The Private Equity Review

Sixth Edition

Editor
Stephen L Ritchie

The Law Reviews

THE PRIVATE EQUITY REVIEW

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For further information please email
Nick.Barette@thelawreviews.com

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Editor
Stephen L Ritchie

THE LAWREVIEWS

PUBLISHER
Gideon Roberton

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Nick Barette

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PREFACE

The sixth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2016 for private equity. Deal activity and fundraising were strong in North America, Europe and Asia, but the year ended with uncertainty in the face of Brexit, a new United States administration and continued challenges in developing economies such as Brazil. Nevertheless, we expect private equity will continue to play an important role in global financial markets, not only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 29 different countries, with observations and advice on private equity deal making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2017, it can confidently be said that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this sixth edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2017

Chapter 18

POLAND

Marcin Olechowski, Borys D Sawicki and Jan Pierzgalski[1]

I OVERVIEW

i Deal activity

Poland is the largest Central and Eastern Europe (CEE) economy, with a stable banking sector, active capital market organised by the leading stock exchange in the region (Warsaw Stock Exchange (WSE)) and an established legal framework adjusted to European standards. Poland has consistently maintained growth during the past 25 years, including during the recent world financial crisis. A positive macroeconomic environment and a well-developed and cost-effective labour market support the strengthening of Polish businesses, creating many unique opportunities for investors.

In 2015,[2] 102 private equity investments with an aggregate value of €803 million were made into companies domiciled in Poland.[3] The number of investments was high (compared with, for example, 58 investments in 2007, 71 in 2008, 74 in 2012, 89 in 2013 and 78 in 2014). Their total value was the highest in the past nine years – in previous record year, 2011, private equity investors invested €678.4 million in Polish portfolio companies, €380 million in 2013 and €251 million in 2014. There were 20 buyouts in 2015 with an aggregate value of over €700 million. The total of 19 new growth investments in 2015 had a value of €79.3 million.[4]

Poland is the biggest private equity market among CEE countries, hosting 53 per cent of investments in the region. By number of investments, the most prominent investments were in venture capital, making up 61 per cent of the total. By value, the most important transactions were growth capital and buyout investments, representing 98 per cent of the total value. Venture capital investments were primarily focused on start-ups: in terms of volume, approximately 45 per cent of venture capital transactions were made into start-ups, and in terms of value, approximately 40 to 50 per cent.[5]

2015 was another year of exits. A total of 44 divestments was valued in the aggregate at €800 million.[6] This was the highest value of divestments in the past nine years. By comparison, there were 24 divestments in 2012 (from investments valued in total at €184.3 million), 21 in 2012 (€52.8 million), 36 in 2013 (€284.7 million) and 35 in 2014 (€530 million).

1 Marcin Olechowski is a partner, Borys D Sawicki is a senior counsel and Jan Pierzgalski is an associate at Sołtysiński Kawecki & Szlęzak.
2 2016 figures are not yet available.
3 Central and Eastern European Private Equity Statistics 2015, Invest Europe, August 2016.
4 European Private Equity Activity Data 2007–2015, Invest Europe.
5 Rynek private equity w Polsce 2016, KPMG.
6 See footnote 3.

The most common exit route in Poland is a trade sale; in 2015, half of exits were performed by sale to an industry investor. In terms of value of divestments, the leading exit route was through a trade sale with a value of over €409 million, contributing to as much as 54 per cent of the total value of exits (in 22 transactions). In 2015 there were seven exits via the public market: two IPOs and five sales of quoted equity with an aggregate value of over €206 million. Management buyouts were exit routes in approximately 11.4 per cent of all divestments; however, these contributed only 1.4 per cent of income from all of the exits. A sale to another private equity house was an exit route in three instances (6.8 per cent), which amounted to 15.1 per cent of the total value of divestments. There were no divestments by write-offs or repayments of silent partnerships.[7]

