International Comparative Legal Guides

Private Equity 2021

A practical cross-border insight into private equity law

Seventh Edition

Featuring contributions from:

Aabø-Evensen & Co
Atanaskovic Hartnell
Bär & Karrer Ltd.
Dechert LLP
Dentons
Eversheds Sutherland (Luxembourg) LLP
Fidal
Garrigues
Grandall Law Firm
Hammad & Al-Mehdar Law Firm
HBK Partners Attorneys at Law
Kirkland & Ellis
Lee and Li, Attorneys-at-Law
Legance – Avvocati Associati
Maples Group
McMillan LLP
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Oh-Ebashi LPC & Partners
Oon & Bazul LLP
Schindler Attorneys
Schoenherr Halwa sp.k.
Shardul Amarchand Mangaldas & Co
Sidley Austin LLP
Udo Udoma & Belo-Osagie
Veirano Advogados
Webber Wentzel

BVCA British Private Equity & Venture Capital Association

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Poland

Krzysztof Pawlak

Paweł Halwa

Schoenherr Halwa sp.k.

1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions?

As a major market in Central and Eastern Europe (CEE) and a member of the European Union, Poland offers many opportunities to private equity firms. Yet, as is the case for most countries in this region, due to historical reasons, there is relatively low number of potential large-cap targets. On the other hand, the Polish economy experienced a continued growth for over almost 30 years, which resulted in the creation of the Polish mid-cap companies target (with values in the range of EUR 10 million to EUR 100 million). Therefore, private equity firms find many targets for buyout in Poland, particularly in the expansion/growth sector. Another feature of the Polish economy is a large number of directly or indirectly foreign-controlled potential targets.

These factors contribute to the fact that Polish companies are normally indirectly acquired by large international private equity firms, while often directly acquired by European or Polish private equity players.

Moreover, all types of private equity transactions, such as buyouts (including leveraged buyouts) as well as trade sales or secondary sales, are visible in Poland.

No major shift in trends occurred in 2020. A relatively strong sell-side position continued to be evidenced by a growing number of auction processes and increased use of warranties and indemnities insurance policies (W&I insurance).

1.2 What are the most significant factors currently encouraging or inhibiting private equity transactions in your jurisdiction?

The crucial factors resulting in an increase of the number of private equity transactions are:

- a substantial number of mid- and low-cap targets in Poland facing leadership and generation change, which translates to buy opportunities for private equity players;
- Polish companies that form a part of international (mostly European) groups are in a relatively healthier financial situation than companies in Western Europe. Therefore, in case of issues at the level of the group, one of the remedies is sale of Polish (or CEE/Southeast Europe (SEE)) operation and investment proceeds in the core markets for the given group; and
- the e-commerce and IT sector is flourishing in Poland, as in many other countries. Interesting and innovative add-on targets for takeover may therefore be found in Poland.

Growing fiscal pressure and frequent changes in tax and financial reporting legislation can inhibit private equity transactions. However, the dynamic increase of M&A transactions in general suggests that the aforementioned unfavourable circumstances are not considered by the buyers as prevailing.

1.3 What are going to be the long-term effects for private equity in your jurisdiction as a result of the COVID-19 pandemic? If there has been government intervention in the economy, how has that influenced private equity activity?

The COVID-19 pandemic only affected selected sectors, while allowing other sectors to progress at the same time; the overall impact of the pandemic is therefore limited. The slowdown in transaction numbers could have been noticeable in the first half of 2020 but transaction activity has since continued to increase. According to available data, the number of transactions increased in 2020, although their aggregate value was lower than in 2019.

The government support packages deployed in 2020 have not yet significantly affected private equity activity in Poland. Nevertheless, a combination of factors such as: (i) public authorities' actions aimed at revindication of the aids granted in 2020 due to errors made by the applicants while filing their application for support; and (ii) a lack of similar government intervention in 2021, are likely to result in an increased of number of potential target companies, especially in a distressed situation.

