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# Acquisition Finance 2022

Poland: Law & Practice and Trends & Developments

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## Law and Practice

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## CONTENTS

|                                                                  |            |                                                |             |
|------------------------------------------------------------------|------------|------------------------------------------------|-------------|
| <b>1. Market</b>                                                 | <b>p.3</b> | <b>6. Guarantees</b>                           | <b>p.14</b> |
| 1.1 Major Lender-Side Players                                    | p.3        | 6.1 Types of Guarantees                        | p.14        |
| 1.2 Corporates and LBOs                                          | p.3        | 6.2 Restrictions                               | p.14        |
| 1.3 COVID-19 Considerations                                      | p.3        | 6.3 Requirement for Guarantee Fees             | p.14        |
| <b>2. Documentation</b>                                          | <b>p.4</b> | <b>7. Lender Liability</b>                     | <b>p.15</b> |
| 2.1 Governing Law                                                | p.4        | 7.1 Equitable Subordination Rules              | p.15        |
| 2.2 Use of Loan Market Agreements (LMAs) or Other Standard Loans | p.4        | 7.2 Claw-Back Risk                             | p.15        |
| 2.3 Language                                                     | p.4        | <b>8. Tax Issues</b>                           | <b>p.16</b> |
| 2.4 Opinions                                                     | p.4        | 8.1 Stamp Taxes                                | p.16        |
| <b>3. Structures</b>                                             | <b>p.5</b> | 8.2 Withholding Tax/Qualifying Lender Concepts | p.16        |
| 3.1 Senior Loans                                                 | p.5        | 8.3 Thin-Capitalisation Rules                  | p.17        |
| 3.2 Mezzanine/Payment-in-Kind (PIK) Loans                        | p.5        | <b>9. Takeover Finance</b>                     | <b>p.17</b> |
| 3.3 Bridge Loans                                                 | p.6        | 9.1 Regulated Targets                          | p.17        |
| 3.4 Bonds/High-Yield Bonds                                       | p.6        | 9.2 Listed Targets                             | p.18        |
| 3.5 Private Placements/Loan Notes                                | p.7        | <b>10. Jurisdiction-Specific Features</b>      | <b>p.18</b> |
| 3.6 Asset-Based Financing                                        | p.7        | 10.1 Other Acquisition Finance Issues          | p.18        |
| <b>4. Intercreditor Agreements</b>                               | <b>p.8</b> |                                                |             |
| 4.1 Typical Elements                                             | p.8        |                                                |             |
| 4.2 Bank/Bond Deals                                              | p.9        |                                                |             |
| 4.3 Role of Hedge Counterparties                                 | p.9        |                                                |             |
| <b>5. Security</b>                                               | <b>p.9</b> |                                                |             |
| 5.1 Types of Security Commonly Used                              | p.9        |                                                |             |
| 5.2 Form Requirements                                            | p.11       |                                                |             |
| 5.3 Registration Process                                         | p.11       |                                                |             |
| 5.4 Restrictions on Upstream Security                            | p.12       |                                                |             |
| 5.5 Financial Assistance                                         | p.12       |                                                |             |
| 5.6 Other Restrictions                                           | p.12       |                                                |             |
| 5.7 General Principles of Enforcement                            | p.13       |                                                |             |

## 1. MARKET

### 1.1 Major Lender-Side Players

Acquisition finance in Poland is dominated by banks. Local banks which are particularly active in providing acquisition financing include Santander Bank Polska, PKO Bank Polski, ING Bank Śląski, Bank Pekao and mBank. Support for acquisitions abroad is also increasingly provided by Bank Gospodarstwa Krajowego (BGK), a state-owned development bank.

The Polish banking sector is relatively robust (though less competitive than, eg, the German market) and has a comparatively low level of leverage. As a result, international banks tend to be involved primarily in larger deals with a cross-border element or as co-lenders alongside their Polish affiliates (eg, Santander with Santander Polska, Commerzbank with mBank, ING with ING Bank Śląski, etc) unless financing is provided to foreign players entering the Polish market (in which case they may use the banks that they usually work with). Otherwise, local banks are usually part of a broader syndicate.

Non-bank finance providers have less visibility, but some are also active – such as Syntaxis or Innova Capital.

### 1.2 Corporates and LBOs

Poland is an active mergers and acquisitions market. Although deal values are still below typical Western European standards, Poland is the biggest private equity market among Central and Eastern European (CEE) countries, hosting 71% of investments by value in the region. The majority of investment opportunities are businesses still led by their original founders, followed by investment opportunities that are corporates' non-core businesses, and those that are secondary sales.