The most popular sectors for private equity investments by number of transactions were computers and consumer electronics, business services and IT, media and communications. By value, the most preferred sectors were energy, and retailing and consumer goods.[8]

ii Operation of the market

Management equity incentive programmes

Management equity incentive programmes are commonly used to align investors' and managers' interests. Typically, the structures used for such programmes are based either on convertible bonds or subscriptions warrants entitling managers to subscribe for new shares in the company's share capital upon fulfilment of the conditions described in the incentive programme. Managers usually benefit from a discount amounting to the difference between the subscription value of the shares and their fair market value. In the case of listed companies, managers are often entitled to subscribe for shares for a pre-determined fixed price. The goals that managers are to achieve depend on the investor's objective in the investment; typically, goals in private companies include reaching a certain EBITDA or amount of income.

Other incentive programme structures may be based on, for example, share options or phantom shares.

Sale process

The sale process in Poland is typical for 'young' private equity markets. Half of the potential investment opportunities that are analysed by Polish investment funds are reported by business owners (or their financial advisers) seeking opportunities to sell a business, or to find a new source of financing or a strategic partner.[9] Investment funds actively monitor the market and seek potential investment opportunities (38 per cent of analysed investment projects were found by funds' investment teams). [10] Active monitoring of the market and the seeking of attractive targets by investing teams play a significant role. The majority of investment opportunities are businesses still led by their original founders (59 per cent in 2014). The second group of investment opportunities are corporates' non-core businesses (14 per cent) and the third are secondary sales (13 per cent in 2014).[11]

7 See footnote 4.

8 See footnote 5.

9 Ibid.

10 Ibid.

11 Rynek Private Equity w Polsce: fakty a opinie, 2014, KPMG Poland.

In the case of investing in original owners' businesses, the sale process often involves prior restructuring of the target. This is because many of the 'family' businesses, especially those that were established in the 1990s, continue to be run as private businesses of individuals (primarily due to tax reasons). A change in the form of running a business and the enterprise's contribution into the company requires diligent separation of business assets from personal property, and identification of debts connected with the business.

The Polish M&A market is relatively professional, and local sale processes are largely aligned with general European practice. The majority of sellers (however, still not more than 70 per cent) are supported by financial advisers, and up to 50 per cent of sales are conducted as competitive auctions.[12] However, negotiations with first-generation owners of small and medium-sized businesses (which are typical for the Polish market) tend to be time-consuming, especially due to the owners' overestimation of their enterprise's value.[13]

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

Types of companies

The vast majority of investors' targets in Poland are companies governed by the Polish Commercial Companies Code (CCC). Thus, the CCC creates the basic legal frameworks regulating control over a target and the rights of a minority investor.

Companies under the CCC are divided into two general classes: partnerships (registered partnerships, professional partnerships, limited partnerships and partnerships limited by shares (SKAs)) and commercial companies (limited liability companies and joint-stock companies). Except for SKAs, partnerships are tax transparent; however, no corporate veil is in place to protect the partners. On the other hand, running a business in the form of a commercial company is connected with double taxation (first to be paid by the company and then by the shareholder) but provides the shareholder with the benefit of the corporate veil. In consequence, a business whose scale may attract private equity investors is usually conducted in the form of a commercial company rather than a partnership (with the significant exemption of first-generation 'family' businesses).

Another significant factor that influences the preferable form for conducting business are the statutory restrictions on how Polish law-governed investment funds invest. Under the Investment Funds Act (IFA), closed-ended investment funds cannot invest in partnerships, while open-ended investment funds cannot invest in partnerships or limited liability companies. Although these restrictions apply only to Polish investment funds, other private equity investors often also prefer to invest in commercial companies.