1.4 Are you seeing any types of investors other than traditional private equity firms executing private equity-style transactions in your jurisdiction? If so, please explain which investors, and briefly identify any significant points of difference between the deal terms offered, or approach taken, by this type of investor and that of traditional private equity firms.

Polish sovereign fund *Polski Fundusz Rozwoju* plays an increasing role as both a private equity investor as well as the fund of funds. It applies private equity firm standards yet, at least for the time being, its strategy seems to be accumulating investment and keeping them in a long term.

Moreover, growing awareness of private clients results in their expectation of selling their businesses on the terms and conditions that are normally used by private equity firms (especially if the buyer is an industry player and there is no expected post-closing involvement of the seller in the operations of the target).

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction?

Private equity investors tend to use EU-based SPVs to buy Polish targets. However, especially if the transaction is an add-on investment, either EU industry operating subsidiaries acquire the target or a Polish SPV, being a limited liability company to acquire the target, is created. In larger deals, e.g. mid-cap market, or deals involving external financing or where a rollover shares are planned to be issued to the seller, a traditional structure with a holding company (HoldCo) and acquiring company (BidCo) is created.

2.2 What are the main drivers for these acquisition structures?

The main drivers are: hitherto investment practice of the given private equity fund; taxes; financing providers requirements; and the purpose of the acquisition.

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

Typically, Polish and European private equity firms structure their equity with the use of Luxembourg or Dutch investment vehicles. The management is offered with shares in Polish targets or, rarely, in entities at upper level. Moreover, phantom shares (or similar instruments) are seen to be offered to the Polish management team.

2.4 If a private equity investor is taking a minority position, are there different structuring considerations?

Structuring deals where a minority stake is acquired, regardless of whether the buyer is a private equity firm or not, requires: (i) careful drafting of control rights, often to be implemented in the articles of association (statutes) of the target; and (ii) envisaging and properly drafting the exit mechanism (normally including tag-along and drag-along options). Particular solutions depend on the relative bargaining powers of the parties and the purpose of the investment. For further details, please see section 3 below.

2.5 In relation to management equity, what is the typical range of equity allocated to the management, and what are the typical vesting and compulsory acquisition provisions?

Typically, the management equity ranges from 3% to 10%. However, if a target is highly dependent on the know-how of the management, that stake may rise to 30%. Related contract provisions normally regulate: (i) lock-up periods; (ii) put and call options (often triggered by good/bad leaver events); (iii) tag-along and drag-along rights; and (iv) non-compete and non-solicitation clauses.

2.6 For what reasons is a management equity holder usually treated as a good leaver or a bad leaver in your jurisdiction?

A bad leaver is normally defined as precisely as possible, in a manner that enables assessing if given circumstances result in the qualification of the management equity holder as a bad leaver, without a need to evaluate general clauses. Sometimes, however, a clause specifies that where the management member may be dismissed for "due reason", he/she will be regarded as a bad leaver. A good leaver is, on the other hand, defined usually as a management member not being a bad leaver.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

The governance arrangements vary depending on the shareholding structure (for obvious reasons, they are more complex in companies with more than one shareholder). Typically, such arrangements regulate: (i) the appointment/dismissal of members of the governing bodies (private equity buyers tend to appoint at least one management board member for control of day-to-day operations purposes); (ii) veto rights and matters requiring consent of the shareholders' meeting or of the supervisory board (major matters would normally require the consent of the private equity buyer in a form of resolution of a pertinent target's governing body controlled by the buyer); (iii) share transfer restrictions and rights of first refusals; and (iv) profit/liquidation proceeds distribution.

While the articles of association (statutes) are available to the public (they must be submitted to the registry court for its effectives) and breach thereof may be effective towards third parties in specific cases, the other aforementioned instruments are not generally disclosed to the public and breaches of them do not normally affect transactions with third parties.

