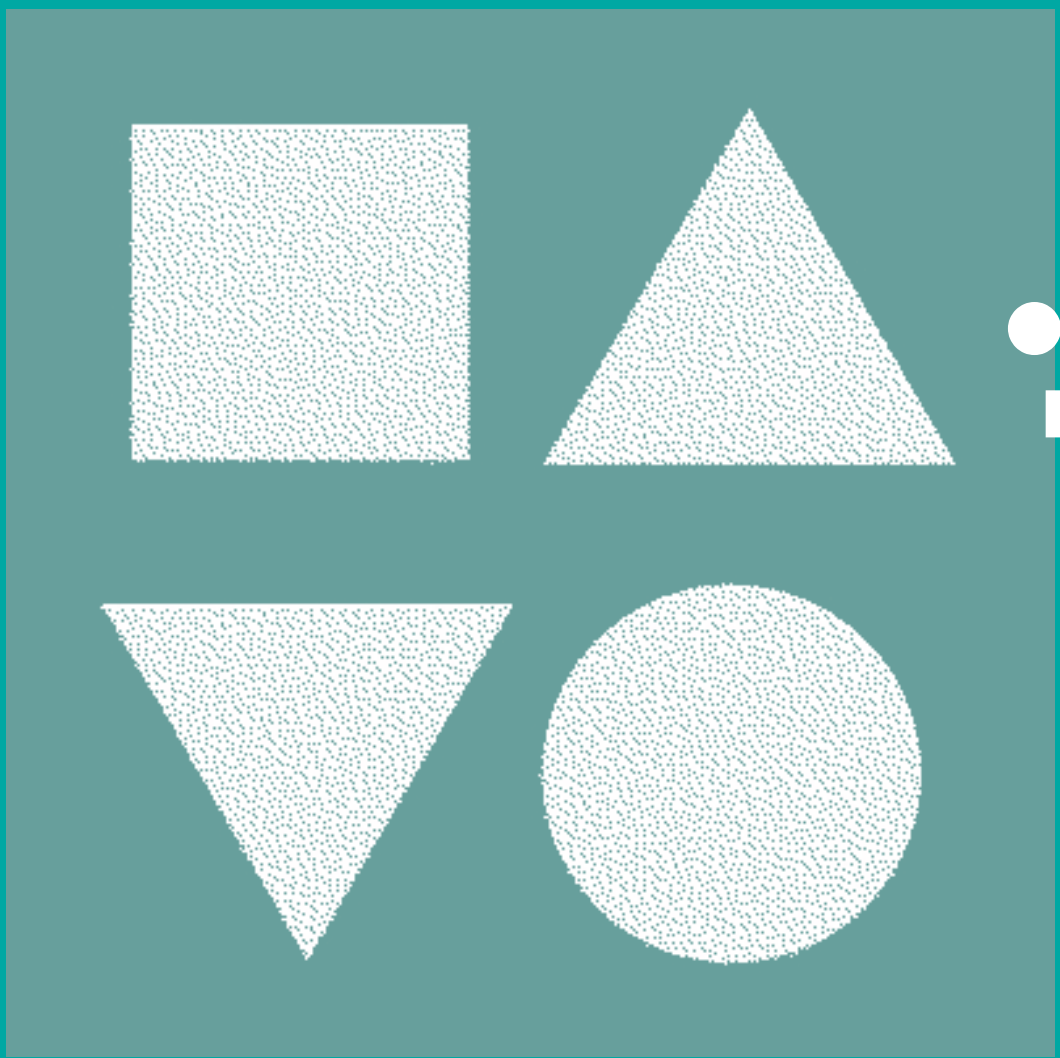
VOL. III

Transactions



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Wardyński & Partners has existed for 30 years. How many transactions has the firm handled in that time?
It's hard to count them. Considering the rate at which new matters flow into the firm, there have been hundreds if not thousands. But I should note that I have only been at the firm since 1999, although I did participate in transactions and the establishment of the capital market in Poland from its start in 1989. Both this law firm and I were present at the founding of the Warsaw Stock Exchange and the listings of the earliest companies on the exchange—the "First Five."

It was a truly exciting time because all of this was new to us. The projects were led by outside advisers, but they needed Polish lawyers to oversee compliance with the requirements of Polish law, and we took part in those projects. Drafting prospectuses, conducting due diligence of those companies, was something Polish lawyers had never encountered before.

Where did you gain knowledge on this topic?
We were learning on the job from the foreign lawyers who came here to assist in this process. The stock exchange was modelled on US law, as is still apparent today. From the very beginning, the law from the Anglo-Saxon tradition had the greatest influence.

Our firm was also one of the first to serve investors entering the Polish market during the period of transformation and privatisation of the Polish economy. Originally these were primarily direct investments. We worked mainly for sectoral investors acquiring Polish enterprises, first from the State Treasury as part of the privatisation of Polish industry, and later from private owners.

So we grew along with the private market and business, but in the beginning it was privatisation of industry across diverse sectors. First was the manufacturing sector, i.e. plants manufacturing automobiles or paper, but also the banking and financial sector. Throughout the period of transformation,

the Polish economy was regarded as highly attractive, mainly due to the huge potential of the market.

We also advised the other party, i.e. the State Treasury, and this was also a totally new experience. You could fairly say there was no sector of industry or the economy where we were not involved. We assisted in the acquisition of steelworks and telecoms.

How closely must the lawyer be oriented to the specific nature of the sector where the transaction occurs?

That has also changed. At the beginning, knowledge of these peculiarities was not essential. Of course our knowledge grew with each transaction, because when you privatise for example a brewery or an automobile plant, you learn the specifics of how they operate. But initially familiarity with the sector was not a condition for taking on a transaction. And even today this is not the decisive factor, although clients often ask whether we have a transaction in our portfolio from the specific sector. Such experience weighs the most heavily when it comes to certain specific industries such as banking and financial services. But in other industries it is also necessary to have some basic knowledge, which comes in handy also in conducting due diligence of companies during the course of the transaction. This is because specific industries differ in the contracts and financial instruments they use.

How were the sellers prepared when this process began?

That also looked totally different than today. We had to participate in drawing up the documentation to be examined. Moreover, we could work only during the operating hours of the enterprise, for example 7:30 am to 3:30 pm. After that everyone left and the plant was locked up for the night. It never occurred to anyone that you could stay and work through the evening.

The sellers could also have a peculiar approach. I remember when I was drafting the prospectus for an enterprise from the construction industry where a very important manager worked. He would not agree to state in the prospectus that the founder of the enterprise was the minister of construction. He insisted that we write in the prospectus that he himself was the founder of the enterprise. It was hard to persuade him that the enterprise was established in the 1970s, as a state enterprise, and even though we appreciated that he had contributed to the success of the enterprise, nonetheless the founder of the enterprise was the minister of construction.

Moreover, everything was in paper form—whole binders, or indeed bags, of documents. They had to be reviewed on site or else photocopied with the consent of the parties. The due diligence reports themselves looked different

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then. Most often the investors demanded that everything be included in the reports, because they didn't know the market and its specifics. They insisted on describing in detail in the report all documents and divisions undergoing examination. This meant that the reports ran on for hundreds of pages. They were huge tomes. Over time, investors ceased to be interested in every single detail and began to request summaries—and at the beginning of the report, not the end, which in itself was a revolution.

Today we rather produce "red-flag" reports. After the examination, the investor receives a summary description of the risks we have identified: the level of risks, whether they can be cured, what should be included in the representations and warranties, how our discoveries impact the transaction or the price for the enterprise. So the work is essentially the same but the investor receives only a summary of the work. This of course carries with it great responsibility.

Has the average duration of transactions changed?

Clearly it is faster now, thanks to the growth of technology. Once upon a time, examination of documents required travelling all around Poland. Sometimes lawyers disappeared for a week or two. You also had to wait a very long time for the party to prepare proper documentation, and then to prepare the following sets of documents, particularly for the purposes of due diligence. Today, even on medium-sized transactions, we use virtual data rooms. So lawyers examine documents at their own desk. In these data rooms you can also ask questions or request additional documents, so everything goes very quickly.

How have the actors involved in transactions changed?

As I mentioned, in the beginning we were dealing mainly with investors from the industry, who were buying specific plants. There were also a number of greenfield projects, where the investor bought land and built a plant. Later, private investment funds and venture-capital funds began to operate more and more actively, aimed at specific sectors or enterprises of a certain size. Private-equity funds arose specialising in our region, or only Poland. Activity of global players, specifically global private-equity funds, also picked up. Gradually they brought the market around to their approach. Funds also appeared specialising in SMEs, stepping in at a certain stage of growth and improving their efficiency.

Funds have a certain period of return and exit, which depending on the sector ranges from three to five or seven years, but every fund invests in order to achieve a certain rate of return on the investment, and then exit and resell

at a higher price. Of course this does not always work out. This is a risk borne by every fund investing with these aims. But that is their operating philosophy. Both the entry phase and the exit phase by the fund generate work for lawyers.

Characteristically, these tend to be fickle clients. They use a whole range of law firms and select entirely different suites of advisers for specific projects.

So is there any room for a relationship between legal adviser and client?

Yes, of course, but these relationships are not decisive. You can and should maintain good relations with the representatives of such funds, but they are not as enduring as in the case of industry clients.

Is advising on transactions an interesting field of law?

Yes, of course! You get to know the most diverse industries, sectors and even fields of life. We encounter people who have been working in a given sector for years and have vast experience. That also pays off in subsequent transactions.

Cooperation with other advisers is also interesting and very important. Today clients expect us to provide practical conclusions or advice that can help them take concrete business decisions. That's why cooperation with other professionals—investment advisers, financial advisers, accounting and audit firms—is so crucial. Now firms from the Big Four offer clients an entire package of transactional support, including legal services. For us this is big competition, but clients in many instances still decide on independent law firms with extensive M&A experience.

I can imagine that a closing is a nervous period, with lots of all-nighters.

That varies. Even with the best-planned process, not everything goes according to plan. But the stories I remember from the transformation process don't really happen anymore.

I remember a Korean investment in a bank where the negotiations of the contract began on Wednesday morning and lasted without a break until 1 pm on Saturday. We sat there non-stop, day and night, only ordering in meals from one of the first sushi restaurants in Warsaw. For a long time after that I couldn't look at sushi. The process was devastating, particularly because with the time difference, the most intense negotiations were in the early morning, when there was direct contact with Korea, where the decision-makers were located.

Today there is also time pressure on deals, but not to the same degree. Yes, there are deadlines that must be met. Sometimes closings are in the middle

of the night. We recently had a transaction in which we summoned a notary at 1 am. Back in the day it was unimaginable that a notary would record a transaction outside of office hours.

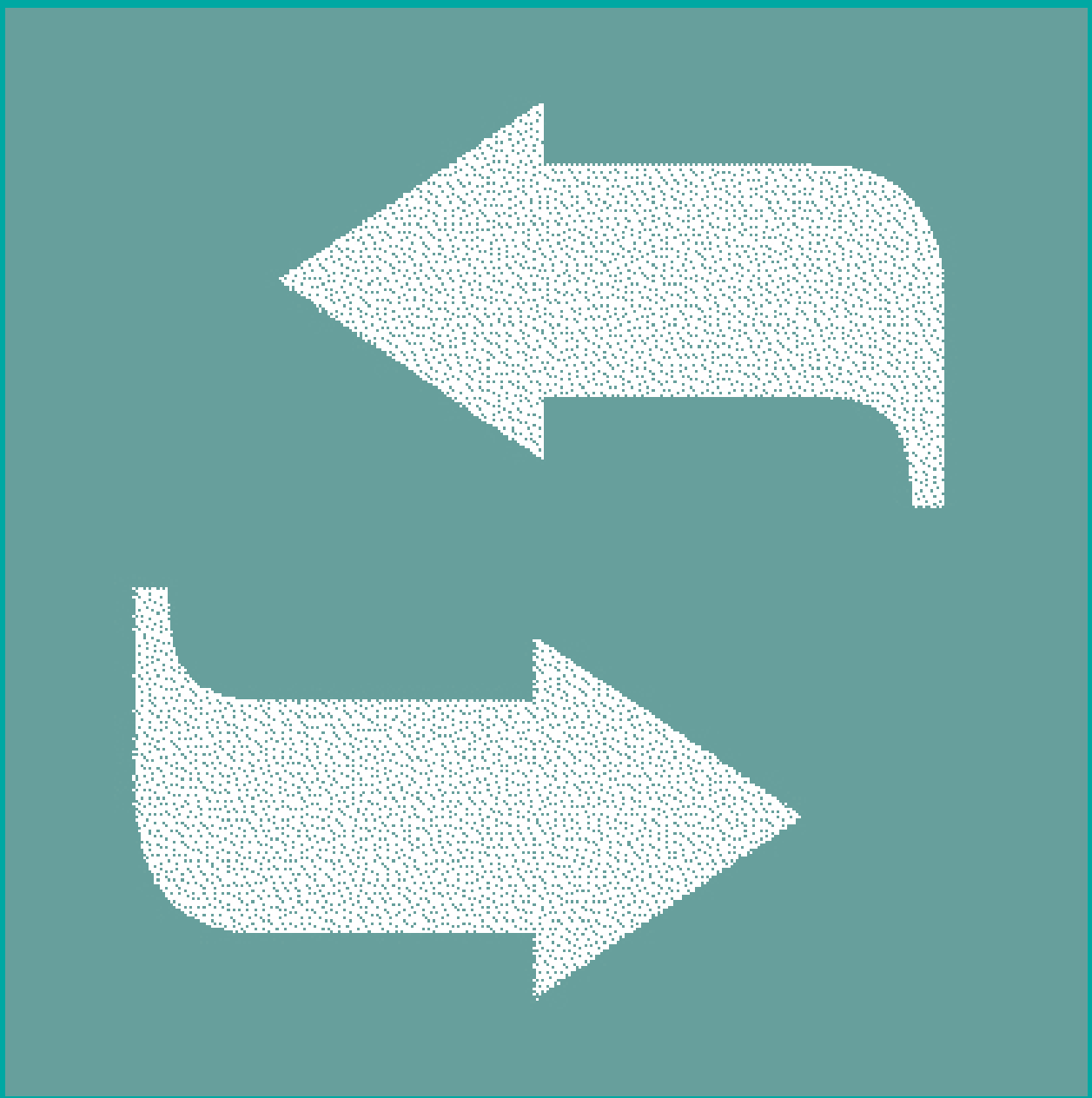
You mentioned a bit about technology. How strongly is it intruding into this field of law?

