The Private Equity Review

Fifth Edition

Editor
Stephen L Ritchie

Law Business Research

The Private Equity Review

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EDITOR'S PREFACE

The fifth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2015 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 declining growth in China, Brazil and other developing and emerging markets, increased volatility in commodity, stock, currency and other financial markets, and deflation concerns in developed countries. 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 2016, 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 fifth 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 2016

Chapter 14

POLAND

Marcin Olechowski, Wojciech Iwański and Mateusz Blocher[1]

I GENERAL OVERVIEW

Poland is consistently a one of the most desirable destinations for private equity funds investing in central and eastern Europe (CEE). The country has experienced sustained and rapid growth since the 1990s when the market economy was reinstated. Today, Poland's key assets include stable economic growth, a modern banking sector and a well-developed capital market. Advanced institutional and legal frameworks supporting investors' activities have had a significant impact on the development of the Polish private equity market. Moreover, being the largest and most populous country in the region means Poland is a regional leader in economic terms (in 2013, Poland represented 35 per cent of the aggregate GDP of all CEE countries and 32 per cent in the region's total population).[2] Poland has recorded robust GDP growth in 2014 and 2015 thanks to solid domestic demand[3] and private consumption and investment.[4] Poland's economical steady-growth should continue into 2016.[5]

Importantly, Poland is one of the EU countries that have recorded the fastest growth in consumption during the period from 2004 to 2013. The total EU household consumption in 2013 was just by 6.2 per cent higher than it was in 2009, while Poland achieved growth at a rate of 31 per cent.[6]

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1 Marcin Olechowski is a partner, Wojciech Iwański is a senior associate and Mateusz Blocher is an associate at Sołtysiński Kawecki & Szlęzak.

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

3 Focus Economics, Economic Snapshot for Central & Eastern Europe, 13 January 2016.

4 Atradius, CEE Country Report – Poland, 21 September 2015.

5 Focus Economics; see footnote 3.

6 Ibid.

As a result, in 2013, Poland was the largest and most attractive private equity market in the CEE region, accounting for almost half of the capital invested. However, Poland – typically the largest private equity market in CEE – recorded a 34 per cent decrease in investments in 2014, which made Poland the third leading CEE investment destination with €251 million invested (290 companies received private equity investment across the CEE region in 2014 which represents an 20 per cent increase in the number of companies financed compared to 2013).[7] Poland along with Serbia, the Czech Republic and Hungary made up 80 per cent of all private equity investment across CEE in 2014.[8]

Private equity investment as a percentage of the CEE region's GDP increased significantly to 0.104 per cent in 2014 from 0.062 per cent in 2013. Buyout investments in CEE increased by 120 per cent in value in 2014 to €935 million from €427 million in 2013 but growth investments, however, decreased in 2014 by 10 per cent to €232 million invested from €259 million in the previous year. Poland led the CEE region in growth investments with €65 million in 2014.

Poland remained the leading country in terms of exits in the region, accounting for €530 million at cost or 42 per cent of the CEE divestment total, making 2014 a record year for Poland (86 per cent increase compared to 2013). It also remained the largest CEE market for a number of companies invested, with 78 companies in 2014 (despite the decrease from 89 companies in 2013).

In 2014 Poland was the second CEE market in terms of companies backed by venture capital (54 companies; 26 per cent of the CEE regional total).

While no 2015 data for the private equity market were available at the time of writing, market observers believe they that the private equity market of Poland is expected to see a slight growth in 2015 (private equity M&A activities are expected to grow up 1.1 per cent on the previous year).[9]

Importantly, despite its sustained growth, the Polish private equity market still remains underdeveloped in comparison with Scandinavian or west European countries, which means that Poland still has high growth potential.

II LEGAL FRAMEWORK FOR FUNDRAISING

Poland has an established and original legal framework permitting the operation of regulated private equity investment vehicles, in particular in the form of UCITS and non-UCITS type investment funds. The establishment and operation of such funds and of their managers are regulated under 2004 Investment Funds Act (IFA).

Private equity investors can also use non-regulated investment vehicles (in the form of 'ordinary' commercial companies) governed by the generally applicable rules of the Commercial Companies Code. These forms of investing are still used by a number of

7 European Private Equity & Venture Capital Association (EVCA), Central and Eastern Europe Statistics 2014, August 2015.

8 Ibid.

9 Roland Berger Strategy Consultants, European Private Equity Outlook 2015, February 2015.

investors; however, the future implementation of Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) will most likely have a significant effect on this part of the private equity market by imposing additional regulatory duties.