3.2 Do private equity investors and/or their director nominees typically enjoy veto rights over major corporate actions (such as acquisitions and disposals, business plans, related party transactions, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

Yes, private equity buyers are usually vested with such veto rights. The less shares they hold, the less matters are covered by such veto rights.

In case of minority shareholding, a private equity buyer will enjoy blocking rights with respect to such matters as changes of share capital or disposal/encumbering of shares in the target or of material part of target's business/operations. Moreover, in such circumstances, the private equity buyer may be entitled to appoint one (or more) members of the management or supervisory board.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

Only a limited number of decisions taken by the target company without authorisation at the shareholder level will result in ineffectiveness of given action. There are no specific rules limiting veto arrangements, except for a general rule that the shareholders in similar situations should be treated equally (which, in specific situations, may mean that excessive rights or minority shareholders included in the articles of association might be challenged).

At the level of the director (management board member), veto rights are also possible but will be effective internally only (i.e. contracts concluded in breach of such veto will be valid).

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

There are no particular duties resulting from law. The articles of association (statutes) of the target company and, especially the shareholders' agreement (if any), may be regarded as a contract between the parties (shareholders). Hence, breach of such "contract" by one party may result in the other party's claim for damages. Duties and obligations of the private equity majority shareholder are therefore set forth in such articles of association (statutes) or shareholders' agreements.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

As a rule, content of the shareholders' agreements may be freely shaped within the general limits of freedom of contracting. Therefore, provisions of the shareholders' agreement may be challenged if, for instance, they can be regarded as by-passing compulsory provisions of commercial companies' laws, such as those related to distribution of profit. The shareholders' agreements may be subject to foreign law.

Non-compete and non-solicitation provisions, as ancillary restrictive, are subject to general limitation resulting from EU and Polish legislation aimed at the protection of fair competition.

Moreover, to the extent the non-compete or non-solicitation clauses concern actions of a third party, not having direct contractual relationship with the buyer (e.g. the seller's affiliates or spouses), which is fairly typical especially in the case of an acquisition of a family business, these should be carefully drafted as there are doubts as to whether such limitations will be effective at all.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies?

Most commonly used types of commercial companies in Poland have a dualistic system of governing bodies, i.e. a management board manages and represents the company, while a supervisory board is vested almost exclusively with control and supervision powers with respect to the management board. Consequently, the obligations and corresponding liability of the supervisory board members are far narrower than those of the management board members. The management board members are by operation of law authorised and obligated to run the company and, in principle, they act collectively.

The distribution of tasks between the management board members has a mostly internal effect. That, in turn, translates into an obligation of all board members to implement an effective management system in which it is not possible to fully exclude liability of the management board members for the actions (or omissions) of fellow management board members. For instance, in case of bankruptcy of a limited liability company, management board members may be found liable for the debts of such company if they have not filed an application for bankruptcy in due time (there are also certain additional requirements in that respect).

There is no specific risk for the private equity firms due to nominating its representatives to the boards of the portfolio companies.

Regulated entities (e.g. financial institutions) should also comply with more specific management and corporate governance rules, in many cases published as a recommendation of the supervisory authorities.

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

Conflict of interest must be disclosed to the company concerned. Moreover, in practice, it is recommended that the portfolio company consents (by way of the management board or supervisory board resolution, as the case may be) to holding by the directors of a position in other companies, including the investor or another portfolio company.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including antitrust, foreign direct investment and other regulatory approval requirements, disclosure obligations and financing issues?

The most time-consuming issues for closing the transactions are those related to the antitrust clearances and regulatory notifications or clearances. Similarly, certain certificates (notably security-related) and public licences, in a limited number of areas, may require renewal or reassessment, which are normally carried out between signing and closing of the transaction.

Comparing to some other EU jurisdiction Polish FDI rules (save for dozens of special targets) are not triggered in case the buyer (its controlling entity) is from an OECD or EU/EEA country.

As regards disclosure obligations and financing issues, they vary from target to target but overall do not affect timing of the transaction materially.