Control in joint-stock companies

In Polish joint-stock companies, the level of a shareholder's control over the company is connected with the percentage participation of the shareholder in the total number of voting rights. In a private joint stock company with 'default' corporate governance rules derived from the provisions of the CCC, a general assembly (which consists of all of the shareholders)

12 Ibid.

13 In accordance with an interview with a Polish Private Equity and Venture Capital Association (PSIK) representative.

appoints the supervisory board members (while the supervisory board nominates the management board), has the power to dismiss members of the supervisory board and management board, and has the power to adopt critical resolutions for the company. Obtaining basic control over the company requires the acquisition of more than a 50 per cent stake; however, some important resolutions require a higher majority.

Reaching a 50 per cent plus one share shareholding allows the shareholder to appoint the majority of the supervisory board, and indirectly gives the shareholder control over the personal policy of the company. The CCC prohibits shareholders from giving management or supervisory board members binding instructions; however, due to the fact that the general assembly has the power to dismiss the company's managers, shareholders have in practice indirect influence over the policy of the supervisory and management boards.

Although the management board runs the daily operation of a joint-stock company (shareholders are not entitled to act on behalf of the company), undertaking the majority of fundamental corporate actions requires a resolution of the general assembly. A general assembly resolution is required to, *inter alia*:

a amend the statutes;
b appoint supervisory board members;
c approve financial statements and the management board's annual reports;
d dispose, lease or encumber a company's enterprise or its organised part;
e acquire or dispose of real estate (unless the statutes provide otherwise);
f issue bonds or subscriptions warrants;
g increase share capital and issue new shares;
h allocate profits;
i exclude a shareholders' pre-emptive rights (the required majority of votes is four-fifths);
j dissolve the company;
k merge, demerge or transform the company;
l change a private company into a public company; or
m change a public company into a private company (the required majority of votes is four-fifths).

The CCC provides for several regulations aimed at protecting minority shareholders. Most notably, shareholders with at least a 10 per cent shareholding may request that an extraordinary general assembly be convened and have influence on the agenda of each general assembly. A 20 per cent threshold of shares in the company allows a minority shareholder (or group of shareholders) to request a vote on the appointment of supervisory board members in groups. In the case of voting in groups, a group of shareholders may vote individually on the appointment of one (or more) supervisory board members, notwithstanding the provisions of the statutes governing the election of the supervisory board members; as a result, minority shareholders who are able to create a voting group may influence the composition of the board. Each shareholder has a right to challenge resolutions of the general assembly, management board or supervisory board. A minority shareholder's level of influence on the company may be further extended by the statutes of the company, which may, for example, provide for the shareholder's individual right to appoint a number of supervisory or management board members, or both, or convene a general assembly.

ii Fiduciary duties and liabilities

The CCC does not expressly state the fiduciary duties of a shareholder towards the commercial company or other shareholders. Shareholders exercise their rights by voting on resolutions at the general assembly. Resolutions may be challenged by other shareholders, and members of the management or supervisory boards (or both), which creates a mechanism of control over the majority shareholder's actions. A resolution may be challenged if it contravenes the statutes of the company or good practices and harms the interests of the company, or if it is aimed at harming a shareholder. The general clause of 'good practices' allows the majority shareholder's actions to be opposed in a wide range of circumstances if the company's or other shareholders' interests are harmed. Although there are no specific provisions of law governing the matter, legal doctrine and jurisprudence have developed the concept of a duty of loyalty, which shareholders (especially a majority shareholder) owe to the company and other shareholders.

Due to the nature of commercial companies, the liabilities of a shareholder towards a limited liability company or joint-stock company are, generally, limited to the proper fulfilment of an obligation to make a contribution to the company (in exchange for shares). In the case of an acquisition of shares, the acquirer is jointly and severally liable for the contribution with the seller. A shareholder is also responsible towards the company or other shareholders in accordance with the general principles of civil law (i.e., for damages caused by illegal actions).