Artificial intelligence is obviously a very fashionable topic. Many Western law firms use instruments allowing them to check all the documentation related to a given clause in just a few minutes. But we have the impression that our market has not yet entirely caught up to such projects. The effects of such software are most visible on gigantic projects where there are thousands and thousands of documents, such as leases, to review. Here such documents tend to number in the dozens or more rarely the hundreds. With those volumes, the use of such programs doesn't pay off yet. Language also presents a powerful barrier, as the existing global solutions are not yet adapted to the peculiarities of the Polish language.

Of course this development occurs very quickly, and certainly soon tools tailored to our market will appear soon. The results of the Polish edition of the Global Legal Hackathon are promising in this respect. Our law firm has served as a partner for this event now for the second time. The contestants propose many tools that could streamline the work of Polish lawyers. So we follow this market closely and anticipate solutions suited to the specific nature of our work.

Paweł Ciećwierz
adwokat, partner in charge of the M&A practice

Interview conducted by Justyna Zandberg-Malec



The M&A market has prospered and is doing well now. But what about the future?

Maciej A. Szewczyk talks with Anna Dąbrowska, Krzysztof Libiszewski and Izabela Zielińska-Barłożek

Maciej A. Szewczyk: It won't come as any surprise to you that we're talking about M&A. We have an excellent year behind us. The number of deals in Poland rose. Their value was lower than in 2017, but still impressive—some sources say the figure is as high as EUR 6.5 billion. In other words, it's good, and maybe even very good. We could end our discussion on that point, but we've just begun.

Izabela Zielińska-Barłożek: Indeed, the figures you mentioned seem excellent and may sound optimistic. For a long time we have observed growth, although obviously not in a straight line. It may not be visible in every sector, but with a certain oversimplification, on a macro scale it applies to the whole economy. So even if we don't expect any sudden meltdown, we should face it that after a long period of increases some decline must occur.

Anna Dąbrowska: And this is not just ordinary pessimism, because more and more forecasts point to an approaching economic slowdown. Sooner or later this will translate into a drop in the number of transactions. We observed this mechanism several years ago. Due to economic turbulence, investors temporarily held back from launching new projects, and suspended ongoing projects. There are also certain apparent symptoms which, even if they do not forebode problems, at least require us to be prepared.

What would you regard as the key factors that could reverse this good trend, or at least shake the good mood? The international situation, such as Brexit, or looking at an even more macro scale, the tensions between the US and China? The slowdown on the German market? Problems right here in

Poland, such as issues involving the law itself?

Krzysztof Libiszewski: We're talking as transactional lawyers, of course, not economists, but it seems that all the dangers mentioned are serious enough to exert a significant negative influence on the condition of the Polish economy. But I would begin an analysis of the risks with internal factors. The impact of the political situation in Poland on the M&A market, or on the business environment more generally, is a vital issue. Probably no one would deny that some changes in law, tied to destabilisation, affect state institutions whose task is to help maintain stability, and thus exert a negative impact on the economy. For one thing, they make the legal environment less predictable, and thus more risky for investors. Presumably that would scare off investors and translate into fewer investments, including M&A deals. So much for theory.

Izabela Zielińska-Barłożek: Right, theory! On the other hand we have a sort of Realpolitik among all stakeholders, or more precisely a certain economic realism, also on the side of investors. Investors observe the situation and know that the situation in Poland is not an utterly isolated case. It is an element of a certain Central European trend—or perhaps a European trend. They observe and say, "Let's wait and see." And they wait, but meanwhile they continue to conduct business as usual. After all, no one would snub the economy and society of a European country with 40 million people unless there were very serious reasons. That's why such political impact on the economy is not apparent, at least not at this stage, when analysing the situation from a high vantage point.

And what about Brexit? As we talk, the case is still open. Will they leave, or won't they? If they do, will it be a hard or soft Brexit?

Anna Dąbrowska: Whatever happens (apart from the case where Brexit doesn't occur at all), it will be an event whose consequences will be simply unforeseeable. Numerous analyses and reports have been developed in recent years on this topic, but they all function in a vacuum. We don't know how markets will behave in a given form of Brexit. We have no idea whether Brexit will cause political friction in practice, or what sort of friction. Carrying this over to the Polish situation, and more specifically transactions and investments on the Polish market, we can say there is a risk of destabilisation as well as certain (rather illusory) opportunities connected with the potential dethroning of the UK, or more precisely London, as the leading financial centre. Will Poland gain or lose from that? It's like reading tea leaves.

Krzysztof Libiszewski: For now, on the home front, we can see the first preparations for the worst-case scenario. In early March a bill was submitted to the Sejm for an act laying down rules for operation in Poland of financial institutions from the UK in connection with its departure from the EU. It may be assumed that the spectre of a hard Brexit, but also the spectre of expiration of the grace period in the Brexit agreement between the EU and the UK and failure to adopt appropriate additional agreements during this period, will spur more such legislative initiatives. Without such an act, British financial institutions could not function in Polish territory. This illustrates well the paralysis that can be expected in the current legal system with respect to activity of other British regulated institutions (air and rail lines, transport companies, shipping firms and so on).

But here we obviously must be aware that such actions are only a response to the situation and an attempt to mitigate the potential and still unknown negative consequences. Moving on, what about Germany?

Anna Dąbrowska: Indeed, we hear more and more that the German economy is slowing. If so, the risk for us can hardly be overstated. Germany after all represents a fourth of our exports, and numerous investments. A major part of the Polish economy functions as a kind of subcontractor for the German economy.

Exactly! It is clear that Poland is still more a recipient than a source when it comes to foreign investment.

Izabela Zielińska-Barłożek: Definitely, although in recent years we have witnessed examples of spectacular Polish investments abroad, more or less successful. Consider the investments by KGHM in South America, or Orlen's business in Germany, Lithuania (refinery), Czechia and Slovakia. Another example is the recent acquisition of Germany's Compo Export by Grupa Azoty for over EUR 230 million. But all of these investments share one characteristic: participation by companies controlled by the State Treasury. Formally they are private investments, but practically, not so much. In the near term this trend is unlikely to change greatly.

Let's return to the Polish market. We already mentioned that a lot happened on that market in 2018. But at the same time, small and medium-sized transactions predominated.

Krzysztof Libiszewski: It all depends on the systematic or methodological perspective we adopt. There aren't many mega-transactions on the Polish

market. I'm thinking about large projects (worth at least several hundred million euro) in which Polish assets play an exclusive or at least predominant role. That's at most a handful of transactions per year. And I would exclude from this real estate transactions, as even though they often involve companies, in fact the subject of the transaction is real property (such as office buildings and shopping malls). Even though they are of significant value, they are of a distinct nature and largely incomparable to what we might regard as M&A as such.

Izabela Zielińska-Barłożek: Undoubtedly transactions of small or medium value dominate in Poland, and it must be assumed they will continue to do so. That is simply the nature of the market. This also applies to transactions involving companies already owned by foreign investors, as well as transactions involving businesses that have so far been local but are only now looking to "sell themselves."

Anna Dąbrowska: With a certain oversimplification, we are witnessing a changeover of generations. Many companies in Poland have continued to be controlled by their founders from the period of systemic transformation. Years later, many of them would simply like to sell their business in exchange for cash and leisure. For others, finding an investor is a condition for survival or taking their business to the next level. There are still many such transactions.

What else would you regard as a major factor shaping the market now or in upcoming years?

Krzysztof Libiszewski: Once more we should point out that we are not talking about economic trends. In a range of reports and in discussions with our clients, it emerges that Poland still offers—but we must stress that this is not a permanent state—truly well-qualified personnel whose salary expectations are markedly lower than in many Western countries. This is still one of the decisive factors making Poland attractive as a location for investment. For a long time it has not been the main factor, but it is still important.

Izabela Zielińska-Barłożek: But we should remember that our human resources are not unlimited, and Poles can do the math and grasp the opportunities connected with working in the West.

This is moreover a common problem for countries in our region.

Anna Dąbrowska: From the perspective of the M&A market we should point out one more thing. It seems like a truism, but we should remember

that the entry or exit of specific investors, shifting of assets or shares between portfolios, and so on, are simply part of a cycle. An investment fund buys a company and a few years later resells it. Similarly, an industry investor buys up a new business to expand its portfolio, and then sells another business that doesn't fit its strategy as well.

Izabela Zielińska-Barłożek: I don't think we disagree that in the future deals will continue to be carried out on our market. On the broader horizon (ignoring short-term turbulence) there should be no doubt that there will be transactions.

The question is, what kind?

Krzysztof Libiszewski: An interesting question—but a topic for another conversation—is how the merger of law and new technologies will impact the realities of how deals are conducted. That is promising, but still in its infancy. Nonetheless, that is the future.

Anna Dąbrowska: Yes, and it's very exciting! But it must be borne in mind that we are really talking about the future. It's true that today, due to new technologies, the way deals are carried out looks completely different than it was just a few years ago, but the potential qualitative leap is still a long way off. It's one thing to have IT tools facilitating communications, reading documents and so on, and thus aiding lawyers in their work. It will be something else when technology enters the sphere previously reserved for people. I have in mind here drawing conclusions from reading documents, or proposing solutions.

Izabela Zielińska-Barłożek: Of course there are promising solutions already in existence today. But their creators still have lot of work to do. So do we, because we can't just stand by and watch. But until concrete technological solutions assume a more tangible form, the activity of lawyers will boil down to what I would call "active observation."

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Kinga Ziemnicka

How have M&A negotiations changed in recent years?

In today's world, modern technology facilitates access to information and accelerates interpersonal contacts. But despite the existence of sophisticated telecommunications tools, at key moments in M&A deals the parties still want to meet at the negotiating table, because it is much easier to reach agreement in direct contact with the other side.

Despite certain standard schemes, legal solutions and document templates applied in M&A practice at specific stages of transactions, it should still be recognised that every transaction is different and requires solutions tailored to its conditions. It's the same with conducting negotiations. There are identifiable negotiating styles and theories of negotiating tactics, but in the real world everything boils down to a meeting between individuals differing in negotiating strength, experience, motivations, emotions, knowledge, and degree of trust in the other party. It is essential to sense these factors if the parties are to reach agreement on the terms of a deal.

Do tough negotiations ensure success?

A decade or more ago, when many of us were at the start of our legal career, the predominant style was tough negotiations, based on the assumption that the other side is the opponent and the measure of success is to extract as many concessions as possible from the other party. But that style doesn't always prove effective.

An example was a transaction in which we represented a big investment fund in the acquisition of a privately held healthcare company. The shareholders of the target were three men, one of whom was a lawyer. Our client offered them very generous financial terms as well as a stake of shares in a company belonging to the fund's capital group, in which the lawyer shareholder would serve on the supervisory board. The fund was seeking to close the transaction quickly, so was initially inclined to make concessions. But this shareholder began to assert more and more extensive demands, threatening to terminate

the negotiations and employing personal attacks. At the final stage of the negotiations, when the key terms of the transaction were already essentially determined and the remaining skirmishes concerned only secondary issues, the other side fought those points fiercely. The ultimate consequence of this was a decision by the fund to withdraw from the transaction. Why? The representatives of the fund became convinced that they did not want to work with someone like that on their supervisory board, because it would be hard to reach agreement with him when taking decisions. Attempts by the other side to soften their position came too late, and finally the transaction did not go through.

Nowadays negotiations usually proceed differently. Thanks to economic development and changes in the business world, the negotiating culture is evolving in the direction of rational consideration of shared issues. A reasonable result of negotiations conducted in a positive atmosphere is particularly important in transactions where the parties will be working together in the future. Of course the lawyers for the two sides most often argue with one another, as that is their role, but cooperation between them is also essential. They should help the parties resolve disputed issues arising in the course of the discussions. The point is not to allow deep concessions for the sake of reaching agreement, but seeking methods of achieving the client's aims that will also be acceptable to the other party.

Clients' growing experience

In conducting negotiations, the experience of the parties themselves is also key, and this has grown by leaps and bounds in recent years. Representatives of investment funds and big firms interested in expanding their corporate groups are closely attuned to legal complexities and solutions often drawn from the common-law tradition. Clients with transactional experience also have clear expectations, which means it is relatively straightforward to work with them. In the presence of such clients lawyers can freely use English terms like "drag along," "tag along" or "bad leaver" without generating any discomfort that something illegal is afoot.

An entirely different approach is required when cooperating with the owners of family firms, for whom the sale of their business is often the only big transaction in their life. Clients encountering a transaction of this type for the first time need to be taken in hand and guided through the process, hinting to them what they can expect, what sorts of risks are in play, and how we can protect their interests.

the negotiating culture is evolving in the direction of rational consideration of shared issues

The role of trust

The trust between the parties also plays a huge role in the course of the negotiations. It might seem that trust lies solely within the sphere of interpersonal relations or psychological concepts, but in reality it is recognised by economists in the context of transaction costs. The less trust exists between the parties, the higher the transaction costs. This results among other things from the need to negotiate additional contractual provisions, for example involving penalties or security for performance of the parties' obligations, making contracts more complicated and voluminous.

For example, we succeeded in closing a transaction worth over PLN 300 million within less than three months, because the parties were well informed of the condition of the affairs and finances of the companies being sold. This meant that the problem of asymmetry of information did not arise, and consequently there were no fears arising from mistrust between the parties. The only issue that required a lot of time was obtaining credit to finance the purchase of the shares. By contrast, in a transaction worth only a tenth as much, we negotiated the terms of the contract for over a year. There the great mistrust of one the parties translated into time and expense required to negotiate and draft documentation in meticulous detail, which grew to the thickness of *War and Peace*.

However, caution and scepticism are not always a negative phenomenon, because during the course of negotiations it is also necessary to face the risk of concealment of certain information, manipulation, and even fraud. Thus limited trust can result in better securing of the client's interests, so long as it leads to rational solutions and not unrealistic expectations of one of the parties. However, where there are objective reasons for mistrust, most often no deal is reached because the transactional risk is too high.

And sometimes it is mistrust between business partners that brings their cooperation to an end. In such situations the negotiations concerning for example one partner's exit from the company are very difficult, as they are tied to a feeling of injury and bruised ambitions. Then the role of the lawyers includes helping their clients master their emotions.