Finally, depending on the quality of the due diligence materials and report, the process of arranging for W&I insurance may take several weeks and should be started as soon as practicable.

4.2 Have there been any discernible trends in transaction terms over recent years?

Every year, the Polish market follows more and more global trends; for instance, it might be noticed that the sale process is more structured and formalised on the sale-side and the role of W&I insurance increases (as well as sellers' willingness for "clean exits"). No general domestic trend is discernible.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

A private equity bidder/buyer is regarded, as a rule, as any other investor within the acquisition process. In particular, the acquisition of shares representing 33% of the votes of the public target, triggers the obligation to make a tender bid for shares representing up to 66% or 100% shares. Similarly, the acquisition of shares representing 66% of the votes results in an announcement being required of a public tender offer for 100% of shares.

This legislation implies a careful structuring of negotiation, due diligence and pre-signing phases, which, on one hand, limit the scope of involved individuals, especially on the part of the target, and, on the other hand, allow a quick and effective pre-signing process to be conducted.

Additionally, a public tender offer requires the prior financing of the commitment papers in a form of a bank guarantee of funding or a cash deposit covering the entire bid stake.

5.2 What deal protections are available to private equity investors in your jurisdiction in relation to public acquisitions?

When making the public tender offer (which is, as a rule, applicable for exceeding 33% and 66% of the votes in the target public company), the bidder may indicate few specific conditions, which must be met to bound him by the public offer. Moreover, the buyer of 95% of shares may initiate a forced squeeze-out procedure and, regardless of the level of held shares, place a secondary public offer.

The main protections need to be sought in the documents signed with the majority stake seller. The protections in the tender offer are almost non-existent.

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

On the sell-side, there is a growing appetite for limiting the potential post-transaction exposure by W&I insurance and, consequently, for payment of the entire purchase price as soon as possible. Normally, the seller prefers to sell not only the operating target but also its HoldCo, if any. Moreover, locked-box structures are preferred by the sellers.

Buyers, taking into account results of due diligence, are aiming at securing at least a portion of the claims they may have under identified (and indemnified by the sellers) risk by placing a portion of the purchase price with the escrow account (alternatively, retained amounts or seller's loans are sought).

6.2 What is the typical package of warranties / indemnities offered by (i) a private equity seller, and (ii) the management team to a buyer?

A private equity seller often refuses to give warranties related to the operation of the portfolio company if it did not have full control over the management board. Hence, the warranties of such seller relate to title, authority and capacity. Even if the private equity seller offers warranties related to the underlying business, they are limited compared to similar warranties usually expected from the management team or from non-private equity sellers.

Normally, the management team only provides warranties if it also shares its shares in the portfolio company or if it is otherwise incentivised to proceed with the exit (e.g. through rolled-over shares).

As regards indemnities, those related to taxes are seen in many deals. Other types of indemnities vary from deal to deal.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

Covenants and undertakings largely depend on the deal structure and the underlying portfolio entity operations. In a typical "locked-box" transaction, crucial covenants concern the leakage and operations of the portfolio company between the accounts date and the closing. In a standard "completion accounts" deals, the covenants mostly concern the operation of the business between the signing and the closing, including – to the extent permitted by the competition regulation – certain buyer's consents required for a limited set of major decisions exceeding the ordinary scope of business of the target.

In case a transaction is subject to the antitrust clearance, the cooperation of the sellers may be material for getting the clearance. Hence, respective undertakings of the seller are drafted. The same applies to transactions being subject to regulatory clearances (e.g. concerning financial institutions) where the quality of data provided by the seller and thorough regulatory and financial due diligence disclosures are of utmost importance.

Indemnities addressing due diligence findings are common in deals where sellers are not private equity firms. In "locked-box" transactions, leakage is indemnified on a EUR per EUR (PLN per PLN basis) basis.