Company officers (members of the management and supervisory boards, liquidators) are personally liable for the damage caused to the company by their actions or omissions contrary to the law or the statutes, unless they were not at fault. Company officers should perform their duties with higher standards of care connected with the professional nature of their positions; they should act diligently, reasonably, cautiously and with foresight, and anticipating the results of undertaken actions. They are also obliged to act in the best interests of the company (which is independent from the individual interests of shareholders) and treat shareholders equally. Management board members cannot conduct a competing business activity without the company's consent and are obliged to refrain from performing duties in the case of a conflict of interest. Shareholders, the general assembly and the supervisory board are not entitled to give the management board or its members binding instructions with respect to the management of the company's affairs.

Management board members in limited liability companies may become liable for the obligations of the relevant company – jointly and severally with the company – if enforcement proceedings against that company are ineffective and the managers did not timely file for a declaration of bankruptcy (the liability may be avoided if they demonstrate that despite the application not being filed, the debtor has not suffered damages).

Private equity investments (Polish or foreign) in regulated financial institutions are limited to smaller stakes and smaller target institutions by the current policy of the financial services regulator (KNF). This is largely because the suitability criteria applied by the KNF in assessing acquisition of controlling stakes usually include the requirement for investors to commit to a long-term investment horizon, as well as capital and liquidity support that is not compatible with many private equity investors' policies.

iii Regulations applying to foreign investors

Poland, as a Member State of the European Union, forms part of the European Union's internal market and aims to guarantee, within the framework of applicable regulations, the EU's 'four freedoms' (i.e., the free movement of goods, capital, services and people).

While the obvious beneficiaries of Poland's membership in the EU are entities from the remaining 27 EU Member States, Poland sets out very few barriers for investors from non-EU countries, as evidenced below.

The principal remaining limitations on foreign investment are found in the Act on Acquisition of Real Estates by Foreigners (AAREF). Under the AAREF, if a foreigner (i.e., an individual foreign citizen, a legal person with its registered seat outside of Poland, or a company domiciled in Poland but controlled by a foreign entity) acquires real property or obtains control over a company holding real property, a prior approval of the Ministry of Internal Affairs is required (under pain of nullity).

The AAREF, subject to some minor exceptions, does not apply to foreigners from the EEA and Switzerland. It also does not apply to Polish law-governed investment funds (regardless of the sponsors' domicile) or to investing in public companies listed on the WSE. Other foreign investors may decide to operate through holding companies incorporated in an EEA country, usually in Luxembourg or Cyprus, to avoid the application and requirements of the AAREF.

In 2015, a new Act on Control over Certain Investments (ACCI) entered into force. The purpose of introducing the ACCI was to give the government a tool with which to control investments (in particular, foreign investments) in companies that are strategic for national interests and security. In general, the regulation follows similar solutions established in other European countries. According to the ACCI, acquisition of a shareholding in companies indicated in secondary regulation issued by the government above certain thresholds (the lowest is 20 per cent) or acquisition of their enterprise require previous notification to the Ministry of the Treasury, which can oppose the transaction. Lack of notification or acquisition contrary to the opposition results in the invalidity of the transaction, and is sanctioned with a fine of up to 100 million zlotys or imprisonment for up to five years. As of the beginning of 2017, only seven entities (mostly leading Polish companies in the energy sector) are subject to ACCI regulations.

iv Tax matters

Poland conforms to current global trends aimed at closing the remaining loopholes in the tax system through various regulations, such as the general tax anti-abuse rule (GAAR), new transfer pricing documentation requirements, taxation of closed-end investment funds (CIFs) and the 'small' anti-abuse clause applicable to the exchange of shares.

Poland participates in the BEPS project and has implemented Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation (Poland started reporting from January 2017). Moreover, Poland has signed many double tax treaties (more than 80 conventions) and international agreements on the exchange of information on tax matters.