Virtual examination

The asymmetry of information between the buyer and the seller, mentioned above, is another key issue in the course of negotiations. This problem is partially solved through including in agreements representations and warranties by the seller concerning the target, and by conducting due diligence, i.e. legal and financial analysis of the company. The buyer's representatives are given access to documents of the target company so they can verify their

correctness and identify potential risks connected to the transaction. Over the years it is this stage that has undergone the greatest changes.

A couple of decades ago lawyers travelled around Poland to examine numerous binders of documents at corporate headquarters. Along the way they could see the subject of the transaction with their own eyes, such as a factory producing ceramics, polyurethane foam, industrial castings, or chocolates. Often alongside the binders of documents the lawyers were offered a range of tasty snacks. An on-site visit to the company and immediate contact with its representatives also helped the advisers become acquainted with the business aspects of the transaction, which has a positive impact on the subsequent negotiations.

Now legal examination of target companies is conducted through virtual access to documentation within the seclusion of the law office. This makes the process much quicker, but also limits it to a dry analysis of the documents, stripped of many elements of reconnaissance and direct human contact.

Summary

Broad access to information and globalisation of transactions are leading to consolidation of legal solutions and consequently to the use of structures borrowed from other legal systems, in particular from the Anglo-Saxon legal tradition. Consequently, much greater weight is now given to a high level of competence among the participants in the negotiations than to the skill of conducting tough and aggressive negotiations. Respect for the other side does not exclude assertiveness, however, or the firm presentation of rational arguments. But mutually building understand allows the negotiations to be completed successfully and with savings of time, which in business is often of the essence.

Dr Kinga Ziemnicka
attorney-at-law, M&A and Corporate practice

Andrzej Madała

A look back at three decades of merger control in Poland and the Competition practice at Wardyński & Partners

Historical background

Competition law, in the sense of antitrust law, has functioned for nearly 30 years in the Polish legal system since its reactivation in the late 1980s and early 1990s.[1] It is a part of public law that directly impacts the economy across numerous planes. It applies to every large undertaking, from mergers and acquisitions to organisation of distribution chains and participation in trade associations. This law plays a major role not only in dealings with the competition authority (formerly the Antimonopoly Office, now the president of the Office of Competition and Consumer Protection), but also in dealings between private entities.[2] The impact of competition regulations on economic processes and the activity of undertakings is clearly visible in the case of M&A transactions, referred to in competition law as "concentrations."

The first regulations governing control of concentrations (then the "intended merger of economic entities") appeared near the end of the Polish People's Republic in the Act on Combating Monopolistic Practices in the National Economy of 28 January 1987. That act existed under the socioeconomic

1 In the Second Polish Republic, public competition law functioned only in the form of the law of cartels, and protection of competition was based on the institution of oversight of agreements between undertakings (the competition authorities were the Minister of Industry and Trade and the Cartels Court). Regulation was based on the Cartels Act of 28 March 1933 and the later Cartel Agreements Act of 13 July 1939 (which was supposed to enter into force in October 1939 but for understandable reasons did not).

2 See T. Wardyński in A. Bolecki et al., *Prawo konkurencji* (Competition law), Warsaw 2012, p. 19.

there was no need for antitrust regulations because the state was the monopolist

realities of communist Poland (where a socialist economy functioned, centrally planned and directed, with units of the "socialised economy" and the "non-socialised economy," and there was no need for antitrust regulations because the state was the monopolist), but foreshadowed changes forced by the bankruptcy of the communist state. A breakthrough was passage in December 1988 of a package of acts, particularly the Economic Activity Act of 23 December 1988. That act caused a radical change in the economic reality of People's Poland, restoring broadly conceived economic freedom after an absence of 50 years and enabling anyone who wished, including private entities, to conduct business activity on an equal footing.

In the evolving commercial reality, a need arose to introduce antitrust regulations suited to the market economy, which was growing more and more rapidly, and responding to threats to competition. That led to adoption of the Antimonopoly Act (Act on Combating Monopolistic Practices of 24 February 1990), which established in Poland a contemporary model for protection of competition, pursued in the public interest. Under that act, the Antimonopoly Office was appointed as a central body of the state administration. The Antimonopoly Act also addressed transactions shaping the organisational structures of commercial entities (an intended merger or reorganisation of commercial entities, as well as intended creation of a new entity, was subject to notification of the Antimonopoly Office, but only if it would cause a dominant position on the market to be achieved, or if one of the parties to the transaction already held such position).

Pioneering beginnings

The first half of the 1990s witnessed the start of our law firm's adventure with antitrust law and the review of concentrations, still in its infancy, by the Antimonopoly Office. Regulations governing review of concentrations began to play a major economic role in mid-May 1995, when one of the most important amendments to the 1990 act entered into force. The number of merger cases examined by the Antimonopoly Office increased, due to the increasing number of mergers and acquisitions connected with opening of the Polish market to foreign investors and privatisation of state and communal property, but also thanks to the notification criteria that were introduced. "Mergers of economic entities" were subject to notification, and that covered a broader catalogue of concentrations than now, including acquisition of minority stakes of shares (from 10% up). The notification thresholds were also relatively low. The notification obligation applied to transactions when the combined value of the sales of goods by the participants in the preceding

year exceeded the equivalent of ECU 5 million,[3] with the exception of purchase or takeover of an organised portion of assets, where the notification threshold was the equivalent of ECU 2 million in the value of the assets. Introduction of new criteria for the notification obligation caused a rapid increase in notification proceedings, which was also experienced by our law firm.

The regulations in force at that time contained numerous interesting legislative solutions, generating many problems of interpretation. For example, the regulations introduced a definite yet indefinite deadline for making notifications: an intended merger was subject to notification "within 14 days after performance of the action which under the act entails such obligation." The document confirming the consent of the Antimonopoly Office to carry out a transaction was an ordinary notice—only prohibitions were issued in the form of an administrative decision.

Further amendments to the Antimonopoly Act followed. In 1996 the name of the antitrust authority was changed to the Office of Competition and Consumer Protection (UOKiK), and the president of UOKiK became the central antitrust body of the government administration. In 1997 the notion of "economic entity" (*podmiot gospodarczy*) was replaced by the term "undertaking" (*przedsiębiorca*), which continues to function to this day (thanks to an unprecedented change in the Polish legal system involving the comprehensive introduction of this term across the regulations existing at that time). And in 1998 the notification threshold was raised from ECU 5 million to ECU 25 million (and from ECU 2 million to ECU 5 million in the case of acquisition of assets). But quintupling the fundamental notification criterion did not cut the number of notifications or proceedings conducted by the office. Nine field offices of UOKiK were also established (in Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Warsaw (separate from the headquarters) and Wrocław). Among other matters, the field offices examined mergers of undertakings (in accordance with their geographical and subject-matter jurisdiction). This made it necessary to determine the field office where the notification should be filed.

Further development and current status

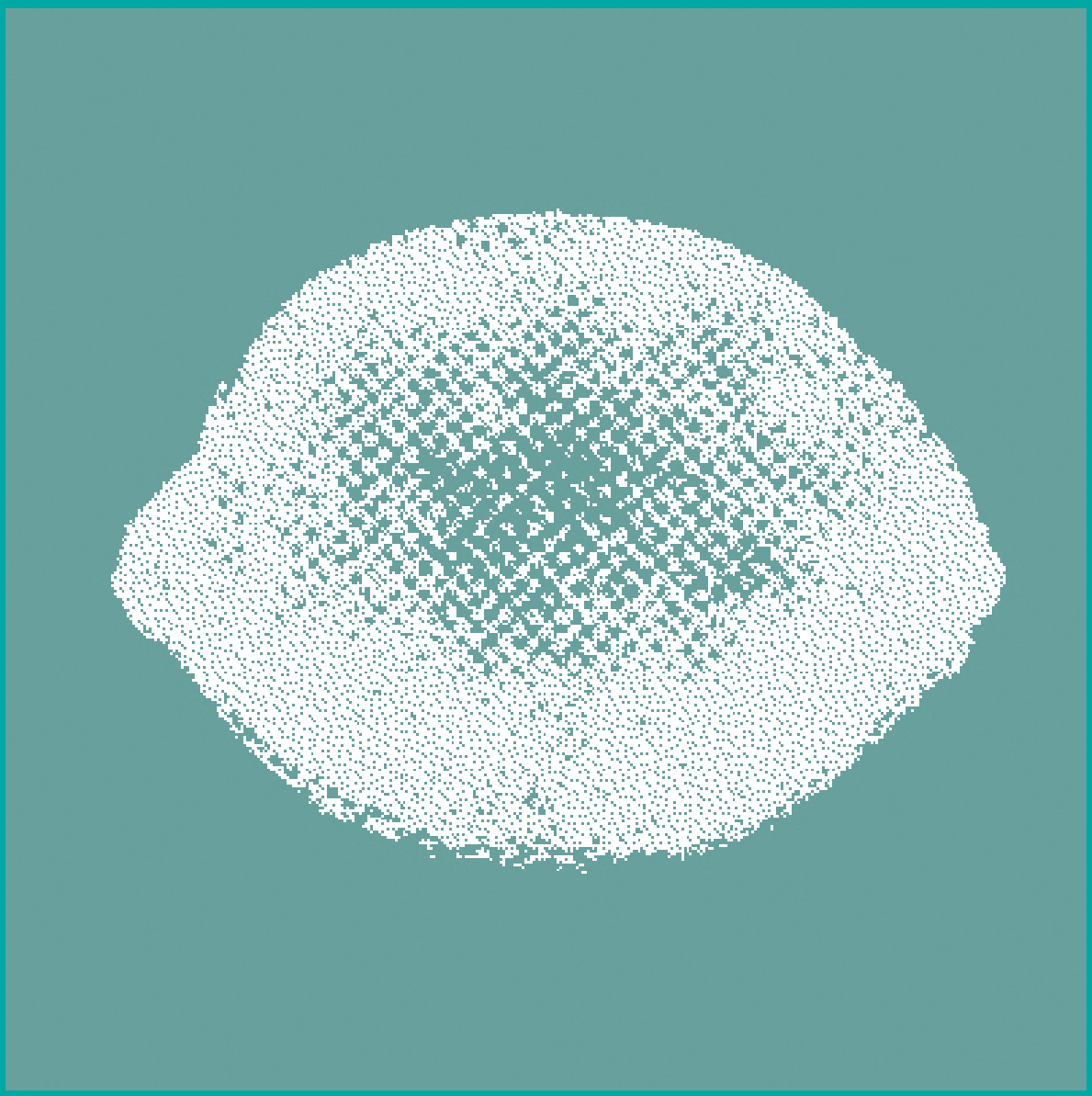
The 1990 act governed the rules for review of concentrations in Poland for over a decade. Apart from its advantages, such as stressing the importance

3 Does anyone still remember the ECU? The European Currency Unit was a settlement currency in the European Monetary System based on a basket of currency of EEC countries, functioning from 1979 to 1998.

of public oversight of economic concentrations and inclusion of these provisions in the Antimonopoly Act, it also had its drawbacks. In the area of concentrations of undertakings, these included the unclear criteria for the obligation to notify an intended merger, the excessive formalism of the procedure, and the petty nature of the regulations.

It was under these circumstances that a new act was adopted: the Competition and Consumer Protection Act of 15 December 2000. This act brought order to the existing system of competition protection (setting forth an extensive glossary defining terms like "undertaking," "dominant position," "relevant market," "acquisition of control," and "capital group"). A number of solutions were introduced involving preventive control of concentrations, reflecting certain institutions of EU law (in light of Poland's prospective membership of the European Union). The act defined three basic types of concentrations (merger, acquisition of control, and establishing a joint undertaking), and also maintained the notification obligation for acquiring or taking up a minority stake of shares (at least 25%). Importantly, the parliament again raised the basic threshold for notification, doubling it to EUR 50 million in worldwide turnover. Exclusions were also introduced for the notification obligation, setting a *de minimis* threshold of turnover by the target of EUR 10 million and a *de minimis* threshold of market share for all types of concentrations at 20% of combined share in the relevant market by the participants in the concentration. The latter exclusion was vague, however, as it left open the issue of proper definition of the market (by product and geography) and calculation of market shares, and the result could differ depending on the method of calculation, the baseline data (particularly in estimating the total size of the market in question), and the assumptions adopted (for example, the results could differ if the value or quantity of sales was measured). We often pondered over the proper definition of the market and the calculation of the parties' market share based on available data.

Undoubtedly a turning point for antitrust regulations and control of concentrations was Poland's accession to the European Union in May 2004. This opened up the possibility for the president of UOKiK to apply EU primary and secondary law, including the EC Merger Regulation (139/2004). As a result of this event, Poland was included in the system of allocation of matters between the European Commission and the antitrust authorities of the member states. Further, the Polish regulator became a member of the European Competition Network. This had a similar impact for the Competition practice at our firm. Every day we also had to comply with EU competition law. At the firm we were verifying every transaction for its EU dimension, while also gaining more



and more experience advising clients on consideration of EU cases by UOKiK as well as forwarding of national cases for examination by the Commission.

In the evolution of control of concentrations of undertakings (and antitrust law more broadly), over the recent decades there has been a noticeable intertwining of tendencies toward greater regulation and deregulation. The deregulatory processes with respect to control of concentrations involved in particular the reduction in the number of types of concentrations (mergers) subject to notification, raising the thresholds for the notification obligation, and introducing additional *de minimis* thresholds and the possibility to exclude certain transactions from antitrust review (so that the notification obligation would apply only to the largest concentrations, with the greatest market and economic impact), as well as greater openness by the regulator to direct contact with undertakings and their counsel. In turn, the regulatory trends involved greater rationalisation of the regulations and legal certainty for businesses. This was also the direction taken by the most recent competition act, along with provisions on control of concentrations, adopted in 2007 and still in force today, namely the Competition and Consumer Protection Act of 16 February 2007. The act was extensively amended in 2014 (effective from January 2015). We have written numerous times on our portal inprinciple.pl on the details of the regulations governing control of concentrations of undertakings. It should only be noted here that the 2014 amendment introduced:

- A two-stage notification procedure (basic period for review one month, with a further four months if the matter reaches the second stage)
- A modified method for calculating the turnover of the undertakings, in terms of alternative notification thresholds (generally a transaction is subject to notification if the combined turnover of the undertakings exceeds EUR 1 billion worldwide or EUR 50 million in Poland), as well as additional notification criteria
- An increased number of exemptions from the notification obligation despite fulfilment of the main notification conditions—which, along with the preceding point, means that only relatively large transactions are subject to review by the president of UOKiK
- The new institution of reservations to concentrations issued during antitrust proceedings, in cases where there is a well-founded probability of a significant restriction of competition.