Both types of structures (i.e., regulated funds and non-regulated commercial companies), usually involve foreign entities as fund investors or limited partners, or both. A current trend is the use of Polish investment funds as shareholders in a tax-transparent Luxembourg special limited partnership (SCSp) issuing interests qualified as transferable securities.

i Non-UCITS investment funds (closed-end investment funds (FIZs) and specialised open-end investment funds (SFIOs))

Polish law provides for two types of non-UCITS investment funds: FIZ and SFIO, both managed by an external and regulated investment fund management company (TFI). Such funds are of specific legal nature that cannot be unambiguously qualified from the perspective of usual EU investment fund classifications (corporate, contractual or trust types of funds). Like corporate entities, Polish investment funds have separate legal personality and governing bodies. On the other hand, they are strictly distinguished from typical commercial companies.

The IFA allows both a FIZ and an SFIO (provided it applies the principles and investment limits of a FIZ) to be established specifically as a 'non-public assets fund' investing at least 80 per cent of its assets in assets other than (1) securities offered in a public offering or admitted to trading on a regulated market, or both, unless such offering or admission takes place after the purchase of the securities by the fund; and (2) money market instruments, unless they have been issued by private companies whose shares are held in the fund's investment portfolio (NPA funds). Such NPA funds also benefit from a slightly lighter regulatory regime than other types of funds.

FIZs

FIZs are often used as 'private' investment vehicles designed to enjoy various legal benefits (*inter alia*, tax benefits) by one or more investors ('dedicated' funds). To date, this practice appears to be accepted by the Polish financial services regulator – the Financial Supervision Commission (KNF) – which has publicly acknowledged that strict supervision of FIZs is not necessary, because FIZs are usually used by qualified investors.

A FIZ structure provides investors and TFIs with relatively broad flexibility in structuring the terms of their cooperation. At the same time, investing through a FIZ is subject to a number of statutory limitations or obligations. It is advisable to pre-agree, in particular, the following issues with the managing TFI before or during establishment of the FIZ:

Payment for certificates

As a rule, investment certificates issued to the investor should be paid for in cash. However, the IFA provides for certain limited possibilities for in-kind contributions (e.g., with transferable securities).

Limited scope of the FIZ's permitted investments

The IFA sets forth a closed list of investments that could be made by a FIZ (*inter alia*, securities, shares in limited liability companies (which, under Polish law, are not securities) and non-standardised derivatives. Under certain conditions, a FIZ may also invest in real estates.

The IFA expressly states that in respect of foreign instruments, the qualification as 'securities' should be made based on the legislation applicable to the company issuing the securities. Furthermore, the instruments acquired by or contributed to the FIZ have to meet the criteria of transferability. Consequently, a FIZ may not become a partner in most Polish – or foreign – law partnerships (unless they issue transferable securities, like the Luxembourg SCSp).

Type of investment certificates

FIZs may issue publicly and non-publicly traded investment certificates qualified as transferable securities under Directive 2004/39/EC on markets in financial instruments (MiFID). The distinction between publicly and non-publicly traded investment certificates is based on the number of investors to whom certificates would be offered. In principle, should there be fewer than 150 investors, non-public certificates may be issued. The certificates can be either dematerialised or issued in tangible form, as well as in registered or bearer form. In most cases, private equity investors choose non-publicly traded, dematerialised and registered investment certificates, which gives them expected flexibility and allows the avoidance of additional regulatory duties.

Diversification of investments

In order to reduce the investment risk, the IFA requires, *inter alia*, that the aggregate of shares in one entity cannot represent more than 20 per cent of the value of a FIZ's assets. A FIZ is legally obliged to adjust its portfolio to the statutory limits within one year from its registration subject to possible sanctions imposed upon the TFI by the KNF.

In the case of a FIZ operating as a PE fund, such period is extended to three years. Based on certain further exceptions related to FIZs established for a specified time, Polish TFIs are in a position to prolong the transition period up to six years (or even rolled constantly).

Management

Investors' influence on the management of the FIZ (including the exercise of rights over the assets held by the FIZ) is limited. This is due to the fact that the TFI, as a third-party entity, manages the FIZ and represents it in relation to third parties because the FIZ does not have its own management board (as in the case of 'regular' companies). The management of a FIZ may be assigned by the TFI only to a third party being a qualified investment entity, bank or other entity specified by the IFA and authorised by the KNF (or a similar authority within the EU) to manage investment funds.