From an investor's perspective, the most crucial change is the introduction in 2016 of the GAAR into Polish tax law system. The GAAR was created as a new tool that tax authorities may apply to reclassify the business operations of a taxpayer who obtains substantial tax profits through tax-avoidance strategies. The clause will allow the authorities to ignore artificial legal arrangements, which means that taxpayer may be obliged to pay the avoided tax with default interest and become exposed to penal fiscal liability. To decide whether a legal arrangement is artificial, various factors should be taken into account, such as excessively complex transactions or the use of conduit entities. To protect taxpayers from the tax authorities' discretionary powers, the former may apply to the Minister of Finance and Development to issue an opinion that disallows the application of the GAAR.

So far, the most effective structures for tax optimisation of business activity carried out in Poland have been based on Polish CIFs. However, from January 2017, this is mostly not possible. The government has decided to exclude the income tax exemption for CIFs (the Polish FIZ and similar EU-based investment funds) with respect to income generated through tax-transparent partnerships, disposal of interest or shares in such partnerships, and other income related to participation in such partnerships (including passive income). This means that such income is now subject to 19 per cent income tax.

A full tax exemption will be still available to Polish open-ended investment funds and special open-ended investment funds (SFIOs) unless a SFIO applies investment principles and limitations relevant for CIFs. Comparable EU-based investment funds fulfilling certain conditions will also retain the income-tax exemption.

The main purpose of the taxation of CIFs is to eliminate those structures in which Polish and foreign CIFs participate with the use of fiscally transparent entities, utilised for tax the optimisation of taxpayers' profits generated from the current business activity. Such an activity is against the primary purpose of establishing the tax exemption of CIFs, that is, exemption from the taxation of the taxpayers' investment activity conducted through such CIF.

Various tax optimisation solutions regarding contributions of assets to companies, with a portion of the contribution allocated to the share premium, are also now ineffective. Until 2017, the taxable revenue from a contribution of assets had been limited to the nominal value of shares received in exchange for an in-kind contribution. However, from 2017, the revenue achieved by the entity making the in-kind contribution is the market value of the contributed assets.

A more detailed description of justified economic reasons warranting preferential taxation of mergers and demergers of companies has also been introduced. This 'small' anti-abuse rule has been also expanded to the exchange of shares (and previously in 2016, to dividends). These exchanges will no be longer tax neutral if there are no justified economic reasons for them. The tax authorities may challenge the tax neutrality of share exchanges when these are done with the sole purpose of enjoying tax benefits and not for justified economic reasons.

As for transfer pricing documentation, more comprehensive information on related party transactions should be disclosed to the tax authorities. Under these new provisions, taxpayers are obliged to prepare more extensive transfer pricing documentation (in particular, local files are expanded). In most cases, benchmarking studies would be necessary.

Poland has commenced its battle to prevent tax avoidance and tax evasion through introducing numerous regulations designed to combat these negative phenomena. It is no exaggeration to state that Poland is becoming a less tax-friendly country, which consciously limits the possibility of tax optimisation.

III YEAR IN REVIEW

i Recent deal activity

Although no statistical data for 2016 are available yet, market participants and observers indicate that 2016 has continued to witness the market dynamics observed in 2014. The priority for CEE region investors is to make new investments. In September 2016, 70 per cent of respondents intended to focus on such new investments, while only 23 per cent claimed that they will focus on portfolio management. Investors expected the average size of transactions to remain the same (67 per cent of respondents), while 20 per cent claimed that it will increase. Overall, 47 per cent of investors expected to sell more than buy.[14] Investors also expect that the biggest competition between acquirers will be among market leaders.[15] Middle-sized growing companies remain popular, but are seen as being less competitive. [16]

Fundraising now takes longer; the fundraising phase currently can take up to 18 months, compared with just a few months some years ago.[17]

A growing number of Polish public entities engage in fundraising and investing. The first public source of financing on the private equity market was the National Capital Fund (KFK), a fund of funds sponsored by, *inter alia*, the government. The KFK manages €200 million of funds and is focused only on small venture capital investments, providing up to 50 per cent of their acquisition financing. Another public entity operating on polish market is Polski Fundusz Rozwoju (PFR), established by the Ministry of Treasury with the State Treasury and Bank Gospodarstwa Krajowego as stockholders. PFR holds the means of approximately €504 million, provided for five funds of funds. One of them has already issued a notice of call for proposals. Open pensions funds are, in turn, restricted from investing on the private equity market.