Despite numerous changes and amendments to the law on control of concentrations, there is still much room for improvement. It would be ideal if some golden mean could be achieved in these regulatory and deregulatory tendencies. Lawmakers are still seeking it, with help from the decisional practice and from legal theoreticians, as well as practitioners—businesspeople and legal

advisers handling competition issues on a daily basis. It nonetheless appears that things are moving along in the right direction.

From our team's practice

Our Competition practice can boast of numerous achievements in concentration proceedings. We have represented clients in over 300 cases before the Antimonopoly Office and the president of UOKiK, and in judicial proceedings related to control of concentrations (not counting examinations of the notification obligation and other transaction-related advice on competition issues). We filed the most notifications, 37, in 2000, obtaining approval for undertakings to carry out transactions at the end of the century.

The shortest notification proceeding in recent years in which we obtained a decision allowing our client to carry out a concentration lasted 10 days. The longest, including a study of the market and passage to the second phase of the proceeding, lasted 7½ months (223 days to be precise). Cooperating closely with our clients, we have contributed to definition of relevant markets by the competition authority, e.g. in cases involving sale of products in big-box stores (DIY items and everyday consumer items), developing our own methodologies for defining the reach of local markets, and calculating or estimating the market shares of the parties and their competitors. We have characterised the product markets in such diverse sectors as the manufacture and supply of medical and industrial gases, aircraft engines, courier and postal services, food and sweets, alcoholic beverages, energy and natural monopolies on network markets (heat and water/sewer networks), aerospace, and many others.

In one case involving a planned acquisition on the pharmaceuticals market, after proceedings lasting five months we obtained a decision permitting our client to carry out the concentration. The transaction was fairly complicated, as the pharmaceutical company Gedeon Richter from Hungary intended to take control of the competing Polish company Polpharma SA. In the case we identified about 30 joint relevant markets for drugs and pharmaceutical active ingredients. After a lengthy procedure, the longed-for approval finally arrived, but unfortunately it was never acted on because ultimately the parties did not reach agreement and the transaction was not carried out. This example well depicts how important it should be in practice to comply with the standards of competition law, in order to avoid the risk of imposition of fines, for example for premature integration of undertakings and exchange of confidential market data.

Another time the phone rang on my desk at 9 am. It was the CEO of one of our clients:

"Good morning, counsellor. How are you?"

"Fine, sir, thank you. It's a beautiful day outside. And you?"

"I'm doing great too. I'm sitting in a conference room in the pleasant company of some guests from UOKiK, who I found waiting when I got to the office this morning. We've been chatting for a quarter of an hour. Would you find time to join us?"

"Please don't worry, sir. Follow the procedure and I will be there right away."

It turned out that the unannounced inspection at the company's headquarters was occasioned by a transaction carried out several months before, which we advised on, where we had excluded the obligation to notify the concentration due to the significant level of intragroup turnover, which exempted the concentration from antitrust review. But when the regulator learned about a major transaction on the publishing market, and was not aware of the details of the case, it decided to take a closer look and conducting an unannounced inspection as part of its investigation. The regulator believed there was a high probability that the recently closed transaction was subject to control by the president of UOKiK. Our team assisted for the next few days in inspection and verification activities by UOKiK staff at the company's headquarters. The investigation lasted for several months following completion of the inspection. The result confirmed our finding that there was no notification obligation. It was one of the precedent-setting cases where UOKiK used the "dawn raid" procedure in a concentration case. Typically dawn raids are used by antitrust authorities in cases involving anticompetitive practices, particularly price-fixing.

Another precedent-setting case in our practice involved drafting and filing with the Court of Competition and Consumer Protection an appeal against a conditional decision, i.e. a decision in which consent to carry out a concentration is conditioned on fulfilment of additional requirements imposed by the president of UOKiK on one or more parties to the transaction. The case involved the market for production and sale of concrete for the construction industry. Our client intended to acquire 100% of a dozen or more subsidiaries of a competitor and 50% of the shares in several other subsidiaries. The condition imposed by the regulator after a proceeding lasting over five months was to resell 50% of the shares in one of the companies. The relevant markets for ready-mix concrete are by their nature local markets (as the concrete mixture may be delivered only within a certain distance without detriment to its properties). Additionally, some of the local markets occurring in the case were moving markets, in the literal sense of the word. This is because each of the parties to the transaction used a certain number of mobile concrete production facilities, which could be erected and removed as needed for specific projects, essentially in any region of the country. The proper definition of the

reach of local markets thus caused a lot of problems. Consequently, a decision was issued in which the markets were defined imprecisely. But all the other elements in the case flow from the proper definition of the relevant market: the size of the market, the number of competitors, market share, and so on. It is only from a properly defined market that all the correct conclusions can be reached, first and foremost to determine whether the concentration will have anticompetitive effects. The case was very interesting, but the most interesting intellectual challenge was preparing a precedent-setting appeal to the Court of Competition and Consumer Protection disputing the definition of the relevant market by UOKiK. The court's ruling could have been fascinating. But as sometimes happens in life, particularly in business, pragmatism prevailed. Ultimately, the obligation imposed by UOKiK was fulfilled. A buyer was found for the unit in question, and after a year the appeal to the court was withdrawn.

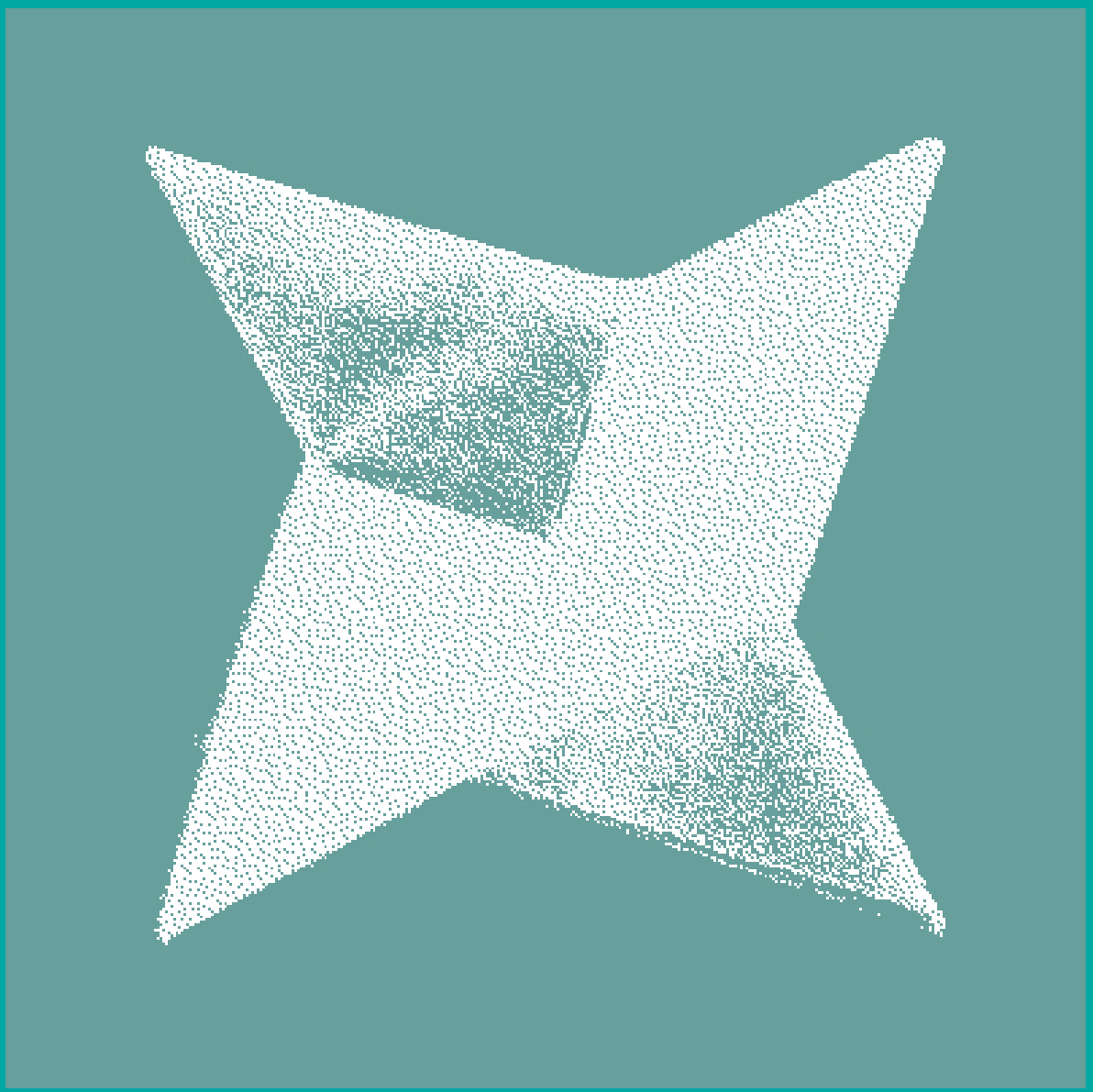
What kind of future?

Competition law, along with merger control regulations, functions under constantly evolving economic, social and political conditions. Thus change is an inherent feature of this field of law. It's good when changes result from growth of the market economy, further economic development and security, accompanied by increasing entrepreneurship and a rising standard of living of the society as a whole.

And the economic and transactional prospects are promising. According to press reports, in 2018 competition authorities noted a record number of notifications of concentrations. Last year a total of 251 notifications were filed with UOKiK, and the president of UOKiK issued 229 decisions in merger control cases (228 approvals and one discontinuance). That was the most in 11 years.

A lot has changed in the last 30 years. Poland, UOKiK, and our law firm have all changed. The international, political, economic and legal environment has also changed. People have changed: the leaders and staff of the Antimonopoly Office and UOKiK, the composition of our own Competition practice. But some things remain constant. We have kept in touch with many entrepreneurs we got to know in that time, as well as many staff of the Department of Concentration Control at UOKiK. And our belief that protection of competition is a fascinating field of law has not changed either.

Andrzej Madała
Competition practice



Maciej A. Szewczyk

The internationalisation of transactional agreements and borrowings from the common law

Along with the systemic transformation from the 1980s to 1990s and the inflow of foreign investment into Poland, the country was exposed to forms of contract already applied in international trade. It wasn't that before then the law in Poland had been homogeneous and "truly Polish." Historically, numerous factors contributed to the development of the Polish legal system, with a dominant role played by solutions from the German and French systems.

But the trend I am discussing here was closely tied to the appearance in Poland of foreign investors who, for understandable reasons, expected the agreements they reached here to be as similar as possible to the forms they were already familiar with. In practice, the constructions they employed were primarily those with their source in countries governed by the common law, and this state of affairs has continued down to the present day.

In simple terms, the greatest influence of the common law is visible in fields connected with the international flow of money. From a legal point of view, these are transactions involving the sale, or more broadly the exchange, of goods, as well as closely related measures connected with obtaining and securing financing.

Legislative traces

From the perspective of transactions as such, the common law and the solutions functioning in that system have exerted relatively little influence over the legislative sphere in Poland. It is true that commercial law, including the law governing the operation of companies, is the subject of far-reaching

harmonisation within the European Union. Thus many solutions function similarly—but not the same—in English law and in Continental systems.

Undoubtedly a key example of the influence of the common law on statutory regulations within commercial law can be found in the regulations governing the involuntary redemption of shares. These are patterned on the English institution of the "squeeze-out" of minority shareholders by shareholders with a large enough majority (90% or 95% of the shares, depending on the redemption procedure).

Another example is the regulations applicable to public companies, e.g. with respect to tender offers for shares or hostile takeovers of companies.

Of course this is not a complete catalogue of the traces of solutions with an Anglo-Saxon genesis found in Polish regulations relevant to M&A transactions. Nonetheless, it would be hard to identify many other such solutions of a legislative nature.

Borrowings in contracts

The influence of the common law is decidedly richer in commercial practice. This is a manifestation of a broader trend also visible in other legal systems. This consists of carrying over certain borrowings of solutions proper to common-law systems into documents (contracts) under which transactions are conducted involving Polish assets (shares, movables, and to some degree also real estate). These transactions, it must be stressed, are still governed by Polish law, where the transplanted solutions either do not exist or, often, exert different legal consequences.

The latter can be especially problematic. To imagine the source of potential problems, it should be borne in mind that (oversimplifying somewhat) a characteristic feature of common-law systems is that the contract concluded by the parties sets forth the entirety of their mutual rights and obligations (with a few exceptions provided for in regulations of law). Consequently, if the parties do not expressly address a particular issue in the terms of their contract, this issue does not form a part of the contractual relationship binding them. This is thus an approach differing greatly from Continental legal systems, one of which is the Polish system. Under Polish law, as highlighted particularly by Art. 56 of the Civil Code, the consequences of a legal act (including a contract concluded by the parties) is determined not only by its express terms, but also by the provisions of the code, principles of social coexistence, and established custom. Thus, under Polish law, it is the entirety of these aspects—not only the words of the contract—that constitute the contractual relationship binding the parties.

Typical construction of contract

In practice, the resort to Anglo-Saxon patterns in M&A transactions begins at the very stage of structuring the contract negotiated by the parties. The structure includes the following elements (not necessarily in this order):

- The subject of the contract (e.g. shares in a company)
- The method of determining the price, where two alternative mechanisms are encountered: "closing accounts" (i.e. with a tentative price calculated according to specified criteria prior to closing, which is subject to verification and adjustment as of the closing date) or "locked-box" (when the price is essentially fixed prior to the transaction, subject to possible change only if unforeseen "leakage" occurs, reducing the value of the subject matter of the transaction)
- The conditions for the transaction to become effective (i.e. to reach closing), known as "conditions precedent"
- Other obligations of the parties (usually the seller) preceding closing of the transaction, referred to as "covenants"
- A definition of "material adverse change," i.e. situations whose occurrence prior to closing will entitle a party (or parties) to be released from the obligation to complete the transaction (for example, a significant decline in value of the shares being acquired)
- Adoption of the closing date and identification of the actions the parties must perform on that date, in a defined order, in order to complete the transaction
- Representations and warranties by the parties addressing for example their legal condition and capacity to conclude the contract, including first and foremost the seller's representations and warranties involving the legal and factual condition of the subject of the transaction
- Indemnification clauses, i.e. provisions concerning conditions where one party is required to make up a loss suffered by the other party, or release it from responsibility if certain conditions occur (this typically involves protecting the buyer in the event that specific risks involving the subject of the transaction, identified during due diligence, actually materialise)
- Dispute resolution procedure—not just making a choice of court or arbitration, but also outlining the specific procedure to be followed for asserting and addressing claims, including deadlines for raising claims and the like.

