Poland

Negotiated M&A Guide

Corporate and M&A Law Committee

Contacts

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I. INTRODUCTION

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

(1) the purchase of shares in a limited liability or joint-stock company, or rights and duties in a partnership;

(2) the purchase of all of the assets of an enterprise, or an organized part thereof or separate assets;

(3) a merger (being a transfer of all assets of the target company into another existing or newly formed company);

(4) a demerger (division of a company into two or more companies, existing or to be formed, whether with or without winding up and liquidation of the divided company).

The content of the documentation required for the last two types of transactions is regulated, in many aspects, by Polish law. The standards and mechanics of agreements pertaining to the acquisition of shares or assets have been mainly developed by practitioners, and derive quite broadly from the UK and US legal regime.

II. LEGAL FRAMEWORK

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;

(f) the Restructuring Law Act.

It should be noted that relevant EU regulations *(for example* the Council Regulation (EC) No. 139/2004 of January 20, 2004 on the control of concentrations between undertakings ("**EC Merger Regulation**"), which regulates anti-monopoly issues resulting from the acquisition of a company and tax regulations are also applicable to this type of transactions.

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

The structure of a 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.

(1) Companies

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

(a) Partnership

Under Polish law a partnership may have the form of a: (i) registered partnership; (ii) professional partnership; (iii) limited partnership; or (iv) limited joint-stock partnership. Although originally designed for the operation of smaller businesses, the booming economic activity in Poland, particularly in the early 90's, 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.

(b) 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 with the competent registry court a new list of shareholders. Shares in a Polish limited liability company are not traded on the stock market and are always transferred in private transactions.

(c) Joint-stock company

In a joint-stock company the share capital is divided into shares, which may take the form of bearer or registered shares and can be either in material form or electronic entries into registries. Similar to the limited liability company, the management board of a non-listed joint-stock company keeps (or appoints a bank or brokerage house to keep) an updated book of registered shares and makes it available to all shareholders. Shares in a joint-stock company (only bearer shares) may be introduced into trading on a regulated market (stock exchange), and may be transferred in private transactions.

(2) Enterprise

An enterprise, or an organized part thereof, is a complex of material and non-material components designed to pursue a business activity. It includes, in particular: (i) business name; (ii) ownership of real properties and moveable assets as well as other titles to such components; (iii) rights from lease and tenancy agreements, as well as rights to use real properties resulting from other legal relations; (iv) receivables, rights from securities and cash; (v) permits, licences; (vi) intellectual property rights; (vii) trade secrets; and (viii) books and documents related to the conduct of business activity.

An enterprise, or an organized part thereof, may be the subject matter of a sale transaction. In such a case the whole business unit, that is, some or all 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.

IV. STRUCTURE 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: (i) through a share deal (the purchase of shares or rights and obligations); or (ii) by means of an asset deal (the acquisition of an enterprise, an organized part or separate assets). Second, the acquisition agreement may be: (i) final and only subject to fulfilment of conditions precedent or (ii) 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 advisors 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: (i) the regime of liability of both the seller and the buyer; (ii) the requirements for regulatory approvals and the transfer of permits and licences; and (iii) 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 practice, in most cases the buyers and sellers will 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 organized part. In respect of the preference between a final and preliminary acquisition agreement, usually sellers prefer to conclude a final contract, subject to conditions precedent (if any), unless excluded by law, and buyers will rather negotiate preliminary sale agreements.

(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 or rights and obligations. 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.

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 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 (e.g. a seller would usually be obliged to indemnify the buyer of the target for losses incurred in connection with intra-group transactions which were not made on an arm's length basis or due to the lack of transfer pricing document) 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 point VIII.(1) below) and/or the approval of the Minister of Internal Affairs (see point VIII.(2) below). Also, in the event where the target is the owner of agricultural land (irrespective of its surface area) the Agricultural Property Agency (Polish: *Agencja Nieruchomości Rolnych*) may exercise pre-emption rights to acquire the shares.

In order to avoid undue postponing of the transaction, the buyer should always carefully analyze 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 (*e.g.* require the prior consent of the management board or the other shareholders or by establishing a 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.

(2) Asset Deal

An asset deal may by structured in two ways: (i) as the acquisition of specific, separate assets not constituting an enterprise; or (ii) as the purchase of an enterprise or its organized 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 it, consents of third parties (creditors) should be obtained in order 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, in which case the buyer will reapply for such permits or licences.

It is important to note that 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.

Similar to a share deal, the acquisition of assets or of an enterprise or its part may require an anti-monopoly clearance (see point VIII.(1) below) and, in certain cases, the approval of the Minister of Internal Affairs (see point VIII.(2) below).