Investors' rights are exercised through participation in FIZ's investors' meetings, adopting resolutions in respect of the most crucial issues related to the operation of the FIZ (its liquidation, change of certificates from non-publicly into publicly traded

certificates, etc.). The statutes of the FIZ may broaden the investors' meeting authority to granting consent in respect of particular actions; however, actions taken in breach of those consent requirements are legally valid.

If there are at least three investors in a FIZ, its statutes may provide for board of investors. The board of investors acts as a supervisory body, and monitors the implementation of the fund's investment goal and its investment policy as well as the application of investment limits. Within this scope, the members of the board of investors have access to the fund's books and documents, and the right to demand explanations from the management company. The statutes of a FIZ may broaden the powers of the board of investors.

Distributions

Generally, all distributions to investors from a FIZ's assets result from redemption of their investment certificates. Distribution of profit is an extraordinary case, reserved for FIZs operating as NPA funds and resulting from the direct sale of a FIZ's assets. Rules of redemption of certificates should be specified in the FIZ's statutes.

SFIOs

SFIOs are not as popular a form of PE fund as FIZs. The SFIO is a type of an open-end investment fund issuing participation units (financial instruments not qualified as securities), and its statutes may restrict participation in the fund only to certain categories of entities (i.e., legal persons, organisational units without legal personality or natural persons) that make a one-off payment to the fund of an amount not lower than the zloty equivalent of €40,000. The statutes of an SFIO may also specify further conditions of eligibility.

As previously mentioned, SFIOs applying the investment principles and investment limits of a FIZ may benefit from the special rules applicable to NPA funds (in particular, a longer deadline for diversification of assets and limited possibilities for profit distribution). At the same time, such NPA fund would still be subject to the less flexible principles of operation and regulatory regime of an open-end investment fund, making this form less attractive to private equity investors.

ii Commercial companies

Limited partnership

A limited partnership combines the features of a typical partnership and a commercial company. It must be established and conducted by at least two entities (natural persons, legal persons or organisational units without legal personality), with at least one partner – the general partner – bearing unlimited liability towards creditors for obligations of the partnership and at least one partner – the limited partner – having only limited liability and acting as an investor. Importantly, limited partnerships are tax transparent. Although they are not, technically, legal persons, they possess a legal, judicial and procedural capacity and may in their own name acquire rights, including ownership of immoveable property and other rights *in rem*, incur obligations, sue and be sued.

The limited partner is only liable up to the value of its contribution to the limited partnership. On the contrary, the liability of the general partner is unlimited. The general partner holds the liability of all assets severally with the other general partners, and with the limited partnership itself.

A limited partnership is established by way of a partnership deed in the form of a notarial deed, signed by all general partners and registration in the National Court Register. No minimum capital is required.

There is a strong convergence between the interests of the financial investor (the limited partner) and the organisation and functioning of a particular partnership, which are specified by the provisions of a partnership's deed.

As a rule, all matters that exceed the ordinary scope of a limited partnership's business require the consent of the limited partner, unless the partnership deed provides otherwise. Investors should consequently make sure that their rights under the deed have been stipulated in a satisfactory way. Furthermore, in accordance with the general rules governing limited partnerships, a limited partner has a right to participate in the partnership's profit in relevant proportion to its actual contribution to the partnership. However, the deed may stipulate otherwise, and investors certainly should consider the partnership's deed in that scope. Finally, as a rule, a limited partner has no right or duty to conduct the partnership's current affairs unless the deed of partnership provides otherwise.

Partnership limited by shares (SKA)

An SKA structure combines the elements of a limited partnership and joint-stock company, making it the most composite type of partnership in Poland. Like the limited partnership, the SKA has no legal personality, but it has legal, judicial and procedural capacity, which means that it may acquire rights and incur obligations on its own behalf (e.g., under agreements), as well as have legal standing in court.

An SKA is established by at least one general partner and one shareholder (the general partner and the shareholder may be either natural persons, legal persons or organisational units without legal personality).

As in the case of a limited partnership, the general partner's liability for the SKA's obligations is unlimited. The liability is joint and several among the general partners and subsidiaries with regard to the SKA. The shareholders do not bear any liability for the SKA's obligations.

As is the case with a limited partnership, an SKA is required to be entered into the National Court Register. The statutes should specify the value of share capital in an amount of at least 50,000 zlotys. The share capital consists only of the contributions made by the shareholders (or general partners in cases where the general partner is simultaneously a shareholder).