For a number of years now, investment by private equity funds has dominated the M&A landscape, with relatively few acquisitions by corporates. Over the past four years there have also been numerous acquisitions by the Polish Development Fund (PFR). Private equity investors, in addition to the PFR, as a rule rely on third-party acquisition finance. Corporates' approach is more varied and depends on the size of the deal and a corporate's own situation.

Securing acquisition finance typically lies with the purchaser (seller financing is very rare and unlikely to occur on purely Polish deals). In private and auction sales a seller will usually expect confirmation of the bidder's capacity to secure financing, by a certain stage in the process.

### 1.3 COVID-19 Considerations

The COVID-19 pandemic has not materially affected the local market. After an initial slowdown in the first half of 2020, M&A in Poland has visibly picked up. In terms of acquisition finance, the pandemic has primarily affected banks' selectiveness in their credit approval processes and their appetite for certain industries. This trend has continued throughout 2021 and the war in Ukraine will presumably make it continue for longer. In most cases, transaction deadlines or documentation have not substantially changed, although some formal processes became more protracted in periods of remote or hybrid work. On the other hand, banks in Poland have quickly embraced electronic signatures and remote closings, which greatly facilitate execution of large piles of documents typical for a finance transaction, leaving only notarised documents for direct execution between the parties.

Some market sectors that have been particularly affected by the COVID-19 pandemic (eg, shopping centres (retail), office or hotels) continue to suffer from limited access to acquisition finance, which constrains the number of M&A transac-

tions in those sectors. Likewise, the number of financings and refinancings in these sectors continues to be limited as parties are awaiting developments in micro and macro-economic situations. The pandemic-relief measures, which significantly facilitated restructuring of existing financings during the lockdowns, have however already expired.

In terms of approvals, in 2020 Poland introduced a provisional foreign direct investment (FDI) control regime which is supposed to apply until 24 July 2022. The new regime applies to investors from outside the EU, EEA, and OECD (and their subsidiaries) which directly or indirectly acquire shares entitling them to at least 20% of votes in a protected entity or its enterprise or an organised part of its enterprise. Protected entities are locally registered entities which conduct activity in a broad range of industries (including energy and power, telecoms, software, foodstuffs) and which have had over EUR10 million in income from sales and services in Poland in any of the two financial years preceding the notification. Listed companies are protected entities, irrespective of their type of activity or turnover. The FDI clearance is issued by the President of the Office of Competition and Consumer Protection (OCCP) in proceedings which can last from 30 to 150 days. In such cases, the new regime is reflected in both the acquisition documentation and the financing documentation.

## **2. DOCUMENTATION**

### **2.1 Governing Law**

Financing agreements, including acquisition financing agreements, are typically governed by Polish law, with the exception of the largest deals that exceed the capacity of the local market. In such cases, English law is usually the law of choice. Security documents are local, but there is a well-established practice with regards

to both their structuring and the composition of a security package.

### **2.2 Use of Loan Market Agreements (LMAs) or Other Standard Loans**

For mid-size and larger deals, facility agreements are typically patterned after the Loan Market Association standard documents with the usual set of clauses, although adapted to Polish law. For smaller deals, banks usually rely on their own standard documentation, which most often takes the form of a relatively concise loan agreement coupled with general terms and conditions set out in a separate document. LMA standards are typically used when the banks opt for external counsel.

Hedging documentation is based either on the International Swaps and Derivatives Association (ISDA) format or on the banks' internal documentation which loosely follows a model master agreement developed several years ago by the Polish Bank Association. There are no model forms for security documents, but there is a well-established practice with regards to their structuring. As regards bond documentation, the banks typically rely on their own templates and the parties hire a joint counsel to handle all legal issues.

### **2.3 Language**

The financing documentation is usually in English, although for smaller deals (or purely domestic deals) the Polish language is also used. Security documents establishing a registrable security (such as a mortgage or registered pledge), are either in Polish or in Polish and English.

### **2.4 Opinions**

In typical acquisition finance transactions in Poland, validity and enforceability opinions are usually issued by lender's counsel, while the borrower's counsel is expected to deliver only a due

capacity and authorisation opinion. However, in leveraged acquisition financing it is not uncommon for the borrower's counsel to deliver a validity opinion on the acquisition documents or on some particular aspect of the transaction (eg, permissibility of a particular debt push-down structure in light of financial assistance regulations).