Consequently, practically every M&A contract contains (at least in theory) a complete set of provisions governing the deal, from defining what will happen and how it will happen for the parties to mutually carry out the contract,

through detailed solutions to be followed if a disagreement or dispute arises between the parties.

The aim of this exhaustive treatment of the contract is to ensure that it serves as a free-standing regulation of the entirety of issues that may arise involving the parties' performance of the contract. The point is that a court resolving a potential dispute will not turn to generally applicable regulations but will seek a resolution to the dispute under the contract itself (which, I would again stress, should in principle exhaustively regulate the relations between the parties to the transaction).

Particularly in the case of a contract between professional entities (i.e. excluding consumers), Polish civil law permits the parties to frame their mutual rights and obligations flexibly and freely. But this does not mean that to achieve the legal consequences that a contract (under its terms) would exert if it were subject for example to the law of England and Wales, it will suffice to make an ordinary choice of Polish law in the contract.

This is because in the absence of an express exclusion of certain dispositive regulations (e.g. concerning statutory warranties), in the event of a dispute between the parties it will be necessary to conduct an interpretation of the text of the contract and determine the actual intent of the parties contained in the contract (for example, in this case, to determine whether their actual aim was to exclude statutory warranties).

Selected examples of provisions

Probably the most attention has been devoted in the Polish legal literature to the topic of representations and warranties. Without delving into the debates and conclusions on this topic, it should be pointed out that given the lack of an equivalent institution in Polish law, simply including representations and warranties of the parties in a contract may generate doubts of interpretation in practice. This is because it is not clear what effect the parties wanted to follow from the fact of making representations and warranties.

The situation is similar with put and call options. For example, simply stating in a contract for sale of a portion of the shares in a company that the buyer has a call option for the remaining shares may not exert legal effect, but in the event of a dispute might even make it impossible to determine the factual intent of the parties.

The solution in this situation is to somehow translate common-law institutions into Polish legal language. This can be done in various ways, but typically is done by:

- Indicating the consequences of making false or misleading representations and warranties—the parties may for example stipulate that if

the point is that a court resolving a potential dispute should seek a resolution to the dispute under the contract itself

a representation by the seller (e.g. that the shares he is selling constitute all the shares in the company) proves to be untrue (as, in this example, there are other shares in the company), then the buyer will be entitled to certain rights (e.g. to renounce the contract or demand redress for the resulting loss, particularly through payment of a contractual penalty)

- Describing the right held by the party and how it may be effectively exercised—in the example of a call option the agreement might include an offer of sale by one party (the seller) which the party holding the option (the buyer) may accept within a certain time and under certain conditions, thus leading in effect to exercise of a call option.

Sometimes in this respect Polish law allows several alternative solutions to be used, any of which would effectively implement common-law solutions under Polish law. (In the option example, we could imagine achieving this through the form of an irrevocable authorisation by the seller to sell the remaining shares, which the buyer could exercise under certain conditions, i.e. the conditions for exercise of the option.)

Risk of incomplete incorporation of concepts

Another problem is casual copying in contracts governed by Polish law of formulations that lack the meaning or relevance they would have if used for example in a contract governed by English law. An example would be the phrase "time is of the essence," the practical consequence of which is that failure to perform a contractual obligation within the designated time is deemed to be a material breach of contract, giving the other party (depending on the type of contract) the right to renounce the contract and not just seek damages for any loss resulting from the delay. If such a provision were simply translated into Polish but later interpreted relying on linguistic or systemic rules proper to Polish law, the original consequences of the breach (intended under English law) might not occur under Polish law.

Boilerplate

Here we should mention another problem that may arise in drafting contracts governed by Polish law but based on patterns from common-law systems (or broadly copying such patterns), namely the use of standard contractual clauses, referred to in English as "boilerplate clauses."

These are provisions covering miscellaneous issues that are not the subject of intense negotiations between the parties, but must be included in the contract if (as discussed above) the contract is to govern the parties' contractual arrangements comprehensively.

The most often encountered clauses of this type include force majeure, severability and assignability clauses. As the names of these clauses suggest, their wording will often overlap greatly with provisions of the Polish Civil Code (usually without modifying the dispositive regulations, but only repeating them).

In practice, such provisions are usually drawn from a repository of ready-made clauses or copied and pasted from previous contracts. Moreover, unlike the principal terms (*essentialia negotii*), often inadequate attention is devoted to boilerplate clauses. This can lead to smaller or larger lapses, or inconsistencies in terminology within the contract, and in extreme cases can even undermine the parties' true intentions, contained in the earlier key provisions, including those set forth in separately drafted agreements. A classic example is inclusion in a contract of a merger clause (also known as an "entire agreement clause"), which provides that the contract being signed supersedes all previous agreements between the parties—when the true intension of the parties is to conclude a new contract alongside the existing contracts, not replacing them.

Summary

Polish law provides the parties great leeway in framing their contractual relations. Thus in bilateral and multilateral agreements among professionals, the parties can greatly limit or even exclude statutory regulations and replace them with solutions chosen by the parties. In practice this often means solutions drawn from common-law systems.

It must be borne in mind, however, that if the contract is ultimately governed by Polish law, the interpretation of these provisions will also be conducted on the basis of Polish law. Thus it is not sufficient to simply lift certain clauses from contracts governed for example by the law of England and Wales, as in effect the actual content of the contract (and thus the meaning of specific provisions) may diverge from what was intended by the parties.

It should also be pointed out, by the way, that if the parties are constructing a closed contractual universe with the intention of excluding certain solutions provided by the Polish legal system, it may be helpful to stipulate that any disputes that arise under the contract be resolved not by the Polish state courts, but in arbitration.

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Bartosz Kuraś

New technologies in M&A transactions

Today new technologies provide lawyers a lot of support—but we want more. Tools are appearing for automation of contract drafting, document review, and due diligence. It may come as a shock to recall how our toolkit looked just a few years ago.

In the 1990s lawyers in Poland commonly used typewriters. When the first computers appeared in law firms, they weren't much more than a glorified typewriter. The internet appeared in Poland in the early 1990s, but it had the status of a technological novelty available only to selected research institutes. Internet access did not become widespread until the end of the millennium, or even the early 2000s. It was only then that the tools used by lawyers began to change rapidly.

Access to sources

The introduction of computers enabled quick access to the sources of law essential to us in our work. Before that, it took a lot of time just to determine the law that was in force at the relevant moment. Consolidated versions of legal acts were helpful when compiled, but they were hard to access and rarely updated. It was also hard to locate commentaries, legal literature, and court decisions.

In the late 1980s there were publishers that compiled indexes of laws in force, in binders with interchangeable pages that could be swapped out for updates. There were also official indexes, but they were not updated as frequently. Of course we also used libraries (as we still do), hardbound sets of judicial decisions, and scholarly law journals. But accessing these sources took time, and you had a competitive advantage on the market if your law firm had a large library under its roof, continually updated.

From the early 1990s, along with the proliferation of computers at law firms, legal acts became available in electronic form, including electronic indexes of current regulations with the texts (at first with a very limited

number of acts). This was the start of the revolution. All the information needed for the work of a lawyer began to appear in electronic form, such as court rulings, commentaries and literature, which is now included in extensive legal information systems with many added functionalities. And these tools are constantly being upgraded. Most of us use one or more legal information systems every day.

On top of these we can add the progressive digitalisation of registers, which began more recently. An electronic search engine for entities listed in the National Court Register (KRS) has functioned since 2012. This allows users to download an electronic document from the KRS Information Centre equivalent to a transcript from the register of companies, partnerships and associations. From 2019 it is now possible to download not just a current transcript, but a full transcript, allowing the user to examine historic entries in the register. This is used for any corporate analysis of a Polish company.

Similarly, the land and mortgage registers were digitalised from the start of the 21st century, and electronic access to these registers was launched in 2010.

These new services have expedited and simplified the process of obtaining information. It is no longer necessary to visit the court to obtain transcripts (current or full) from the commercial register. Versions printed out by users on their own devices have the same force as copies issued by the court in traditional paper form. At any moment we can check the contents of a given land and mortgage register without visiting the court. Many of us don't yet take full advantage of the potential offered by these tools, and there are further changes to come. Traditional filing of hard copies of applications is being superseded (though timidly so far) by electronic filing of applications to the registry courts.

Analysis of documents

New technologies are changing the method of conducting transactions which involve examination of the subject of the transaction.

Not so long ago (in the present century) due diligence in Poland was carried out in physical data rooms. The documents concerning the subject of the transaction (such as a company, an enterprise, or selected assets) were made available to the advisers of the potential buyer for analysis in paper form, typically at the offices of the company, its owner, or the seller's advisers. This required the team of the buyer's advisers—legal, tax and financial—to spend several days at the company, and sometimes weeks, reviewing documents, making notes, and, on this basis, preparing a due diligence report familiarising the buyer with the subject of the transaction and any identified risks connected with the potential transaction.

many lawyers don't yet take full advantage of the potential offered by existing tools, and there are further changes to come

Those days are now just a memory. Even in smaller transactions, the documents are rarely provided in any form other than electronic. Virtual data rooms have obviated the need to examine documents at a fixed place. During the due diligence phase, the buyer and its advisers generally have access to the documents from virtually anywhere on earth that has an internet connection. The suppliers of virtual data rooms have equipped them with tools useful to both the seller and the buyer. The seller can freely regulate access to selected documents and distribute them to various advisers, even different buyers in the case of auctions. The activity of specific buyers and the time they spend reviewing the documents can also be monitored. This makes it much easier to administer the sale process.

Buyers, on the other hand, now have the possibility of round-the-clock access. Suppliers of virtual data rooms offer additional tools facilitating document search and analysis, cooperation between lawyers of different specialties, and even cooperation between different advisers (such as legal, tax, financial and technical) working with the given party to the transaction. This streamlines the flow of information and thus facilitates identification of risks connected with the transaction.

Automation of due diligence

The next phase is supposed to be the era of artificial intelligence and AI-based platforms supporting lawyers, and perhaps partially replacing them. There are already platforms available on the market which can be fed a large quantity of documents (such as employment contracts or leases, which in the case of the specific employer or landlord may be very similar in content, with only slight variations), and in a short time will generate a report analysing the documents based on previously established search criteria. This facilitates searching and comparing documents. The software can identify in a concise report the differences across a large quantity of similar documents, generating statistical data on salaries or rents as well as locating selected clauses (e.g. concerning change of control, governing law, jurisdiction, or rent escalation).

These programs learn by working on documents. They identify patterns and reactions to documents. They read and apply remarks by lawyers, and after obtaining a sufficient quantity of data they flag issues that might escape the attention of less-experienced transactional lawyers. At present they can also catch simple errors, such as missing pages or poorly scanned electronic versions.

Tools of this type facilitate cooperation between advisers from different specialities or different offices, and even across different jurisdictions. They

have built-in systems for notes, comments, reporting and raising questions, facilitating communications within the team.

Thanks to these tools, we can generate high-quality work product faster than we could 30 years ago. But these programs are still incapable of operating without lawyers, although they replace lawyers in many activities. They are useful for preparing preliminary reports, which can then be verified and explored in more depth by lawyers experienced in the relevant field of law.

Drafting documents

The introduction of computers at law firms made it easier and faster to draft documents. The first step was to move from typewriters to computers equipped with a word processing program. Later, as word processors became more advanced, it became possible to track different versions of documents, mark changes electronically, and compare documents. Today we have reached the stage of automated preparation of transaction documents—or at least the first drafts.

Electronic databases store huge quantities of data, including basic templates for documents. Effective management of data and using the data to generate the documents needed for the specific case is possible today using semi-automated tools and also, increasingly, automated tools.

Various types of programming (including plug-ins to word processors as well as stand-alone applications) are capable of generating the initial drafts of simple documents, for now mainly documents of a repetitive nature. These technologies are constantly being improved, raising the question of whether—or rather perhaps when—the client will be able to submit the necessary data to the application (rather than to the lawyer), so that the application can prepare the first draft of the contract.

What more will the future bring?

In the future, will lawyers still be needed to check and revise drafts of contracts generated by an application, and also to negotiate the terms of the contract with the other party? Will the contract be drafted on the basis of a due diligence report also prepared by an application? That remains unknown. The internet and popular search engines can already find the answer to any question. But so far they have not replaced lawyers. It is still important to know who stands behind the answer. A lot depends on whether we trust the person, whether the person can provide assurance that the answer is correct and adequate to the situation, and whether the person can take responsibility if the answer proves incorrect. For now, responsibility, including for decisions and their consequences, is assigned only to people.

In the near future we can expect that transactional lawyers will gain new tools facilitating and expediting their work. But there's no telling what the more distant future will bring.