Also, in cases where the assets under sale include agricultural land the lessee of such land (subject to certain conditions) or in the lack of the latter the Agricultural Property Agency (Polish: *Agencja Nieruchomości Rolnych*) may exercise pre-emption rights to acquire such land.

V. AGREEMENTS CONCLUDED PRIOR TO THE TRANSACTION

Often the parties to a negotiated M&A transaction in Poland first negotiate and sign documents to: (i) procure the confidentiality of information disclosed, and (ii) 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.

It should be noted that 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: (i) the breach of law, consisting in particular of the lack of intention of the other party to sign a binding agreement; (ii) damages resulting from the expenses incurred in connection with the failed transaction (which may include lost profits resulting from missed business opportunities); and (iii)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.

No lock-up (or voting) agreements with major shareholders are common in private company sales in Poland.

(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 advisors or other representatives. Under such agreement the potential purchaser undertakes to keep confidential, and not disclose to unauthorized parties, any information disclosed during the 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.

Sometimes instead of an agreement, the potential purchaser will deliver a confidentiality letter.

(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 clauses regarding: (i) confidentiality of any information disclosed by any of the parties; (ii) the applicable governing law; and (iii) dispute resolution. It may also provide for binding provisions under which: (i) the potential buyer and/or the seller will not be allowed to withdraw from negotiations without a material reason; and/or (ii) the seller will grant to the buyer exclusivity as to discussions regarding the deal.

The purposes of a letter of intent are to: (i) provide comfort to the parties by evidencing their common intention at a point in time; and (ii) 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 a company. The reason for this is that 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 – i.e.* terms and conditions which are legally required to give effect to a civil law act, such as *e.g.* a sale), will be considered as a preliminary effective and binding agreement. In other words entitling any of its parties to request the execution and performance of the final agreement.

It is therefore very important that the parties to a letter of intent make clear that it reflects only their intention 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: (i) potential buyers only generally acquainted with the target company and prudently approaching the transaction, *i.e.* 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 (ii) sellers conducting parallel negotiations on the deal or still considering different ways of disposing of the company (*e.g.* through an initial public offering).

(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 more details and an 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 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.

The disadvantage of a term sheet is that it may have binding force and could be interpreted as a preliminary agreement for the sale of a company.

VI. 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 perspective.

Legal due diligence is usually conducted on the basis of a questionnaire provided by the advisors of the potential purchaser, unless the seller arranges a data room with documents and information it has chosen. However, even in such cases, the buyer’s advisors 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. Land and mortgage registers are also public.

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).

VII. 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:

(1) Price, Price Adjustment, Holdbacks and Escrows

In the event the price agreed between the parties is not fixed but is to be calculated on the basis of specific financial ratios (*e.g.* working capital, debt free formula, earn-out), the acquisition agreement will provide for: (i) a base price and a detailed mechanism to calculate and pay any price adjustment; and (ii) 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, though foreign investors, specifically from the UK or US, tend to show a preference for locked box.

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.

(2) Conditions Precedent

The usual conditions precedent relate to: (i) regulatory or corporate approvals or submissions (*i.a.* 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 Agricultural Property Agency, consent of corporate authorities of any of the parties); (ii) lack of material adverse change (*i.e.* a material deterioration of the business, operations, assets, liabilities, financial condition or results of the target); and (iii) other contractually agreed conditions precedent (*e.g.* 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).

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.

(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: (i) increasing or decreasing the target company's share capital and changing the articles of association/founding deed; (ii) paying out dividends; (iii) the target incurring liabilities exceeding an agreed amount; (iv) the target disposing of its assets, except in the ordinary course of business; and (v) the target establishing any encumbrances on its assets. 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.

(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: (i) fulfilment of the conditions precedent; and (ii) 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) notification to the target of the sale of the shares;

(d) delivery of corporate books regarding the target.

In the event of an acquisition of an enterprise, its part or separate assets, it is advisable for the seller to deliver 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 of 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.

(5) Representations and Warranties

Most acquisition agreements concluded under Polish law contain extensive seller's representations and warranties relating to 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) legally binding and valid nature of the acquisition agreement upon the seller; (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; (v) no bankruptcy proceedings or similar proceedings instigated against the target;

(c) holding of permits, licenses 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; (iii) no material adverse change in the general affairs, management, financial position, shareholding structure or results of the target's operations; (iv) lack of payment of dividend or other distribution of profits; (v) 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; (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 agreements, contracts and other arrangement material to the business of the target;

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

(i) 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; (iii) no contamination of the environment;

(j) employment relations including: (i) employee pension programs; (ii) collective bargaining agreements; (iii) payment of social security contributions;

(k) taxes including: (i) due payment of any taxes; (ii) timely submission of all tax notices, returns, computations, documentation, declarations and registrations; (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 & indemnity (W&I) insurance.