ii Financing

Due to the lack of 'mega-deals' on the Polish private equity market over the past few years, acquisition financing structures have remained rather simple. The typical structure of financing consists of an investor's equity, banking loans (senior debt in the case of other financing) or other sources of financing (e.g., bonds). According to market surveys, 71 per cent of private equity investors consider that debt financing is easily available and does not pose an execution risk.[18] A quarter of respondents claimed that debt financing is difficult to obtain, although promising prospects can be sure to succeed in that field. Only 4 per cent of respondents stated that debt financing is very hard to get and constitutes an investment barrier. The Polish banking sector is relatively strong, having avoided the global financial crisis. The level of leverage in Poland (and in the CEE generally) has never reached the pre-crisis levels achieved in Western Europe. In addition, the percentage participation of equity in capital structures in the CEE (including Poland) in 2014 was reported to be 20 per cent higher than in Europe;[19] the typical loan-to-value ratio for investments in Poland does not exceed 50 per cent.

14 CE Private Equity Confidence Survey, May 2016, Deloitte Poland.

15 Ibid.

16 Ibid.

17 See footnote 13.

18 KPMG Poland; see footnote 5.

19 Time for another look – Central & Eastern Europe Private Equity, 2013, PSIK.

Polish investment funds are subject to limitations on incurring debt. Closed-ended funds may only obtain loans or credit from banks, foreign banks or credit institutions.[20] Other debt financing available for closed-ended funds is the issuance of bonds, but only with a value not exceeding 15 per cent of the net value of the fund's assets. The total value of debt incurred by closed-ended funds (both in the form of credits and loan facilities and bonds) must not exceed 75 per cent of the net value of a fund's assets. Debt financing restrictions are more stringent in the case of open-ended funds, which may only obtain credits and loans of a maximum value of up to 10 per cent of a fund's net assets, with the repayment date being no longer than one year after acquiring the debt financing, and only from Polish banks or credit institutions.

In terms of legal documentation, facility agreements are typically patterned after the Loan Market Association standard documents with the usual set of clauses. Security documents are in turn local, but there is a well-established practice with regard to both their structuring and the composition of a security package. Depending on the available assets, the package usually consists of a share pledge, asset pledge, account receivables pledge or assignment, and mortgage. It is often coupled with a corporate guarantee and a voluntary submission to enforcement, which is not a security instrument in the strict sense, but allows for faster satisfaction of the creditor.

iii Key terms of recent control transactions

Key legal terms of control transactions on the Polish market are rather standard. The most important points are the mechanics of the transaction, conditions precedent, shareholders' mutual obligations and corporate governance, as well as the sellers' liability for representations and warranties.

The scope of legal documentation required to effect takeover transactions varies for investments in which the investor acquires 100 per cent of shares, and those in which the investor acquires a controlling stake but the other shareholder (or shareholders) remains in the target company. The latter requires execution of an investment agreement regulating the mutual commitments of the acquiring investor and the shareholder regarding their involvement in the target company and describing its corporate governance structure. Under Polish law, investment agreements are of contractual effect only, meaning that voting contrary to the agreement constitutes a breach of an obligation towards the other shareholders, which may result in liability for damages or an obligation to pay contractual penalty, but which is valid and has no impact on the effectiveness of the adopted resolution. Thus, the parties will usually strive to specify additional rights of the shareholders directly in the company's statutes, because a resolution adopted in breach of the statutes may be effectively challenged before a court. Commonly, such additional rights of the shareholders will include the right to appoint some of the management or supervisory boards members (or both) to monitor the company's regular business activity; and the establishment of a blocking minority to protect the shareholders from a loss of investment value (e.g., in the case of the adoption of resolutions approving the disposal of key assets) and from the dilution of their corporate

