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Corporate M&A

Poland: Trends & Developments

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chambers.com

2020

Trends and Developments

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Market Overview

The Polish M&A market has prospered continuously over recent years. It has been most active in Central and Eastern Europe, accounting for over 30% of the region's deals in 2019. For a long time, growth has been observed (in both deal number and value), although obviously not in a straight line (which was particularly visible in the 2018 slump). It may not have been visible in every sector, but with a certain oversimplification, on a macro scale that applied to the whole economy.

The market has been dominated by sector investors, who accounted for some 82% of transactions, leaving just 18% to financial investors. There has been a continuously growing number of transactions with Polish buyers (now accounting for as much as 46% of overall deal volume), almost 8% attributable to British investors, then German (6.4%) and American (6.4%).

It is difficult to indicate a single dominant sector, with the Polish M&A market being rather scattered. Around 9% of targets were entities from the financial sector, with a similar number in construction, then IT, health and energy (each accounting for some 8%), followed by the food sector (6%).

Market Structure

There are not many mega-deals in Poland, ie, large projects (worth at least several hundred million euro) in which Polish assets play an exclusive or at least predominant role. There are at most a handful of such transactions per year. This excludes 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.

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

With a certain oversimplification, a changeover of generations is being witnessed. Many companies in Poland have continued to be controlled by their founders from the period of systemic transformation in 1989. 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.

In a range of reports and studies it emerges that Poland still offers — but we must stress that this is not a permanent state — 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.

Of course, it should be remembered that human resources are not unlimited, and Poles can do the math and grasp the opportunities connected with working in the West. Moreover, this is a common problem for countries in the region.

Threats and Challenges

Only a few weeks ago (time of writing is the beginning of April), one probably would have said that there are no good reasons to expect any sudden meltdown in 2020 (except that after a long period of increases, some decline must inevitably occur). The global COVID-19 pandemic has, however, changed that, drastically turning what was once relatively predictable into the entirely unpredictable.

Implications of COVID-19

As far as pending transactions are concerned (ie, projects which are at the pre-signing or interim period stage), the occurrence of the COVID-19 pandemic and the resulting practical consequences (such as illness of employees) and legal consequences (in extreme instances, resulting in a restriction or temporary shutdown of activity) may impact the economic assumptions underlying a contract signed by parties. This primarily concerns the valuation of the target and the mechanisms for setting the final price (whether based on a closing-accounts model or a locked-box model).

Limitations on the work of courts, state offices, banks and other institutions may also lead at least to delays in fulfilling conditions for closing the transaction (eg, obtaining approval from competition authorities) or in carrying out activities foreseen by the parties during the interim period (eg, corporate changes requiring entry in the National Court Register, deletion of

pledges or mortgages, and the like). This presents a risk that the transaction cannot be closed by the long-stop date set by the parties, which in turn gives rise to a risk of automatic dissolution of the contract or termination by one of the parties.

The situation connected with the COVID-19 pandemic may also result in occurrence of circumstances expressly provided for in the contract, particularly a material adverse change or effect, typically giving the parties (or one of them) the ability to terminate the contract due to a worsening situation of the target (eg, a certain decline in turnover, increased indebtedness, etc).

Finally, although it cannot be assumed that it will automatically apply to all transactions, the pandemic and its consequences may, in certain instances, provide grounds for either of the parties to rely on an extraordinary change in circumstances (*rebus sic stantibus*) or force majeure. Here, much will depend on whether the parties have modified the statutory construction of these institutions in the contract.

Categorical, universal conclusions cannot be drawn for either of these aspects of M&A projects. Just as the transaction agreement is drafted through a process of bilateral or multilateral negotiations, and thus greatly individualised, so the measures which the parties should pursue in the current situation must be determined on a case-by-case basis.

Obviously, in certain instances unilateral action may be considered in order to renounce the contract (eg, if the transaction has entirely lost its purpose for one of the parties) or modifying the contract due to a change in circumstances. But it seems that, most often, the solution will be dialogue between the parties, seeking solutions through good-faith negotiations.

A consequence of the COVID-19 epidemic that is understandable and can already be observed is a reduction in activity connected with new M&A deals. Of course in an age of progressive digitalisation there is no barrier to continuing due diligence already begun, or even beginning new due diligence projects. Such processes may be conducted successively on an entirely remote basis, but the review must appropriately reflect circumstances related to the pandemic and their impact on the current and future condition of the target.

From the perspective of negotiations and drafting of the terms of transactional agreements (which can also be conducted remotely), it should be borne in mind that concluding new contracts during a pandemic may in certain circumstances be regarded as imprudent and deprive the parties of protection in the future (as we write here). Thus, it cannot be excluded that the other party will allege that a rational undertaking concluding a contract during a pandemic must foresee difficulties related to the cur-

rent situation and take them into account when incurring new obligations, to ensure that they can be performed.