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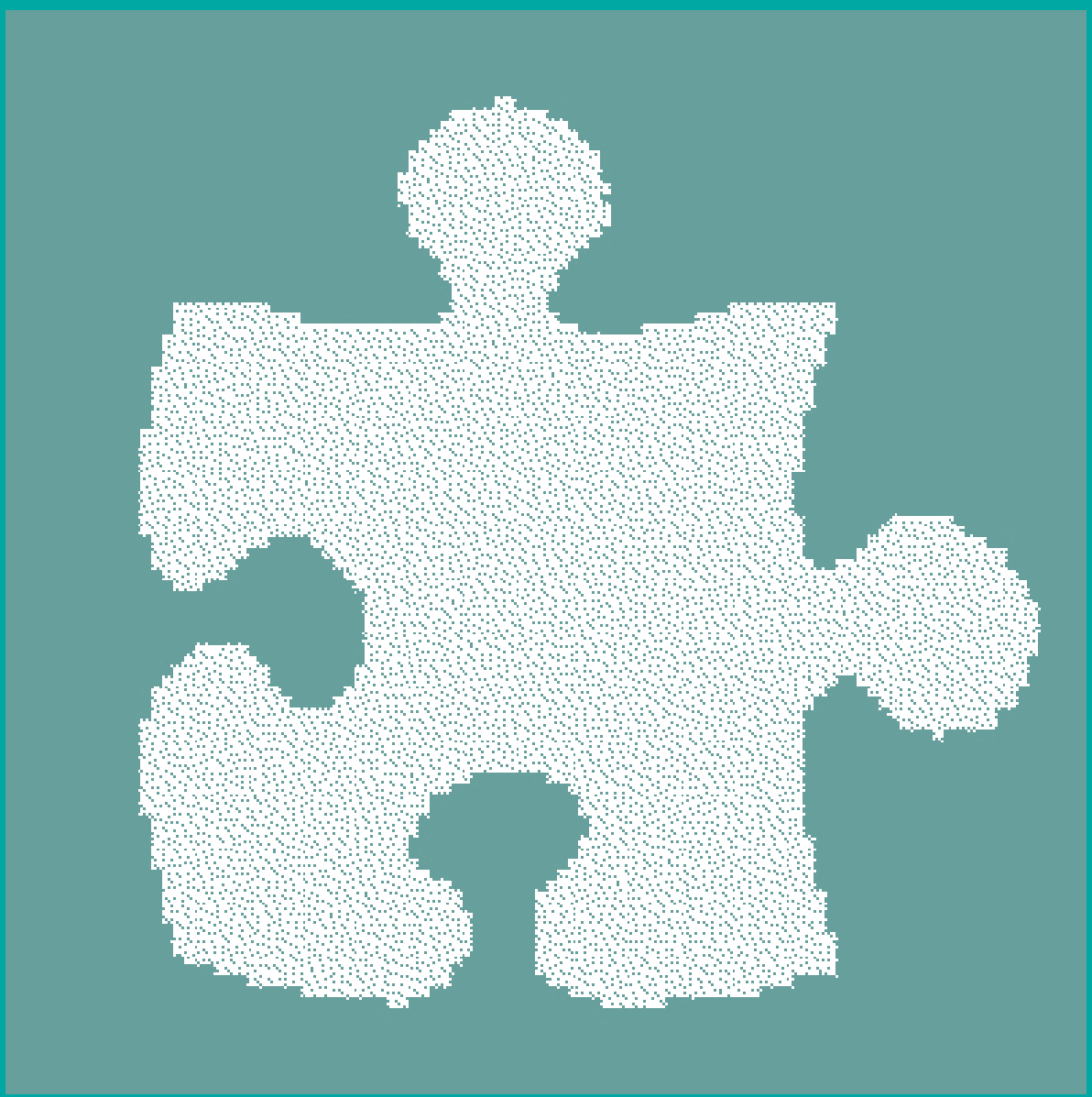
attorney-at-law, M&A and Corporate practice



Mirella Lechna

Public procurement in Poland: Formalism as strong as ever

Over the first 30 years of existence of Wardyński & Partners (and 10 years for the Public Procurement practice) we have observed Polish public procurement law merge into the European system. For the public procurement market here it has been a period of a difficult shift from a formalistic approach to European rules.

The regulations governing the European public procurement system date back nearly 50 years. From the start it was one of the foundations of the functioning of the common market. The idea of adopting it arose from the need to create transparent procedures ensuring fair access to government contracts throughout the European Community. Thus the aim of EU public procurement law is to open up the market for public contracts to competition from all member states and to increase competition in tenders generally.

The Polish history of public procurement dates back to 1994, and for the last 15 years Poland has been covered by the EU system. Statistics show, however, that the level of competitiveness of Polish tenders is alarmingly low. According to the Ministry of Entrepreneurship and Technology, in 2016 there were an average of 2.5 bids submitted in each procurement procedure, and in over 40% of procedures only a single bid was submitted.

Why is this? Unfortunately, it is due to excessive formalism and a lack of concern for achieving the aims of the EU procurement directives in implementation and interpretation of the Polish Public Procurement Law.

Contracting authorities maintain their dominant position

Among practitioners of public procurement law in the EU, there is a commonly held belief that in member states formerly behind the Iron Curtain, the public procurement process is carried out with an excess of formalism. It's hard to deny that view. One of the most telling examples from our own practice in Poland is how the contracting authority is vested with a superior position over contractors, backed by the claim of the need to protect the public interest at the expense of the legitimate interests of contractors. The

Polish government procurement culture represents a hangover from the era of the socialist economy. When the infrastructure market was entirely dependent on state policy, contracting authorities as investors imposed on contractors not only the terms of construction contracts (set forth in a decree of the minister for construction), but also the obligation to conclude the contract and execute the project within a specified time (in line with the provisions of the national socioeconomic plan).

In a centralised system based on state ownership and central planning, the allocation of risk in construction contracts may not have been essential, but the transformation of the system compelled different standards. Nonetheless, habits linger in Poland reflecting the old practices, because there was never any other standard of public procurement to follow.

This is manifest firstly in the common acquiescence to the contracting authority's framing of the conditions for performance of public contracts in an un-partner-like fashion, grossly privileging the contracting authority. The National Appeal Chamber (KIO), the body standing guard over proper application of public procurement law, operates from the assumption that the contracting authority has the right to unilaterally determine the wording of the tender documentation, deciding on the subject of the procurement, the conditions for performance, and other contractual obligations. In this spirit KIO has held that if the provisions of the contract don't suit the contractors, they can simply not file a bid in the procedure for award of the contract.

KIO has also explained that the contractor itself defines its counter-balancing consideration by specifying its fee in the price formula. In this respect the chamber relied on the view that the public interest, as represented by the contracting authority, outweighs the interest of the contractors. Consequently, public procurement contracts provide for severe contractual penalties and an expansive regime of liability for damages on the part of the contractor. This is treated as a justified element of protection of the public interest, in the aim, as KIO stated, "of eliminating pathologies connected with execution, timeliness and curing of defects" (KIO ruling of 29 October 2009, Case KIO/UZP 1461/09).

A fiction of proportionality

For years a practice has become deep-rooted of disproportionate shifting onto the contractor of risks connected with execution of the venture, with the full approval of review bodies. This is based on the claim that there is no obligation to submit an offer. In effect, in Poland public procurement law is essentially perceived as guarding the principles of prudent management of public assets, with the main emphasis on protection of the public interest.

This loses sight of fundamental principles which public procurement law is supposed to pursue, such as the principle of fair competition in access to public contracts and the principle of proportionality in the actions taken by contracting authorities in the procurement procedure. Proportionality is regarded by the Court of Justice of the European Union as one of the fundamental principles of EU law. It requires that measures introduced under acts of EU law be adequate to achievement of the adopted aims and not extend beyond what is necessary to achieve those aims. Simply put, the principle of proportionality means that the measures applied by the contracting authority must be essential and as unburdensome as possible. In Polish public procurement practice this principle was neglected for years, and was only codified in the Public Procurement Law in 2016.

Condoning noncompliance with the principle of proportionality in public procurement has allowed the tendency to secure the public interest at the cost of contractors to expand beyond all reason. In 2018 we witnessed an attempt to deprive contractors of the protection of the courts in a situation where, due to a change in circumstances or the purchasing power of money, execution of the contract would expose the contractor to a glaring loss (see Case KIO 173/18 on the General Directorate for National Roads and Motorways' exclusion from contract templates of Civil Code Art. 357^1, 358^1 and 632 §2).

Upsetting the economic balance

A formalistic approach to public procurement is also the basis for negating the need for contracting authorities to seek compromise when it comes to escalation of contractors' fees for construction work due to changes in market prices of materials. The universal justification for refusal to modify a contract due to a change in market circumstances arising after conclusion of the contract is Art. 144 of the Public Procurement Law. This article instates a general ban on amending contacts, but also explains the rules under which modification of the contract is possible. It is very often forgotten that the current Art. 144 is the result of evolution in the rules of European public procurement law. In Europe in the 1980s a need was identified for introducing flexibility in performance of public procurement contracts. It was recognised that when factual and legal changes occur during contract performance, exerting an impact on the contract, the need for realistic and fair execution of public tasks requires that contracts be modified to reflect those changes.

This is because from the perspective of public procurement law, disruption of the economic balance between the parties to a public contract is unacceptable. This principle is confirmed by rulings from the Court of Justice examining

disruption of the economic balance between the parties to a public contract is unacceptable

the permissibility of modifications to public contracts. The economic balance between the parties to the contract established at the stage of the tender, determined by the scope of the procurement stated in the contract description and the price offered by the contractor, ensuring an equivalence in the mutual consideration, serves as an indicator of the fairness of the method of establishing the parties' contractual relationship (see *Pressetext Nachrichtenagentur GmbH v Austria*, Case C-454/06). A similar position was expressed by the president of Poland's Public Procurement Office in the opinion entitled "Modification of public procurement contracts due to statutory change in the VAT rate."

Clearly, the process of modification of public contracts must be controlled so that conclusion of an annex or settlement between the contracting authority and the contractor does not lead to a situation where the changes made in the contract are so material that they constitute de facto the award of a new public contract. Contracting authorities in Poland may now apply without fear the guidelines from the Court of Justice, codified in Art. 144(1e) of the Public Procurement Law, to conduct a test of the materiality of each change being considered. Nonetheless, annexes and settlements are generally not concluded by Polish contracting authorities, because they do not want to assume responsibility for proper classification of a given change as permissible or not.

Digital nightmare

Digitalisation of public procurement is without a doubt one of the most important changes in public procurement law introduced by the reform of the EU directives in 2014. Poland was required to adopt appropriate regulations to enable tender procedures to be conducted electronically, which was intended by European lawmakers to simplify the procedure and facilitate access to public contracts.

But in Poland the consequence of introducing the new regulations was not to simplify the procedure. Rather, it created new, previously unknown barriers in access to contracts, and the digitalisation of public procurement in the everyday practice of contracting authorities and contractors turned into a digital nightmare. In resolving disputes over whether a contractor had used the correct algorithm for a qualified electronic signature or properly placed an electronic signature on a scan of a document previously signed by hand, the National Appeal Chamber adopted mutually exclusive positions, and the decisional practice became fragmented. Thus the problem arose of great legal uncertainty and failure by the Polish authorities to comply with the principle of equal treatment in public procurement. There can hardly be said to be equal access to contracts when the identical factual situation of contractors may be evaluated in diametrically opposite ways and there is no way to predict the

outcome. It took months for the Public Procurement Office to take a position on how to treat a scan of an offer signed electronically (the regulations in this respect in force since 18 October 2018 are impenetrable to participants in the public procurement market) and to unify the application of law in this respect.

Necessary changes

Work is currently underway on a new Public Procurement Law. Lawmakers have identified certain problems, such as disproportionality in contractual relations and the lack of settlements and escalation mechanisms in public contracts. Unfortunately, the methods employed by the drafters of the new act still perpetuate the infamous tradition of formalism in Polish public procurement. According to the draft provisions, a public procurement contract can still be disproportionate, so long as it is not grossly disproportionate. To encourage settlements, in the event of a dispute the parties would have to apply to the Court of Arbitration at the General Counsel to the Republic of Poland (PGRP) for mediation or conciliation, even though PGRP acts for public entities in judicial proceedings whenever the amount in dispute exceeds PLN 5 million. Escalation of the contractor's fee, in turn, would be limited to an amount arbitrarily set by the contracting authority. It is thus doubtful that the mechanism of escalation will effectively restore the economic balance between the parties to public contracts.

It is apparent that much remains to be done in Poland to establish a standard for applying public procurement law consistent with the European acquis. Disregarding the aims expressed in the procurement directives leads to excessive formalism in applying the law in this area, procedures become unintelligible, and consequently the results that should be achieved become distorted.

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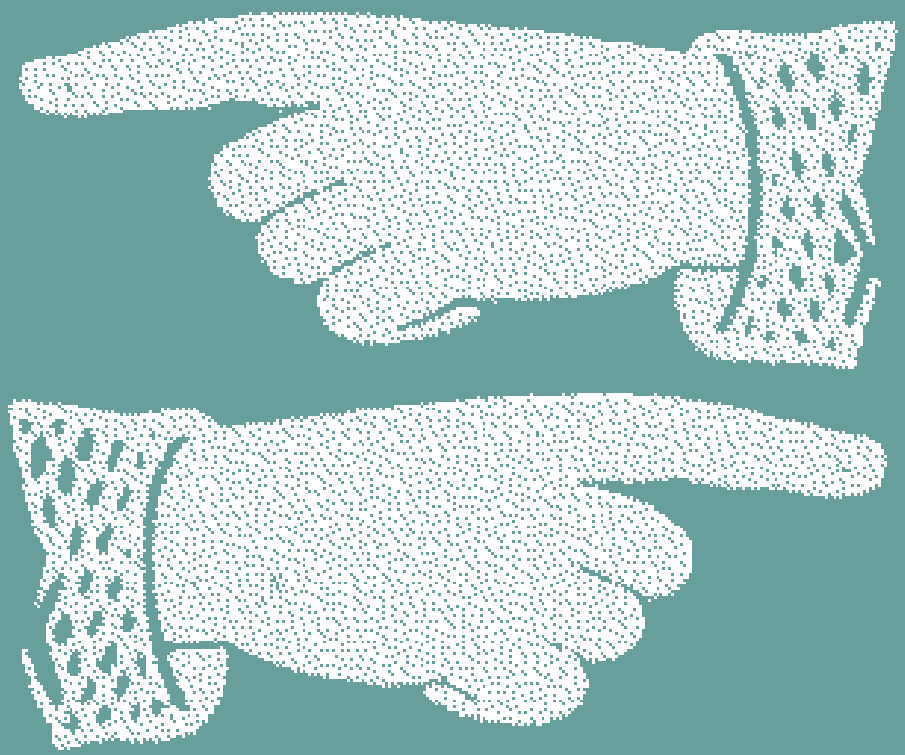

Martyna Robakowska
Dominik Wałkowski

The evolution of environmental aspects of projects in Poland

For a decade or more environmental protection has become an increasingly important element of execution of construction projects. Not only is the number of regulations in this area growing, but also the ecological awareness of society and interest in ecological issues. Investors also place greater weight on this area.