20 According to the Polish Banking Law, credit institutions are entities whose registered office is outside the Republic of Poland, but in another Member State of the EU, and who are conducting an activity in their own names and for their own account, on the basis of the authorisation of the competent supervisory authorities, consisting of accepting deposits or other resources entrusted under any redeemable title and consisting of granting credit or issuing electronic money.

rights. On the other hand, the controlling investor will usually aim to structure the statutes in such a way that the company officers appointed by it may freely conduct the company's day-to-day business, and to have the majority required to adopt most of the resolutions to avoid deadlocks. Investment agreements will also typically provide for regulations facilitating an exit from the investment, such as tag-along and drag-along mechanisms, rights of first refusal and provisions facilitating a possible IPO in the future (e.g., regarding the obligation to adjust the statutes accordingly).

Other key terms of a share purchase agreement include representations and warranties, which are usually extensively negotiated between the parties as the scope of liability of the seller depends primarily on the wording of the contract in this regard, as well as conditions precedent, which determine the mechanics and timing of the closing of the transaction. Typical conditions precedent include subscription for shares in the increased share capital, registration of amendments to the statutes with the commercial registry and obtaining concentration approval from the antitrust authority.

Liability caps range on average between 15 and 25 per cent of the purchase price (with, however, 100 per cent of the purchase price as the cap for liability on title). Representations and warranties insurance is more and more frequently considered as a possibility; however, it is still not much used in practice.

In 2016, the new legislation on agricultural lands entered into force and, unexpectedly, had an impact on transaction mechanics. The Polish Public Agricultural Lands Agency has a priority right in the case of any sale of agricultural land. To prevent circumvention of this right, the new regulations also provide the Agency's priority right with respect to shares in a company that holds any agricultural land. The size of such given company, the structure of its assets, and the value or area of the given agricultural land are irrelevant for the application of the priority right. On the other hand, there is no register of agricultural lands in Poland, and in certain cases it is not clear whether such land is in fact agricultural. As a result, in the case of any share deal, a due diligence of a company's real estate is required and, if the company holds agricultural land, non-performance of a priority right by the Agency is a condition precedent.

iv Exits

In the opinion of private equity investors, the most likely type of exit from an investment is a trade sale to a European strategic investor outside the CEE.[21] One-fifth of investors believe that a strategic acquirer will be from Poland, and 17 per cent that it will be from the CEE. No investors have claimed that an acquirer will be from outside Europe. The second most likely exit route is via the public market.

IV REGULATORY DEVELOPMENTS

i Investment funds

Polish investment funds operate in accordance with the IFA. There are three basic types of investment funds: open-ended, specialised open-ended and closed-ended. Each investment fund type must be managed by an investment fund management company (TFI). Both investment funds and TFIs are subject to the supervision of the KNF. Establishment of a

21 KPMG Poland; see footnote 5.

TFI or an investment fund requires a licence from the KNF. The IFA provides for a number of limitations as regards types of investments that an investment fund may carry out, as well as requirements as to the diversification of risk. If a TFI or an investment fund managed by a TFI breach a provision of law, and especially of the IFA, or infringe a fund's statutes or the terms and conditions of a licence (e.g., if the investment fund invests contrary to the IFA or its statutes), the KNF may impose a financial penalty of up to 500,000 zlotys on the TFI or cancel the licence.

Moreover, since 4 June 2016, when the 2016 Act Amending the Act on Investment Funds and Certain Other Acts[22] entered into force, a legal framework has been established for a new category of investment vehicles – namely alternative investment companies (ASIs) – that are deemed alternative investment funds under AIFMD. ASIs are generally non-regulated investment vehicles in the form of 'ordinary' commercial companies that are governed by the applicable rules of the Commercial Companies Code.

ii Antitrust issues

Larger-scale transactions that may influence the market come under the purview of both the Polish and European competition authorities (the President of the Office of Competition and Consumer Protection (UOKiK) and the European Commission, respectively). Any M&A transaction, subject to statutory turnover thresholds, may require competition clearance. If the turnover thresholds are exceeded, Polish antitrust law requires prior notification to the UOKiK on the intention of concentration. Until the UOKiK issues a decision allowing the transaction (or the lapse of the statutory deadlines for the UOKiK to issue the clearance, which are one or four months depending on the complexity of the transaction), the acquirer should refrain from closing the deal. Antitrust issues are especially relevant in the case of a trade sale exit.