In respect of the shareholder's economic rights, the shareholder should ensure its right to participate in the profit of the SKA in proportion to the contributions they have made (i.e., at least proportionally to the value of their contributions). It is possible to establish preference shares with regard to the right to dividend of up to 150 per cent of the dividend designated to non-preference shares. In order to increase the attractiveness and legal certainty of the SKA, the SKA's statute may provide that each share taken up

or acquired by a shareholder (investor) will give the right to more than one vote (with a maximum of two votes per share). Finally, it is possible to establish preference shares with regard to the distribution of the SKA's assets in the event of its liquidation.

The SKA's statutes may also provide for a supervisory board appointed by the shareholders.

Additional rights may be also vested with the general assembly of the SKA. In particular, an SKA's statutes may broaden the scope of matters that require the general assembly's approval. As a rule, such approval is required for:

a consideration and approval of the SKA's yearly statements;
b acknowledgement of the fulfilment of duties by the general partners conducting the SKS's affairs;
c acknowledgement of the fulfilment of duties by members of the supervisory board; and
d winding-up of the partnership.

iii Solicitation

As a rule, distribution of securities (investment certificates in a FIZ and shares in an SKA) constitutes regulated services and is restricted for investment firms. The applicable distribution rules and the scope of mandatory disclosure are in that case subject to Poland's local implementation of MiFID, including mandatory adequacy and appropriateness tests. However, if the investor is qualified as a professional or an eligible counterparty for MiFID purposes, MiFID duties are considerably limited.

It should be noted that pursuing such an activity without the required permit could be subject to criminal responsibility. If a criminal investigation is triggered by the actions of the KNF, the suspected entity is immediately disclosed on the KNF website.

Distribution of units in SFIOs is subject to the special regulation of the IFA and its secondary legislation. Generally, such distribution may be entrusted both to regulated entities (banks, other investment firms, etc.) or non-regulated service providers, with the restriction that they have received a suitable permit issued by the KNF. The investor's orders related to the purchase and redemption of the units may be made through natural persons who cooperate with the above-mentioned distributors on the basis of an agency agreement. Such natural persons may not receive payments designated to buy units or transfer redemption proceeds. Distributors are liable for the actions performed by their agents.

The distribution of participation interests in Polish limited companies, as well as the limited partner's interests (neither of which qualify as securities), are not subject to any specific legal framework.

Private equity investors could, in particular cases, be qualified as consumers. Business–consumer relationships fall under the applicable restrictions contained in the consumer law. While the Polish consumer protection requirements are generally in line with the applicable EU framework, the policy regarding their enforcement by the local consumer protection authorities and courts is relatively restrictive. Moreover, any marketing communication addressed to Polish consumers should always be drafted in a

clear and precise manner in order not to confuse consumers. In addition, as a rule, under the Polish consumer protection laws, Polish must be used for all documents related to services provided to consumer clients residing in Poland.

iv Fiduciary duties

Pursuant to the IFA, an investment fund (this applies to both FIZs and SFIOs) must conduct its operations with due regard to the interests of the investor, and in keeping with the investment risk mitigation rules set out by the IFA. A TFI and the fund's depositary are also legally obliged to act independently and in the interest of investors.

If a TFI's actions taken in relation to the management of the fund are considered to be in breach of investors' interests, such TFI would be subject to quite restrictive regulatory sanctions imposed by the KNF.

In the case of commercial companies, there are no express fiduciary obligations of the general partner in relation to the investors. Those duties should be specified either in the partnership deed or statutes, or in a separate investment agreement. Legal commentators emphasise, however, that all partners and shareholders have fiduciary duties in relation to the partnership itself.

III REGULATORY DEVELOPMENTS

i Current regulatory framework

The KNF is the 'competent authority' within the meaning of the EU directives. It performs integrated regulatory supervision over local financial services (banking, insurance, pension fund and financial instruments markets, including the investment funds market).

The current regulatory regime applicable to private equity investments encompasses the establishment and operation of FIZs and SFIOs, as well as their management by TFIs.

FIZs

The creation of an investment fund requires:

a adoption of the FIZ's statutes by the TFI;
b execution of an agreement with a depositary on the maintenance of a register of the fund's assets;
c the KNF's authorisation for the establishment of a FIZ (with the reservation outlined below);
d collection of payments in the amount stipulated in the fund's statutes (in the case of publicly traded certificates, not less than €40,000); and
e entry in the register of investment funds.