Today a thorough assessment of the environmental impact of a planned project is one of the key rules of environmental law, implementing the concept of preventing negative consequences for the environment. But 30 years ago not many investors planning to build a residential estate or industrial plant in Poland examined meticulously how their project would affect the immediate vicinity. This was due to a lack of regulations requiring investors to analyse such issues, as well as a lack of awareness of the nature and aims of environmental protection. There was also no formal necessity to consider the interests of others impacted by the project.

The first act comprehensively regulating environmental issues was adopted just a few years before, in 1980. Later, the parliament took an interest in assessment of the environmental impact of projects. Somewhat earlier, regulations governing these issues began to take shape under international law (the Espoo Convention of 1991) and European law. Over time, more regulations were passed in this area, particularly in connection with Poland's efforts to join the European Union and the need to bring the national legal system into line with EU regulations. Consequently, today any larger project is practically impossible to carry out without a thorough consideration of its environmental impact. Obtaining the relevant administrative decisions connected with environmental impact is generally the hardest and most important element of the development process.

Slow beginnings

Even a superficial analysis of the history of environmental law in Poland shows that environmental protection requirements took a long time to mature. The obligation to obtain a decision on environmental conditions has existed since 2005, but that doesn't mean much serious thought was given to protecting the environment at that time. The first environmental decisions were often terse and vague. It was only in subsequent years, thanks to implementation of successive EU directives and the growing awareness of the negative impacts of large construction projects, that the procedure for assessment of environmental impacts became an incredibly complex and exhaustive instrument drawing on the best available scientific knowledge. This process reached full maturity only recently, and even now in some aspects the existing solutions leave much to be desired.

It might be asked why this took so long. It seems that the fundamental reason was the low awareness of environmental protection issues and the meagre knowledge of how development projects impact the environment and human life and health. These attitudes cannot simply be legislated into existence. Additionally, the basic regulations concerning environmental impact assessment, despite their level of detail, are identical for the most varied projects, regardless of whether the investor plans to build a rail line, a brewery, a power plant, or a waste treatment plant. The maturity of the system is evident in the adjustment of the standard requirements, through processes of screening and scoping, to the nature and parameters of the specific project and its location.

Today verification of the documentation doesn't involve only checking whether all the legally required elements are identified. The collected data and findings of the authors of environmental impact reports are checked by experts from the regional environmental protection offices, verified against the latest nature surveys and the available scientific literature, and sometimes confronted with the findings of other experts. Environmental impact assessment has ceased to be merely a formal check on the completeness and consistency of the documentation for the project. It has become a scrupulous, scientific and critical analysis of the impact which the project is likely to have on the environment.

Not a step without an environmental decision

A decision on environmental conditions is generally the first permit which a planned project must obtain during the development process, as this decision must be enclosed with the application for a zoning decision, a building permit, certain water permits, or licences connected with waste treatment.

The environmental decision primarily specifies the essential conditions for exploitation of the environment during the phase of construction and operation or use of the facility. It reflects the impact the planned project is expected to have on human life and health, the conditions for functioning of local communities, and the impact on biodiversity, natural resources, the landscape, and even climate. Sometimes additional, highly specific and often also quite burdensome obligations are imposed on the investor. There are several different authorities taking part in the procedure, analysing the documentation prepared by the investor falling within their competence (the regional director of environmental protection, inspectors from the State Sanitary Inspectorate, and authorities of Polish Waters state water administration). Sometimes the investor is required to implement the project using a different approach than it would have preferred, when that is the only reasonable way to minimise the negative environmental impacts.

Although a decade and a half has passed since introduction of the regulations requiring investors to obtain an environmental decision, certain issues continue to stir doubts and lead to errors that can sometimes make it necessary to repeat the process. Sometimes the first questions arise before an application for such a decision is filed. Many investors are unable to determine unequivocally whether their planned venture should be regarded as one that may cause a significant impact on the environment. A catalogue of such projects is set forth in a regulation of the Council of Ministers. Only implementation of such projects requires the investor to obtain a decision on environmental conditions. Among other reasons, difficulties arise because, apart from indicating specific types of installations constituting such projects (e.g. installations for production of basic pharmaceutical products using chemical or biological processes, or installations for manufacturing paper or cardboard with a production capacity of 200 tonnes per day or more), the regulation also employs categories such as "parking lots" and "industrial development," indicating that a structure of this type is deemed to constitute a project that may cause a significant impact on the environment if its built area (including accompanying infrastructure) exceeds certain thresholds. It should also be borne in mind that one project may fall under more than one category of projects indicated in the regulation. This needs to be reflected in the stage of preparing the environmental documentation.

Many controversies occur also in situations where the investor intends to modify or expand a functioning facility. Taking such actions may require the investor to obtain an environmental decision even if such a decision was not required for the initial venture. Doubt may also arise when, after obtaining all required permits, the investor commences execution of the project. This is

because certain project specifications undergo modification from the original assumptions. In such instances, it should be determined whether in light of the modifications, an amendment to the existing environmental decision should be sought.

Neighbours have a say

The parliament has provided for broad social participation in proceedings for issuance of environmental decisions. Members of the local community have a right to review the documentation filed by the investor and the positions presented by authorities negotiating and advising on the project. They can also make comments or requests and take part in administrative hearings open to the community. Ecological organisations may join such proceedings, file evidentiary motions, appeal against decisions, and challenge decisions in the administrative courts.

In the early years of functioning of these regulations, the authorities conducting the proceedings often interpreted the regulations governing social participation too narrowly. Sometimes comments by representatives of the local community were ignored, they were not provided with essential documentation in the case, and ecological organisations were not allowed to join proceedings even though they met the statutory requirements. These violations resulted in decisions on environmental conditions being overruled by the administrative courts. For many investors this meant they had to suspend the project until they could obtain a new decision.

Based on these experiences, both investors and the authorities issuing environmental decisions now take a much more cautious approach to issues connected with social involvement in environmental proceedings. Investors respond in depth to comments raised by the local community, and in the case of particularly large projects also apply to hold administrative hearings open to the community, during which they attempt to dispel concerns raised by the community and ecologists. At their own initiative, they also organise meetings with residents, and prepare reports and presentations on the project. These measures initially lengthen the procedure, but once a decision is issued, they can hold down the number of appeals and challenges, as at least some of the doubts about the nature of the venture have already been resolved.

For the common good

Given how time-consuming proceedings for issuance of environmental decisions can be, and the costs connected with obtaining such decisions, some investors try to avoid this process or conduct it at the lowest possible cost. In the past it was common to split planned projects into several smaller ones

to obviate the need to seek an environmental decision (as the requirement to obtain a permit often depends on exceeding certain parameters for the project, such as the built area).

Currently one of the sore points is the lack of objectivity in the authors of environmental reports. On one hand this seems inevitable, as the reports are commissioned by the investor with the aim of justifying implementation of the project under conditions acceptable to the investor. On the other hand, this may lead to ignoring inconvenient aspects in reports, overemphasising positive aspects, or burying negative impacts so they go unnoticed.

The staff at the regional environmental protection offices can readily identify such weaknesses, however, and ensure that all doubts are clarified. Thus it is in the interest of all stakeholders to ensure that the scale of negative environmental impacts of a project are correctly identified, evaluated and mitigated. Once the facility is built, it may operate for decades, and over all that time exert an impact on the environment and the living conditions of the nearby residents. The point is for the investor to achieve its aims while the residents continue to enjoy an unspoiled environment. It's good that we are now much closer to this goal than we were 30 years ago.

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Real estate transactions: Share deals and asset deals

The real estate market in Poland has enjoyed continual growth for 30 years, apart from brief slumps in the residential sector. The volume and value of transactions in the real estate industry is growing year on year. But a change in the profile of transactions has been visible for several years. More and more investors are deciding to acquire companies that are owners or usufructuaries of property (share deals) rather than buying the property directly (asset deals).

Two types of transactions—different requirements, rules and conditions

Both asset deals and share deals achieve the same aim, which is for the investor to acquire control of real estate. But the two structures entail different obligations for the parties and different risks, particularly for the buyer. This in turn creates a need for different structuring of the transaction itself, and also the preliminaries, such as legal examination of the subject of the acquisition.

An asset deal is understood to mean the acquisition of an enterprise or an organised part of an enterprise, as well as a transaction involving acquisition of particular assets, which might include a piece of real estate. This definition of the subject of the transaction in turn determines the scope of legal review the investor should conduct prior to the acquisition. In particular, due diligence in an asset deal can skip corporate issues connected with legal title to the shares in the company that owns the assets being acquired, as the shares are not the subject of the acquisition.

But examining title to the shares is an essential element of due diligence in the case of a share deal, in which the buyer is not acquiring the real estate

directly but taking control of the company that owns the property (or holds it in perpetual usufruct). Share deals can also be used to pursue joint ventures on the property market, involving more than one entity. In that case, the parties will conclude additional agreements, such as a joint-venture agreement or shareholders' agreement. This structure for joint ventures currently appears to predominate over shared ownership of real estate and agreements allocating portions of the property between the co-owners for their exclusive use (*quoad usum*).

Regardless of the structure of the transaction, where the underlying asset is real estate, the investor should focus on evaluating the effectiveness of acquisition of the key assets by the seller. In the context of real estate, particular attention should be paid to whether the planned transaction will be conducted under the protection of the warranty of reliance on the land and mortgage register, that is, whether the seller's right to the property is disclosed in the land and mortgage register for the property. Under Polish law, the contents of the land and mortgage register are dispositive on a buyer's acquisition of title under a transaction with the person entitled to the property according to the entries in the register. This principle is subject to certain limitations, however, in particular in the case of market transactions between professionals. Thus, apart from verifying the entries in the land and mortgage register, it is also essential to examine and assess the basis for acquisition of the real estate by the existing owner for validity and effectiveness. For example, a determination that real estate was acquired by the seller in avoidance of a statutory right of pre-emption or from an unauthorised seller will exclude the protection of the warranty of reliance on the land and mortgage register. This may entail negative legal consequences for the buyer in the form of a risk of undermining the effectiveness or validity of the acquisition of the property. Examining title to the real estate is particularly important in share deals, as there the investor will not enjoy the protection of the warranty of reliance on the land and mortgage register.

In real estate asset deals, apart from the real estate itself, which is the main subject of the acquisition, the investor may also acquire a range of other assets and rights connected with the real estate or the enterprise. In transactions of this type, leases of the property may play a particularly important role. This applies especially to commercial properties such as office buildings, shopping centres, and warehouses, where rental income is the foundation of the owner's business model. As a rule, in the event of the sale of real estate, the buyer enters into the lease relationship as the lessor, in place of the seller. Unless otherwise provided in the lease, the tenant will not be entitled to terminate the lease due to a change in the owner of the property. In the case of other contracts,

investors should focus on evaluating the effectiveness of acquisition of the key assets by the seller

depending on whether the subject of the transaction is the property itself or an enterprise, the possibility for assumption of each contract connected with the subject of the transaction should be examined individually. In the case of direct sale of the real estate, contracts only related to the real estate typically do not pass to the buyer. In the case of sale of an enterprise, only assets may be transferred, not obligations. This means that for obligations arising out of contracts concluded within the enterprise to be effectively transferred to the buyer, the consent of the obligee will be required. An asset deal may entail the need for the buyer to obtain various types of permits, licences or concessions to operate the business. If the subject of the transaction is an enterprise, then, unless otherwise provided by law, these things pass to the acquirer of the enterprise. But acquisition of the real estate alone does not carry with it this effect. The same applies to transactions occurring as part of an ongoing process of developing the property. Administrative decisions issued during the development process, such as the building permit, must be transferred to the new investor by a separate administrative decision.

This issue generally does not apply to share deals. In the case of acquiring shares in a company, the operation of the company as such does not change. All contracts concluded by the company prior to the transaction remain in force and should continue to be performed under the existing terms. The only exception would be contracts in which the parties included specific change-of-control clauses, in the event of changes in ownership of the parties. Apart from exceptional situations, the investor should not be concerned about the loss of licences, concessions and permits obtained by the company it is acquiring before the transaction which are necessary for the company to operate its business. The same applies to administrative decisions issued in the course of development of the property. The rights under those decisions remain with the company and there is no need to transfer them.

Both share deals and asset deals may require additional permits or allowance for the rights of other entities, including the State Treasury or local government units. Particular attention should be paid to the statutory right of pre-emption. This may apply in particular to asset deals in situations where the real estate has a specific nature or characteristics. For example, the right of pre-emption should be dealt with in the case of undeveloped real estate held in perpetual usufruct, real estate located within special economic zones, and woodlands. Another category involves agricultural property, trade in which is subject to special regulations applying to both asset deals and share deals. Regulations in force since 2016 limit the set of entities that can acquire agricultural real estate from individual farmers. Other entities must obtain an appropriate administrative permit for such an acquisition. If agricultural

property is owned by a company, trading in the company's shares is also subject to restrictions in the form of a right of pre-emption in acquiring the shares by the State Treasury or the right to buy the property from the company after its shares have been acquired by the investor.

Share deal—tax consequences

As a rule, the sale of shares in a company that is the owner or perpetual usufructuary of real estate is not subject to VAT. Instead, such transaction is subject to the tax on civil-law transactions (at the rate of 1% of the market value of the shares), if the subject of the transaction is shares in a Polish company. The tax obligation rests on the acquirer of the shares.

With respect to corporate income tax, the income from sale of shares in a company that is the owner or perpetual usufructuary of real estate is subject to taxation at the standard CIT rate of 19%. This is based on the difference between the revenue on the sale (typically the purchase price) and the revenue--earning costs, which are the expenses incurred to acquire the shares (purchase price, brokerage fees, notarial fees etc). Expenditures on acquisition or taking up of shares are recognised as a revenue-earning cost only upon disposal of the shares (and not at the time of acquiring or taking up the shares). Shares are also not subject to amortisation.

From the income-tax perspective, a special situation arises when there is a sale of shares by an entity that does not have tax residency in Poland. In such case, the income will be taxed in Poland only when it is deemed to be obtained in Poland, and thus if:

- There is a sale of shares via the Warsaw Stock Exchange, or
- There is a sale of shares in a company in which at least 50% of the asset value constitutes (directly or indirectly) real estate in Poland or rights to such real estate.