V OUTLOOK

We believe that, overall, the Polish private equity market has significant potential for further growth.

Poland is typically the largest CEE private equity market – in 2015, the share of Polish exits of the total amount of exits in the region amounted to as much as 65 per cent, while the share of Polish investments amounted to 54 per cent by value.[23] Poland still hosts the highest number of companies invested. At the same time, the value of private equity investments in Poland amounted to 0.21 per cent of the country's GDP, which is still less than the European average of 0.30 per cent. These two factors, when combined, suggest that the already large market should continue to expand. A high average rate of return on investment (2.78 over the past decade) adds to the positive picture of Poland as the place to invest.[24]

22 Act implementing into Polish law, *inter alia*, Directive 2011/61/EU of the European Parliament and of the Council on alternative investment fund managers (AIFMD), and also Directive 2014/91/EU amending Directive 2009/65/EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (UCITS V).

23 See footnote 3.

24 Ibid.

KPMG survey[25] respondents have claimed that in the past two years, the Polish market has offered huge opportunities in the scope of attractive investment targets. Some respondents stated that the number of available transactions in the small companies sector has increased. It was also said that the quality of portfolios is getting better. According to some private equity investors, companies' knowledge about private equity functioning is continuing to grow. Owners tend to understand the benefits of such cooperation, as well as investors' demands and expectations. According to the respondents' opinion, in 2015 the average valuation of companies in Poland was higher than in Western European countries. Taking everything into consideration it seems that Poland is a good place to invest.

25 Ibid.

Appendix 1

ABOUT THE AUTHORS

MARCIN OLECHOWSKI

Sołtysiński Kawecki & Szlęzak

Dr Marcin Olechowski leads the banking and finance practice of Sołtysiński Kawecki & Szlęzak. He advises clients on complex bank and financial regulatory matters and represents them in proceedings in front of the Polish financial markets regulator. His transactional experience includes a broad range of financing transactions, as well as financial sector M&A. In addition to his banking and finance practice, he is involved in international arbitration work and has represented clients in a number of high-stakes international commercial and investment arbitrations under Vienna, LCIA, UNCITRAL and ICC Rules. Dr Olechowski combines his professional career with academic work, and regularly lectures and publishes on issues of banking, civil and commercial law, as well as international arbitration.

BORYS D SAWICKI

Sołtysiński Kawecki & Szlęzak

Borys D Sawicki joined SK&S in 1998 and specialises in banking and finance transactions, focusing on project finance and other structured financings. His area of expertise also includes leveraged finance transactions. He has been working closely for several years with the European Bank for Reconstruction and Development, providing advice in the fields of project finance, local self-government regulations, public aid and public procurement laws. In the field of corporate law, he has successfully completed a number of mergers and acquisitions of entities of various sectors and provides day-to-day corporate advice to numerous clients of the firm.

JAN PIERZGALSKI

Sołtysiński Kawecki & Szlęzak

Jan Pierzgalski joined SK&S in 2013. He specialises in private banking law, corporate law and capital markets law. He advises banks, public companies and public companies' shareholders. He has participated in M&A transactions, financing transactions and corporate disputes.

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

ul Jasna 26
00-054 Warsaw
Poland
Tel: +48 22 608 70 00
Fax: +48 22 608 70 70
marcin.olechowski@skslegal.pl
borys.sawicki@skslegal.pl
jan.pierzgalski@skslegal.pl
www.skslegal.pl