking; and
f) an agreement which stipulates the management of another undertaking or the transfer of profit by such undertaking.

Therefore, in each process of business combination, it is essential to determine whether control, within the meaning of the Act, will be acquired or not as it may be subject to an anti-monopoly control.

As a general rule, an acquisition of a company will require filing for the approval of the President of the OCCP if: (1) the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the filing exceeds the equivalent of €1bn; or (2) the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the filing exceeds the equivalent of €50m.

Under Polish law, the turnover calculated for the purpose of establishing whether an obligation to obtain an anti-monopoly clearance will arise should include the turnover of businesses directly participating in the combination, as well as of their subsidiaries and holding companies, if any.

The Act provides for several exemptions from the obligation to notify the Polish anti-monopoly office, including when:

a) the turnover of the undertaking over which the control is to be taken by acquisition or subscription of shares did not exceed on the territory of Poland in any of the two financial years preceding the filing the equivalent of €10m;
b) the undertaking acquires or takes over shares on a temporary basis in order to secure receivables, provided that such undertaking does not exercise the rights arising from these shares, except for the right to sell;
c) the concentration arises as an effect of insolvency proceedings, excluding cases where control is to be taken over by a competitor or a participant of the capital group to which the competitors of the target belong; and
d) the concentration applies to undertakings participating in the same capital group.

Depending on the type of transaction, the entity filing for the anti-monopoly clearance will be: (1) jointly all entities participating in the concentration of businesses – in the case of a merger or creation of a joint undertaking; and (2) the buyer – in the case of acquisition or subscription of shares or part of another's company property.

The anti-monopoly proceedings should be closed within: (1) one month of the date of application (Phase I – standard cases) or (2) five to six months of the date of application (Phase II – complicated cases). However, this period is subject to extension if the OCCP requires additional documents or information. In practice, proceedings within Phase I take from one to two months and in Phase II up to six months (although in very complex transactions Phase II proceedings can last even longer).

While the proceedings are not completed, the business combination should be suspended. Failure to meet the requirements of the Act with respect to concentration of undertakings may result in administrative fines up to 10 per cent of the revenue earned in the financial year preceding the year in which the penalty is imposed, as well as a fine of the equivalent of €50m. It is also possible that members of the management board of a business participating in a concentration will be fined up to 50 times their average salary should such a person, intentionally or unintentionally, not notify the President of the OCCP of the concentration. In practice, share purchase agreements are conditional upon obtaining the anti-monopoly clearance.

If the transaction is deemed to have a European Community dimension, it will be subject to the EC Merger Regulation and its implementing legislation.

9.2 Foreign direct investment screening

FDI screening applies to investors whose seat is not and, within a period of two years prior to the notification regarding the envisaged investment, was not located in the EU, European Economic Area (EEA) or Organisation for Economic Co-operation and Development (OECD) or who do not possess the nationality of an EU, EEA or OECD-member country. It is conducted by the OCCP.

Subject to the scrutiny are both direct and indirect investments which may have an impact on public order, public security or public health and which relate to:

a) listed companies;
b) entities holding critical infrastructure;
c) IT companies providing software regarding power supply, water supply and wastewater treatment, telecommunications, public transportation and logistics, card payments, settling of transactions in securities, data processing and hospital and laboratory services, medical devices or sales of prescription drugs; and
d) companies active in certain sectors including:
    i. generation and distribution of electricity;
    ii. production, transport and storage of gasoline or diesel;
    iii. manufacturing of chemicals, products and technology for military or police purposes;
    iv. telecommunications;
    v. manufacturing of medical devices or of pharmaceutical products; and
    vi. processing of meat, milk, fruits, cereals and vegetables.

In assessing whether a transaction might have a negative influence on public order, public security or public health, the OCCP gauges if there exists a potential risk of moving the production abroad, closing the plant, exiting key technologies, or if it would threaten other activities carried out in another way by the target. The thresholds triggering the screening procedure are accordingly:

a) 20 or 40 per cent of the total number of votes or share capital, depending on the case; and
b) the revenue of the target or its group realised on the territory of Poland in any of the two

financial years preceding the notification on the planned investment exceeds the equivalent of €10m.

The preliminary proceedings should last up to 30 business days, after which the OCCP will either issue a decision on the absence of objections or on the initiation of control proceedings. The decision on the initiation of control proceedings may be issued only if: (1) there is a need to investigate the matter further from the point of view of public safety, public order or public health; or (2) there exist formal deficiencies which were not remedied.

The control proceedings may last up to 120 days (subject to prolongation due to request for additional information or documents).

9.3 Consent of the Minister of Interior and Administration

As a general rule, the acquisition by a foreigner (individuals, companies or partnerships), directly or indirectly, of more than 50 per cent of the shares or voting rights of a company owning real property located in Poland requires a permit from the Minister of Interior and Administration. This requirement does not apply to foreigners from Member States of the EEA and Switzerland, including the acquisition by such foreigners of shares of companies holding an agricultural and/or forestry real property.

A transaction is null and void if the permit of the Minister of Interior and Administration is not obtained prior to closing.