6.4 To what extent is representation & warranty insurance used in your jurisdiction? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such insurance policies, and what is the typical cost of such insurance?

As noted above, the representation & warranty (or W&I) insurance is more and more popular in Poland. In a standard insurance policy, i.e. not enhanced and not specific title or tax insurance, the average value of the insurance is 30–50% of the enterprise value in consideration for a premium starting from 0.4% of the enterprise value. The standard policy does not cover, among others, known risks, fairly disclosed matters, forward-looking warranties, fraud or criminal liability. In terms of policy limits, in the vast majority of cases, the policy is back-to-back with the related acquisition document. The retention amount in some cases may be as low as 0.3–0.4% of the enterprise value.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

As mentioned above in the answer to question 6.1 above, since the scope of warranties offered by a private equity seller is narrower than those offered by the management team, the scope of liability is different. Namely, as a rule, caps for liability of the private equity seller are significantly lower than of the management team. Typically, for a standard transaction, such caps amount to *ca.* 20–30% of the total purchase price (for non-fundamental warranties) and claims may be pursued for all non-fundamental warranties, usually within 18–24 months, while for tax warranties it is usually six years and for title 10 years. Indemnities are also usually capped.

However, both in case of any seller's warranties, its liability is typically excluded to the extent incorrectness of the warranty resulted from the disclosed information.

6.6 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

Private equity sellers are unwilling to provide any security deferring payment of the full price. However, in specific cases (especially if the buyer has greater bargaining power), that relatively small fraction of the purchase price is escrowed to cover potential liability under the identified risk with respect to which parties are not in a position to agree on the likelihood of materialising such risk.

In the case of sellers not being private equity firms, escrow accounts are rather common.

Other types of securities, e.g. pledges, are not common, as such collateral security may complicate third-party financing of the transaction or a consent of the sellers' financing bank. Please also see the answer to question 6.1 above.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain in the absence of compliance by the buyer (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

The typical comfort measures may include providing copies of final equity commitment letters and financing documentation. In the absence of compliance/performance by the buyer, the sellers would be entitled to damages only.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees are not common in Poland. Consequently, they are negotiated case by case and one may not provide their typical terms.

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

Challenges related to IPOs are rather standard across the EU and result mostly from formalisation of procedure, the need for involvement of additional advisors (especially for the purpose of preparation of a comprehensive information memorandum), and interaction with financial market regulatory authority (which, in turn, adds more uncertainty and time consuming actions).

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

Lock-up periods normally range between six and 18 months.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

Based on our practice, dual-track exit processes are currently not very common in Poland. Even assuming that such dual-track process is considered by the seller, the vast majority of transactions are realised through private sales.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

Private equity transactions are mostly financed by banks in the form of loans. Usually, for mid-cap and larger transactions, financing is secured by foreign banks or syndicates including foreign and domestic lenders. For smaller deals, where the transaction may not be financed entirely by the private equity fund, the financing is normally provided by banks where the main operations of the private equity firm concerned are located.

A seller's loan may be found (but is not common) in deals where the post-closing involvement of seller(s) being the management of the portfolio company is required.

Private debt financing has been seen more frequently in recent years.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

It is quite common to secure the external financing of the transaction through the establishment of pledges over the shares held in the target company.

Moreover, if a target company is a joint-stock company (or a limited partnership related by shares), the financial assistance restriction rules apply both to direct financing by the target and guarantees granted by them. Due to such restrictions, such financial assistance is rare in M&A transactions in general.

Additionally, for all types of the target being a commercial companies, granting a collateral security for the purpose of financing an acquisition of a given target is subject to further restrictions and consideration such as: (i) consideration of the target interest and related management board liability for acting detrimentally to the interests of the given company; (ii) rather vague and unprecise (under Polish law) concepts of over-collateralisation; and (iii) potentially limited effectiveness of such collateral securities in case of the insolvency of the target.