The income from the sale of shares by such an entity is then taxed under the same rules applicable to persons with Polish tax residence, but often modified pursuant to tax treaties signed by Poland. Under such treaties, profit from the sale of shares is typically subject to tax in the country where the seller has its registered office or residence, unless the treaty contains a real estate clause permitting Poland to tax the profit from sale of shares in companies whose assets primarily consist of real estate in Poland. Real estate clauses are found for example in tax treaties with Austria, Denmark, France, Germany and Sweden. But there is no such clause for example in the tax treaty with the Netherlands, which has thus encouraged its residents to invest in the Polish real estate market. The lack of a real estate clause ensures investors tax

neutrality in Poland in the event of sale of shares in a Polish company holding real property assets.

Asset deal—tax consequences

In the case of asset deals involving real estate, the key from the point of view of the tax consequences is the proper determination of the subject of the transaction, i.e., whether the transaction is deemed to involve an enterprise (or an organised part of an enterprise), or individual assets (including real estate). The differences involve not only the immediate effects in the area of taxes on turnover and income (as discussed below), but also the buyer's liability. This is because only the buyer of an enterprise (or organised part of an enterprise) is jointly and severally liable with the seller for the seller's tax arrears arising prior to the date of acquisition (although the liability is limited to the value of the acquired enterprise or organised part of an enterprise). Such liability does not arise in the case of acquisition of individual assets.

Sale of an enterprise or organised part of an enterprise

The sale of an enterprise or an organised part of an enterprise is not subject to VAT (Art. 6(1) of the VAT Act). However, it is subject to the tax on civil-law transactions under general rules; that is, the sale of any asset that is an element of an enterprise or organised part of an enterprise is subject to the tax at a rate of 1% or 2% of the market value (depending on the type of asset). Then the acquirer of the enterprise or organised part of an enterprise is regarded as the taxpayer for purposes of the tax on civil-law transactions.

In the case of income generated from the sale of an enterprise or an organised part of an enterprise, the standard corporate income tax rate of 19% applies. The income constitutes the excess of the revenue (in practice, the sale price for the enterprise or organised part of an enterprise determined by market value) over the tax value of the enterprise or organised part of an enterprise in the accounting books (which in the case of fixed assets, including real estate, is the initial tax basis less amortisation deductions, and in the case of other assets is generally the acquisition price).

It should be borne in mind that the sale of an enterprise or organised part of an enterprise may generate certain CIT consequences also from the buyer's perspective. Namely, transactions of this type often lead to the creation of positive value of the business (i.e. goodwill), understood for the purpose of tax regulations as the excess of the price for acquisition of the enterprise (or organised part of an enterprise) over the market value of its components. If goodwill arises, it can be amortised, and for this purpose the initial tax

basis for the components of the acquired enterprise (or organised part of an enterprise) is established based on their market value.

Sale of particular assets

As a rule, the sale of individual assets is subject to VAT at the standard rate, which is currently 23%. In the case of real estate, however, a reduced VAT rate (8% for residential property) or exemption (e.g. for undeveloped land not of a construction nature, and for structures and parts of structures at least two years after initial occupancy) may be applicable. In certain situations taxpayers may also waive the VAT exemption and elect to be taxed. If it turns out that the supply of real estate is subject to a VAT exemption, and the taxpayer does not waive the exemption, then the transaction is subject to the tax on civil-law transactions (2%), and the obligation to pay this tax will rest on the buyer.

As in the case of the sale of an enterprise or organised part of an enterprise, the income derived from the sale of individual assets, including real estate, is subject to corporate income tax at the rate of 19%. The tax base (income) here constitutes the excess of the revenue from sale (in practice the price) over the value of the assets according to the accounting books.

Unlike the sale of an enterprise or organised part of an enterprise, however, in this instance no goodwill is created. This does not change the fact that the acquired assets, including real estate (except for land), may be amortised.

Summary

Selection of the appropriate structure for a real estate transaction may influence the ease of conducting the transaction as well as the risk on the part of the investor. The structure determines the scope of necessary legal analysis prior to the acquisition, as well as the duties and conditions the parties must fulfil prior to closing. For this reason, further growth in the number of share deals on the real estate market may be anticipated, particularly in the case of commercial properties that have already been let.

It should also be borne in mind that these types of transactions have different tax consequences (for both turnover tax and income tax), which often generates conflicting interests between the parties to the planned real estate transaction (for the seller a share deal may be more advantageous, and for the buyer an asset deal). Conducting a tax analysis of the transaction sufficiently far in advance facilitates appropriate planning of the structuring measures and preparation for negotiations. For each of the parties, it is vital to define precisely in the sale contract the rules of liability for tax risks connected with

the assets being sold, including proper framing of damages clauses and the seller's representations and warranties (for example with respect to possible reclassification by the tax authorities of the subject of the transaction from an enterprise or organised part of an enterprise into a set of separate assets).

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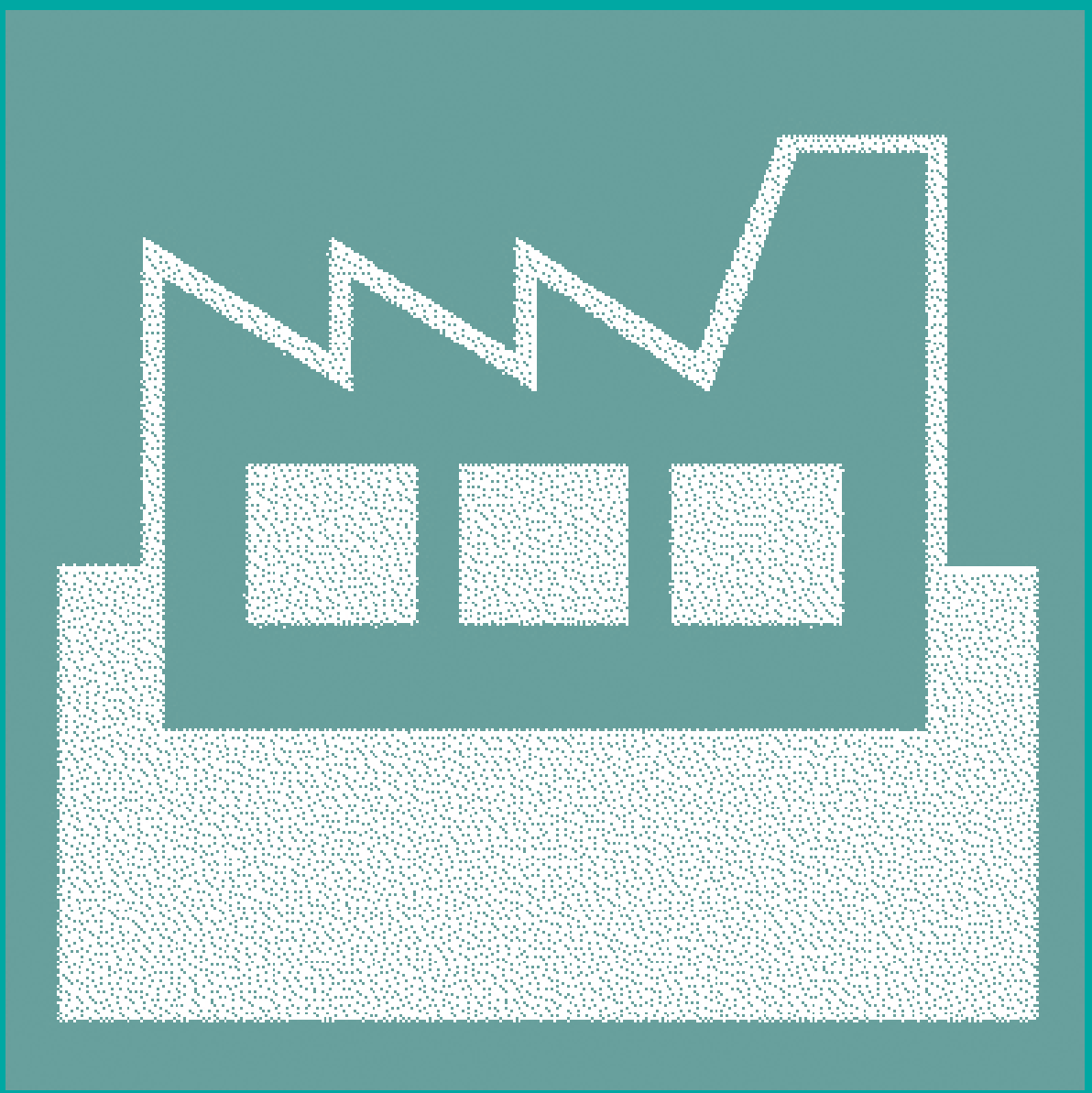

Julia Dolna

Approvals: Legal limitations on conducting transactions in Poland

The condition of the Polish M&A market depends on many factors, such as the economic and political situation in the country and the legal and tax environment for businesses. But another significant element impacting the size and structure of investments in Poland is the legal restrictions on conducting transactions. They affect both share deals and asset deals. These restrictions may involve the obligation to obtain approvals of various kinds. This might mean the consent of the relevant body of a company, a public administrative body, or a third party. Below we describe the most common instances where approvals are required to carry out transactions, as well as the consequences of failing to obtain them.

Approvals of corporate authorities

The Commercial Companies Code provides for the possibility of restricting the alienability of shares in a limited-liability company in the articles of association, as well as limiting the disposal of registered shares in a joint-stock company in the company's statute. Such limitation may consist of a requirement to obtain the consent of the management board or other authority of the company: the supervisory board, the shareholders' meeting or the general meeting. Such restrictions are "relative" in nature, meaning that they apply only when the company's articles of association or statute contains provisions on this issue. An exception is the transfer of registered shares in a joint-stock company which are linked with an obligation to provide recurring in-kind consideration. In that instance, disposal of the shares is mandatorily conditioned on obtaining the consent of the company.

Mandatory restrictions on alienability also apply to disposal of certain elements of the company's assets. This applies among other things to sale of a company's enterprise or an organised part of its enterprise, which occurs in the case of asset deals. Then there is a statutory restriction requiring the approval of the shareholders' meeting or the general meeting, in a resolution adopted by a two-thirds majority of the votes (in the case of a limited-liability company) or three-fourths of the votes (in the case of a joint-stock company), although the company's articles of association or statute may impose more demanding conditions for adoption of such a resolution.

The consequence of failure to obtain corporate consent to conduct the transaction depends on the source of the requirement. If the approval is required by law, the transaction is invalid. If the approval is required by a provision of the company's articles of association or statute, the transaction is still valid, but should be ratified through subsequent consent.

Approvals of public administrative authorities

Another type of approval for carrying out a transaction is the consent of public administrative authorities. An example is approval of a concentration, issued by the president of the Office of Competition and Consumer Protection (UOKiK) in the form of an administrative decision, after an undertaking notifies the intended concentration and the president of UOKiK finds that the concentration will not significantly restrict competition on the market. It should be pointed out that not every intention to carry out an M&A transaction requires notification of the president of UOKiK. This obligation arises when the combined turnover of the undertakings participating in the transaction in the year preceding the notification exceeded the values specified in the regulations and there are no "exonerating" conditions applicable in the case. The consequence of carrying out a concentration without obtaining the required approval of the president of UOKiK may be imposition of a fine on the undertaking. Additionally, in certain circumstances, the president of UOKiK may order the demerger of the merged undertaking or sale of assets or shares, among other sanctions.

Another example of an approval from an administrative authority which must be obtained during the course of the transaction is a permit from the minister for internal affairs. This will be necessary if, as a result of the transaction, a foreigner would acquire or take up shares in a company with its registered office in Poland which is the owner or perpetual usufructuary of real estate in Poland. The need to obtain such a permit arises firstly if, as a result of acquisition or taking up of shares, the Polish company becomes a "controlled company" (i.e. controlled by a foreigner), or secondly, if the Polish company

failure to obtain approvals may invalidate the transaction

is already a controlled company and the shares are to be acquired or taken up by a foreigner who is not an existing shareholder of the company. A permit from the minister for internal affairs will also be required when ownership or perpetual usufruct of real estate in Poland would be acquired in the acquisition of an enterprise or an organised part of an enterprise.

The regulations do provide for certain exceptions to these instances, involving foreigners who are citizens or undertakings of countries that are members of the European Economic Area or Switzerland, but these exceptions do not apply to real estate in zones close to the national border or agricultural land with an area greater than one hectare. It should be stressed that when such a permit from the minister for internal affairs is required, acquisition of real estate or shares without obtaining a permit is invalid.

There is also a danger of the sanction of invalidity in the case of acquisition of real estate in violation of the limitations arising out of a statutory right of pre-emption. This right may be vested in the local commune (for example if undeveloped real estate is sold which the seller previously acquired from the State Treasury or a local governmental unit), in the State Treasury represented by State Forests (for example when property is designated as forest land, not owned by the State Treasury), and in certain instances in the tenant of agricultural real estate or the National Support Centre for Agriculture (KOWR) acting for the State Treasury (in the case of sale of agricultural real estate).

Under the prevailing position of the courts, restrictions involving the right of pre-emption of real estate also apply to transactions in the form of asset deals, where the subject of the transaction is an enterprise that includes real estate. KOWR also holds a right of pre-emption in the case of disposal of shares in a company that is the owner of agricultural real estate. An unconditional sale of shares in this situation is void by operation of law.

Approvals of third parties

In certain transactions the consent of third parties may also be required. For example, if a married individual is a party to an asset deal or share deal, for safety's sake it is advisable to obtain the consent of the individual's spouse. The situation is similar in a case where several persons share the right to disposal of the item which is the subject of the transaction. Then the approval of the joint holders is required. Other examples of approvals that may prove necessary when carrying out a transaction include the consent of counterparties with whom the company that is the subject of the transaction has concluded commercial agreements. This is because such agreements may contain change-of-control clauses, which in the case of a change in the

ownership structure of the company require notification and consent of the other party for the agreement to remain in force.

Approvals as legal restrictions on conducting transactions

The obligation to obtain approvals of various types to carry out transactions may be perceived on one hand as a restriction on the freedom of investment, but on the other hand may be justified by the need to protect certain rights and values. It should be added that apart from such approvals, there are also other legal limitations on carrying out transactions in Poland, such as the specific form required for an agreement to sell shares, an enterprise, or an organised part of an enterprise, as well as certain notification requirements provided for in the regulations (including post-transaction notifications).

Thus the M&A area illustrates the Polish proverb "Concord builds, discord destroys." Obtaining the approvals required to carry out a transaction is a condition for its success, while failure to obtain approvals may invalidate the transaction, which could prove ruinous to the parties.

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