The investment fund acquires legal personality upon its registration in the register of investment funds, which is maintained by the District Court of Warsaw. Upon registration, the management company becomes the governing body of the investment fund.

Establishment of an FIZ whose investment certificates are not publicly traded does not require KNF consent. In addition, the scope of KNF supervision over the operations of such a fund is considerably limited. The regulatory burden in this case is moved to supervise the TFI.

SFIOs

The creation of an SFIO, open-end investment funds and public FIZs requires KNF authorisation and entry in the register of investment funds. At the same time, the SFIO is obliged to publish information prospectuses and financial statements.

TFIs

Management of investment funds (including, as a rule, distribution of their units) is reserved to TFIs regulated under the IFA and its secondary legislation. Establishment of a TFI requires a regulatory permit. A permit to act as an investment fund management company may be granted only to a joint-stock company with a registered office in Poland. The scope of the permit covers activities consisting of the establishment and management of investment funds, including intermediation in the redemption or sale and repurchase of investment funds units or certificates, representing investment funds in dealings with third parties and managing a collective portfolio of securities.

The TFI must comply with certain specific requirements, including the capital adequacy requirement and the appointment of managers complying with certain conditions. The scope of activities of the TFI must be limited to the management of funds.

Commercial companies

The establishment and operation of commercial companies that are private investment vehicles currently does not trigger any regulatory duties.

ii Expected AIFMD implementation

The regulatory framework outlined above will be reshaped upon the implementation of AIFMD into Polish law. Despite the lapsing of the deadline, the legislative process is still at a preliminary stage, with the draft bill of amendment for the implementation having only been submitted to the lower house of the Polish parliament in December 2015. This means that both the date of AIMFD's implementation in Poland and its final shape are still uncertain.

One reason for this delay is that the AIFMD rules must be combined with the existing, complex FIZ and SFIO regulations. Currently, it is contemplated that the implementation be effected through an extensive amendment of the IFA, affecting the FIZ, SFIO and TFI regulations as well as adding additional regulation of commercial companies being used as investment vehicles.

The current draft amendment (which may change in the future) provides for a new closed catalogue of investment vehicle legal forms qualified as alternative investment funds. In addition to non-UCITS investment funds, such alternative investment funds would include 'alternative investment companies' (ASI) either internally or externally

managed by authorised managers. Consequently, the future list of non-UCITS regulated investment vehicles under the draft bill of amendment will likely include the following legal forms:

Externally managed	FIZs SFIOs	SKA Limited partnerships (spk)
Internally managed	–	Joint-stock companies (SA) Limited liability companies (sp zoo)

The current draft sets the requirement that in the case of SKAs and limited partnerships, the general partner will have to be a commercial company (a joint-stock company, a limited liability company or an European company). Such a general partner will then have to fulfil the regulatory requirements for a manager of an alternative investment fund under AIFMD and obtain KNF authorisation (unless it benefits from certain exemptions depending on the value of assets under management). The currently envisaged grandfathering period is at the same time relatively short: six months from the entering of the new law into force.

Additionally, the draft bill of amendment distinguishes between regulatory permits granted to TFIs managing UCITS from alternative investment funds. This may have an impact on the scope of permitted operations and regulatory duties of particular TFIs. Additionally, due to some fundamental differences between the Polish type and the common EU types of non-UCITS funds, the draft limits the possibility of 'passporting' the activity of alternative investment fund managers from other EU countries.

iii Taxation

Under the Polish Corporate Income Tax Act, Polish investment funds as well as foreign investment funds (i.e., collective investment institutions) with their registered offices in other EU or EEA Member States are exempt from Polish corporate income tax (the tax exemption of foreign investment funds is subject to certain conditions that must be met).

Investors in Polish investment funds are subject to income taxation with respect to proceeds received from the funds (the standard tax rate is 19 per cent, which in the case of foreign investors may be reduced on the basis of respective double tax treaty and internal regulations).

IV OUTLOOK

The pending AIFMD implementation process is currently the number one topic of discussion in the Polish private equity market. Its final shape, which is currently under discussion by the competent public authorities and market participants, will have a significant impact both on the existing market and future investments. It cannot be excluded that a number of currently operating private equity entities will have to be restructured to achieve compliance with new regulatory duties, the scope of which, for the time being, is not certain. The initial draft bill on legislative amendments to the IFA and certain other laws is currently under discussion before the lower house of the Polish parliament.

Appendix 1

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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.

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