8.3 What recent trends have there been in the debt financing market in your jurisdiction?

As mentioned above, we have seen an increasing involvement of private debt financing.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

Private equity investors should be aware of numerous major amendments to the Polish tax law. Currently, the actions taken by the investors in organising tax-efficient structures are impacted by:

- strict rules on withholding tax withheld by Polish payers requiring due diligence to verify the status of the beneficial owner of the payment and the resulting possible temporary freezing of withholding tax funds in the tax office's account;
- limitation of expenses on certain intangible services (such expenses may constitute tax deductible costs up to the amount equal to 5% of "tax EBITDA");
- thin capitalisation rules (limitation on tax deductibility of debt financing financial costs exceeding PLN 3 million (approx. EUR 666,000) is limited up to 30% "tax EBITDA");
- limitation of CIT exemption for investment funds and elimination of the exemption for closed-end investment funds;
- limited partnerships and certain general partnerships become subject to CIT (from 2021);
- new rules for taxation of the sale of real estate companies using a local real estate company as payor (from 2021);
- implementation of ATAD 2 (from 2021, taxpayers are required to analyse the payments made for the use of hybrid instruments or hybrid entities in the payments, under penalty of disqualifying the taxpayer's deductible expenses for the payments);
- GAAR clause and "little" tax anti-abuse clause (the latter may result in the denial of an income tax exemption for dividends if such exemption results in no taxation or a reduction in the taxable amount without an adequate business justification); and
- Mandatory Disclosure Rules (the obligation to report information about "the tax schemes" to the Head of the National Treasury Administration).

9.2 What are the key tax-efficient arrangements that are typically considered by management teams in private equity acquisitions (such as growth shares, incentive shares, deferred / vesting arrangements)?

It is quite common for the local management teams to apply preferential rules for PIT settlement on participation in the incentive programmes. The PIT Act provides for the possibility of deferring the taxation of share-based compensation, until the sale of the shares, at which point the income will generally be taxable as a capital gain. It is important, however, that a given programme meets the conditions specified in detail in the PIT Act, among other things:

- the incentive plan is implemented and the participants acquire shares on the basis of a resolution of the general shareholder meeting of a joint-stock company;
- the joint-stock company is either an employer of the participants or a parent company of the employer of the participants, which directly or indirectly holds a majority of the voting rights in the employer; and
- the shares are of a company with a seat in an EU or EEA Member State or in a country with which Poland has concluded a double tax treaty.

A capital gain from a share sale would be subject to a flat tax rate at 19%. Extra solidarity tax of 4% applies to annual income over PLN 1 million (approx. EUR 222,000).

9.3 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

The key tax consideration for management would be the deferral of tax payment until any disposal proceeds are received with a minimum level of tax available. Typically, tax consequences of such actions may be safeguarded through obtaining a tax ruling.

Generally, tax neutrality of mergers or an exchange of shares may be preserved based on the local implementation of EU legislation subject to meeting certain conditions provided in the Polish provisions, including, in particular, the condition that the purpose of the transaction cannot be tax avoidance or evasion.

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

Recent changes in the tax laws have shown a tightening of tax regulations impacting private equity investors (see question 9.2 above).

However, recently, the Government officials presented the main assumptions behind the possible introduction of a new plan to stimulate the economy – the so-called "Polish deal". The planned changes should include new tax reliefs for investors and expansion of the scope of IP BOX relief and R&D relief.

The implementation of the institution of the "590 ruling" (a new instrument to secure the tax position of strategic investors investments in Poland) and a new "Polish Holding Company", with some preferential treatment for dividends taxation (e.g. more liberal conditions to apply a dividend exemption) and new participation exemption relief, is also planned.

The Ministry of Finance also intends to establish an "Investor's Desk" for strategic investors from Poland and abroad. It is intended that key investors will be directly and comprehensively serviced by the designated officers at the Ministry of Finance.

Unfortunately, the Government has not published any draft legislation of the new Polish deal. The effective date of the new regulations has not yet been specified, but some changes are supposed to enter into force as of January 2022.