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 should have after due inquiry of the management board and senior officers of the target.

(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: (i) a floor amount of damages resulting from a single breach of a representation and warranty which, only if exceeded, entitles the buyer to recovery; (ii) 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]); (iii) a maximum aggregate amount of the seller's liability (typically defined as a percentage of the purchase price); and (iv) 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: (i) the damage is the result of a voluntary act or wilful omission of the buyer; (ii) occurred after closing; or (iii) 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 taxes and title to the shares remain in full force and effect until the lapse of the statute of limitations. 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: (i) retaining a portion of the purchase price; and (ii) using an escrow amount.

(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 3 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) 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 sale 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.

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 Krajowej Izbie Gospodarczej*) and the Court of Arbitration at the Polish Confederation Lewiatan (*Sąd Arbitrażowy przy Konfederacji Lewiatan*) and rules are those of these courts. London, Vienna and Paris are also a choice in terms of venue and the ICC rules as the rules to govern the arbitration process though 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 vs rights and obligations vs enterprise or its organised part vs 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; and

(e) a miscellaneous clause.

VIII. OTHER ISSUES RELATED TO THE ACQUISITION OF A COMPANY

(1) Merger Control

Subject to specific exemptions, the intention to combine businesses by one entity acquiring control over another has to 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: (i) merger of two or more entities; (ii) takeover of control (whether direct or indirect) by means of acquisition or subscription of shares; (iii) formation of a joint business or (iv) acquisition of a part of another undertaking (if the turnover achieved by such part exceeds a certain amount in a given period of time, *i.e.*, €10m during any of the two years preceding the acquisition).

It should be noted that the Polish Act on Competition and Consumers Protection, dated 16 February 2007 (consolidated text: Journal of Laws of 2017, item 229, as amended) (the "**Act**"), defines broadly 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: (i) holding directly or indirectly a majority of voting rights; (ii) having the right to appoint or recall a majority of members of the management board or supervisory board; (iii) members of one management board or supervisory board constituting more than half of the members of another undertaking's management board; (iv) holding directly or indirectly, a majority of voting rights in the dependent partnership or in the dependent cooperative; (v) the ownership of all or part of the property of another undertaking; and (vi) 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 Office for Competition and Consumers Protection if: (i) 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 (ii) 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.

It should be noted that under Polish law the turnover calculated for the purpose of establishing whether or not there will arise an obligation to obtain an anti-monopoly clearance 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: (i) the turnover of the undertaking over which the control is to be taken by acquisition or subscription of shares did not exceed, in the territory of the Republic of Poland in any of the two financial years preceding the filing, the equivalent of €10m; (ii) 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; (iii) 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 (iv) 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: (i) jointly all entities participating in the concentration of businesses – in the case of a merger or creation of a joint undertaking; and (ii) the buyer – in the case of acquisition of subscription of shares or part of another's company property.

The anti-monopoly proceedings should be closed within: (i) one month of the date of application (Phase I – standard cases) or (ii) five to six months of the date of application (Phase II – complicated cases), however, this period is subject to extension if the Office of Competition and Consumers Protection 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.

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 percent of the revenue earned in the financial year preceding the year in which the penalty is imposed, as well as fine of the equivalent €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 of the concentration. In practice, share purchase agreements are conditional upon obtaining the anti-monopoly clearance.

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

(2) Consent of the Minister of Interior and Administration

As a general rule, the acquisition by a foreigner (individuals, companies, partnerships), directly or indirectly, of more than 50% of the shares or voting rights of a company owning real property located in Poland, requires a permit of the Minister of Interior and Administration. This requirement does not apply to foreigners from member states of the European Economic Area 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.

(3) Pre-emption rights of Agricultural Property Agency

The sale of a assets which include agricultural property or of shares in a company being the owner of agricultural property is subject to pre-emption rights of the Agricultural Property Agency (Polish: *Agencja Nieruchomości Rolnych*).

The only exempted transactions are the sale of shares:

(a) shares admitted to organized trading (stock exchange);

(b) to descendants, ascendants, spouses, siblings, siblings' children, adoptees and adoptive parents;

(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.

(4) 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.

(5) 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 notarized 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 signatures notarized; whereas for the sale of shares in a joint-stock company a simple written form will be sufficient.

(6) 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.

(7) 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, enterprises or organized parts thereof.

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

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

(8) Labor and Employment Issues Related to Certain Transactions

Some transactions (*e.g.* mergers, demergers, enterprise sale) 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 labor 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) 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.

(10) 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 licenses obtained by the bankrupt entity, unless the law provides otherwise.

Under the Bankruptcy Law Act it is also possible to acquire the enterprise of a 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.

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