As a result, in contracts currently being negotiated, provisions should be included addressing potential inability to perform contractual obligations due to the COVID-19 pandemic. This may involve in particular appropriate framing of provisions on force majeure or circumstances excluding the parties' liability.

Political Environment

The impact of the political situation in Poland on the business environment, including the M&A market in particular, is still a vital issue. 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. This specifically applies to the judicial system, which has been subject to special concerns over the last few years. For one thing, these changes make the legal environment less predictable, and thus riskier for investors.

Of course, Poland is not an utterly isolated case. It is one element of a Central European trend - or perhaps a European trend. That is 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.

Brexit

Although Brexit has formally taken place, its actual impact has been delayed beyond 2020. Given that a good portion of foreign investments come from Britain, one cannot underestimate the consequences Brexit may have on the economy and M&A market in Poland. Numerous analyses and reports have been developed in recent years on this topic, but they all function in a vacuum.

It is not known how markets will behave in a given form of Brexit; there is no way of knowing if Brexit will cause political friction in practice, or even what sort of friction. Carrying this over to the Polish situation, and more specifically transactions and investments on the Polish market, 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.

German Market Condition

Of course, there are some fears that are greater than the implications of Brexit. This specifically applies to the condition of the German economy (including once the pandemic dust settles). Germany, after all, represents a fourth of Polish exports, and numerous investments. A major part of the Polish economy functions as a kind of subcontractor for the German economy.

POLAND TRENDS AND DEVELOPMENTS

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Other Considerations

The M&A processes functioning in Poland do not display many country-specific issues. The country simply follows worldwide trends. What can be pointed out in terms of the transactional “kitchen” are louder and louder claims that legal due diligence preceding M&A transactions is little more than a technical exercise, which should be limited or even skipped if possible.

Given that a major portion of transactions involving Polish entities or assets are run as part of global mega-deals, this approach means that due diligence is increasingly truncated. This is due to major limitations in scope and time of the review, an inadequate sample of material for review, etc. As a result, such an examination often fails to serve a larger purpose.

Simultaneously, the growth in technology has greatly changed how due diligence is conducted, but another even farther-reaching change lies ahead. This of course involves the use of artificial intelligence in the process of digesting and analysing documents.

Work on the relevant technologies is already well advanced, but it will still be some time before they displace lawyers from involvement in the due diligence process to any great degree.

While technological support may indeed change due diligence as we perceive it now, it is a long path ahead before technology can substitute for analysis of identified issues by professional advisers.

These trends undoubtedly affect the way transactions are handled in Poland, and there is reason to believe that they will continue to have a growing impact on transactional processes.

Perspective Ahead

The long-term legal consequences of the COVID-19 pandemic can hardly be predicted at this point, as the situation is highly dynamic and depends on too many factors.

However, irrespective of the fears or threats highlighted above, on the broader horizon (ignoring the turbulence caused by the pandemic) there should be no doubt that will this be numerous interesting transactions on the Polish market. The question, though, is what sort of market this will be at the end of the day: will there be interesting targets, being very well developed and performing business, or companies suffering from post-pandemic economic crisis, desperately seeking cash and ready to sell out even under lowball offers? The answer to those questions is still ahead of us.

TRENDS AND DEVELOPMENTS POLAND

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Wardyński & Partners was established over 30 years ago. It is particularly noted among clients and competitors for its services in corporate and M&A, dispute resolution, intellectual property, employment, private client, real estate and title restitution and provides comprehensive multidisciplinary legal advisory services. The firm has over 100 lawyers and has offices in Warsaw, Kraków, Poznań and Wrocław. The Corporate and M&A team has 27 lawyers in the core team. Its transactional

experience is well established and covers the entire spectrum of industries, sectors and areas of expertise. Apart from building client and peer relations both in Poland and abroad, and being busy with a significant number of M&A projects, the team strives to be active in implementation of e-solutions in the fields of M&A processes in Poland (such as machine learning software and automated documents review solutions for due diligence projects).

Authors



Izabela Zielińska-Barłózek heads the firm's Corporate and M&A practice. She is also the head of the Poznań office. She provides legal support for M&A transactions and ongoing advice on corporate law. In her long practice, she has advised on and co-ordinated legal support

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Anna Dąbrowska is a partner in the Corporate and M&A practice at Wardyński & Partners. Anna is involved mainly in transactional work, focusing on corporate law. She has taken part in many mergers and transformations of corporate entities, as well as share purchase transactions and

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