9.4 Pre-emption rights of the National Centre of Support to Agriculture

The sale of a assets which include agricultural property or of shares in a company being the owner or perpetual usufructuary of agricultural property of a surface area of 5ha or more is subject to pre-emption rights of the National Centre of Support to Agriculture.

The exempted transactions are the sale of shares:

a) admitted to organised trading (stock exchange);
b) to descendants, ascendants, spouses, siblings, siblings' children, adoptees and adoptive parents; and
c) by the State Treasury.

In share transactions where the agricultural property is not material to the target's business, parties tend to structure the deal in such a way that, as part of pre-completion actions, the seller will ensure disposal of the agricultural property.

9.5 Polish Financial Supervision Authority

In respect to certain sectors there may be specific obligations in respect to the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego). For example, an investor is required to notify to the Polish Financial Supervision Authority the intention to acquire or subscribe for shares of a bank or an insurance company that results in reaching or exceeding the threshold of 10 per cent, 20 per cent, one-third or 50 per cent of voting rights. The Polish Financial Supervision Authority may object to such acquisition if:

a) the investor has not timely supplemented information requested by the regulator; or

b) it is justified, ie, by reasons relating to the lack of guarantee that the investor will duly protect the interest of the clients or to its financial situation.

The abovementioned decision should be issued within 60 business days (subject to prolongation due to request for additional information or documents).

9.6 Corporate filings

Business combinations consisting of the purchase of shares, as well as the purchase of an enterprise, merger or demerger, require registration in the entrepreneurs' register of the National Court Register, which is maintained by the competent registry courts. Mergers and demergers become effective upon registration. Registrations in the entrepreneurs' register are subject to court fees and registration announcement fees.

9.7 Notarisation

A large number of documents related to the process of business combinations require the form of a notarial deed or certification of the parties' signatures by a public notary. The notarial fees vary in regard to the type and value of the transaction.

An agreement for the sale of assets does not require a specific form unless the assets include real estate, in which case the form of a notarial deed will be mandatory. The acquisition of an enterprise or part thereof requires at least notarised signatures, and a notarial deed if real estate is included in the transaction. The purchase of shares in a limited liability company may be validly made only with notarised signatures, whereas for the sale of shares in a joint-stock company a simple written form will be sufficient.

9.8 Break-up and reverse break-up fees

Break up or reverse break-up fees are not very common in Poland; although, if certain legal rules are complied with, they are allowed. The amount of such fees should not exceed a reasonable estimate of costs, as they may be reduced by a court. As indicated above, even without a break-up fee, there may be pre-contractual liability if one party breaks off negotiations unreasonably after it has induced confidence that an agreement would be reached.

9.9 Tax duties

In respect to acquisition of companies, two taxes should be taken under consideration: the civil law transaction tax (PCC) and VAT.

PCC (as stamp duty) is applicable to sale agreements of shares (where the rate is 1 per cent of the purchase price), and enterprises or organised parts thereof (where the rate of 2 per cent will be applied in respect to real estate and assets and 1 per cent to other rights).

In general, VAT is applicable to the sale of goods and services; its basic rate in Poland amounts to 23 per cent. In business combinations, VAT will apply to asset deals subject to a rate qualification which may differ from asset to asset.

A transaction may result in obligation to pay a personal income tax (in general 18 per cent or 32 per cent) or a corporate income tax (flat 19 per cent) upon the gain arising out from the closed transaction.

9.10 Labour and employment issues related to certain transactions

Some transactions (eg, mergers, demergers or enterprise sales) involve the transfer of the workplace or part thereof. In such case the former employer will be replaced, by operation of law, by the new employer, who becomes a party to the employment agreements concluded prior to the workplace transfer. Moreover, the former and the new employer will be jointly and severally liable for the obligations which arose prior the transaction. The former and the new employer have the duty to inform, in writing, their employees (or trade unions if any) about the planned date of workplace transfer, its reasons, the legal, economic and social implications for the employees, and on the intended actions in regard to work, remuneration and retraining conditions. The employees must be notified 30 days prior to the transfer.

Certain labour and employee benefits are also regulated by the company's social benefits fund, the company's remuneration regulations, work regulations and collective labour agreements. Their content might have an impact on the planned business combination.

9.11 Financial assistance

As a general rule, a company may advance funds, make loans or provide security in order to finance the acquisition or subscription of its shares by a third party. However, such financing should be made on market conditions and following an analysis of the debtor's solvency.

9.12 Restructuring, bankruptcy or receivership

The general rule is that all assets of a bankrupt entity must be sold at a public auction by the official receiver. The council of creditors may, however, allow for an unrestricted sale indicating the conditions for such sale. The enterprise of the bankrupt entity should be sold as a whole. The buyer of the bankrupt entity's enterprise acquires all permits, concessions and licences obtained by the bankrupt entity, unless the law provides otherwise.

Under the Bankruptcy Law Act, it is also possible to acquire the enterprise of the debtor in a private sale subject to certain conditions (pre-pack). In particular, a pre-pack transaction requires that the application for the declaration of bankruptcy is accompanied with an application for confirmation of terms and conditions of the debtor's enterprise sale. A pre-pack is not admissible in respect to assets which are encumbered with a registered pledge providing for the creditor's right to take over title to such assets or their sale in case of default.