10 Legal and Regulatory Matters

10.1 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

We do not anticipate any private equity-related-only legislation in Poland. Nevertheless, various new legislation has been considered or discussed that may affect M&A transactions in general – for instance, those related to public takeovers.

10.2 Are private equity investors or particular transactions subject to enhanced regulatory scrutiny in your jurisdiction (e.g. on national security grounds)?

No. Based on our practice, we believe that private equity investors are not subject to more thorough scrutiny than other investors, assuming that there are no money laundering and financing terrorism concerns (in that respect Polish law essentially implements the AML legislation of the European Union). However, in case of targets being banks or insurers, we expect that any non-industry investor may face enhanced investigations by the regulatory authorities comparing to an industry investor.

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope, etc.)?

As a rule, fully fledged due diligence reviews are conducted. In case W&I insurance is expected, the materiality thresholds are relatively low. The due diligence review reports are, in most cases, prepared as a red-flag or issue reports only. Vendors' due diligence reports or fact books are common in the case of secondary sales conducted by private equity sellers. Please see also the answer to question 10.4 below.

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

In recent years, we have seen increased interest of the private equity potential buyers in pursuing compliance due diligence review including anti-bribery- and anti-corruption-related matters. In transaction documentation, this translates into enhanced representations and warranties given by the sellers in these areas. The trend seems to mostly be driven by the fact that US and UK investors first started to put emphasis on these aspects.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

As a rule, any investor will not be found liable for liabilities of portfolio companies being limited liability company or a joint-stock company. There are exceptions with respect to potential ineffectiveness or intragroup transactions and obligations to reverse (financial) effects of such transactions if any creditor of the portfolio company was affected; however, such circumstances are very rare in practice.

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

We do not see any special factors applying to private equity investors only.

Krzysztof Pawlak joined Schoenherr's office in Poland in 2018 as counsel in the corporate and M&A practice. He has over 18 years of experience in corporate law, cross-border and domestic transactions, restructuring processes, and corporate dispute resolution. He manages many cross-border transactions, and did so before joining Schoenherr while at a national leading law firm. From 2018 onwards, he has been coordinating the majority of the Schoenherr Warsaw office's transactions, including advising major European and global private equity funds, as well as industry investors across various sectors. His areas of expertise include insurance, IT, beauty, and the automotive and machinery industries as well as corporate compliance matters.

Schoenherr Halwa sp.k.
9 Próżna Str. 00-107
Warsaw
Poland

Tel: +48 22 223 09 00
Email: k.pawlak@schoenherr.eu
URL: www.schoenherr.eu

Paweł Halwa joined Schoenherr Warsaw in 2011 as the office managing partner. He focuses on corporate and M&A, banking & finance and capital markets practice. Paweł's experience includes advising corporates, private equity funds and financial institutions on large transactions with an international angle. He frequently advises on structuring transactions, including cross-border M&A and private equity transactions, offerings of securities and restructuring processes. He has represented clients in negotiations and proceedings before courts and administrative bodies such as the Financial Supervision Authority, Ministry of Finance and Office for Competition and Consumer Protection. Paweł has authored books and articles on company law and capital markets in Poland.

Schoenherr Halwa sp.k.
9 Próżna Str. 00-107
Warsaw
Poland

Tel: +48 22 223 09 00
Email: p.halwa@schoenherr.eu
URL: www.schoenherr.eu

Schoenherr is a leading full-service law firm in Central and Eastern Europe. Operating in a rapidly evolving environment, we are a dynamic and innovative firm with an effective blend of experienced lawyers and young talent. As one of the first international law firms to move into CEE/SEE, we have grown to be one of the largest firms in the region. With 15 offices and several country desks, our comprehensive coverage of the region means we can offer solutions that perfectly fit the given industry, jurisdiction and company.

www.schoenherr.eu

schonherr

ICLG.com

Other titles in the ICLG series