There is relatively uniform market practice in respect of the structure and contents of legal opinions in financing transactions. The current market standard is relatively streamlined, and largely influenced by international practice. Opinions typically adopt a structure which sets out:

- the opined/reviewed documents;
- assumptions;
- briefly formulated opinions;
- reservations.

For obvious reasons, validity and enforceability opinions are usually longer than due capacity opinions. In particular, they are characterised by a more comprehensive list of assumptions and reservations.

## 3. STRUCTURES

### 3.1 Senior Loans

Given the absence of “mega-deals” on the Polish market over the past few years, acquisition financing structures have remained rather simple. The typical structure of financing consists of an investor's equity, banking loans (senior debt in the case of other financing) or other sources of financing (eg, bonds).

Due to the predominance of banks as providers of acquisition finance and their relative conservatism in Poland, funding is almost exclusively on full documentation. Most loans are vanilla loans

and it is infrequent to see other types of facilities taking on different levels of risk, seniority or rates. When a bond component is used, the bonds issue is usually post-acquisition, with the actual acquisition being funded from a bridge-to-bond facility. In addition, the percentage participation of equity in capital structures in the CEE (including Poland) tends to be higher than in the rest of Europe; the typical loan-to-value ratio for investments in Poland does not exceed 60%.

Generally, an acquisition finance package will involve both loans granted to the acquisition vehicle for acquisition of the target and loans granted to the target (post-acquisition) for refinancing of its existing indebtedness and financing of its activities. A debt push-down to the target could also be employed, though given limited application of the Polish financial assistance regulations, this is a rare scenario.

The prevailing practice in the Polish market is for bank lenders to insist on hedging arrangements to accompany the loan, usually in the form of interest-rate swaps and currency hedges (most loans continue to be granted in foreign currencies).

### 3.2 Mezzanine/Payment-in-Kind (PIK) Loans

Mezzanine financing is still not very popular in Poland, mainly because of the limited number of financing providers and a relatively high minimum financing threshold. It is extended mostly by private equity funds, including some dedicated mezzanine funders; only a few banks offer the instrument.

Mezzanine financing is typically used when a commercial bank has denied financing due to the level of risk or insufficient asset coverage, or when the financing obtained from a commercial bank is not sufficient to complete the relevant business goal.

On the documentation side, mezzanine financing is usually extended using the financing provider's standard documentation. LMA standard documentation is typically used for larger deals or, if senior financing is provided in connection with the relevant deal, based on that senior financing documentation in order to limit negotiations and ensure consistency between both sets of arrangements.

There is no specific market practice applicable to PIK loans and such products are very rarely, if at all, visible on the market.

### **3.3 Bridge Loans**

Bridge loans are offered by banks, mainly in a bridge-to-bond context, but no distinct bridge loan financing structures have been developed within the Polish banking sector as such.

Bridge loans are also offered outside the banking sector, mainly in connection with small to mid-size transactions. The lenders are either private equity funds or high-net-worth individual investors (or groups of individual investors); borrowers are typically entrepreneurs, and the financing offered is up to 50% of the market value of a particular real property. The real property is typically transferred to the lender as collateral security, subject to an undertaking of the lender to re-transfer it back (a separate legal act is required to that end) if the borrower repays the debt in full, or at least subject to a mortgage. If possible, other types of security interests, such as a pledge over shares or assets, are also taken. The purpose of the financing depends on the needs of the borrower and, since the lender is fully secured by the real property, it is less restrictive as regards the application of the proceeds of the relevant loan. This type of financing is considered to be among the most expensive in the market, with interest at the statutory limit (currently 16% per annum) and fees (typically

a concealed interest above the statutory limit) approximating 25% of the principal.

The financing is typically extended under the financing provider's own standard documentation, which tends to be rather simple.

### **3.4 Bonds/High-Yield Bonds**

The Polish bond market is broadly divided between bond issues arranged by banks and those arranged by private equity funds.

In bank-arranged issues, banks provide documentation and access to potential bondholders (selected from among their customers). The terms of the bond documentation are subject to negotiations limited to key commercial terms, thus the parties typically manage with just one external legal counsel who takes care of all (rather simple) documentary work. Only very large bond issues are more extensively negotiated and based on more sophisticated documentation.

A similar approach is followed in bond issues arranged by private equity funds (with such funds usually becoming the holder of bonds). The documentation is typically drafted by the fund in-house or by an external counsel of the fund and is subject to limited commercial negotiations.

Hybrid bond issues are rather exceptional in the Polish market, given the complexity of the process (including involvement of rating agencies) and related costs, which may be justified only in the case of sizeable deals (approximately EUR100 million or more).

High-yield bond issues are primarily governed by US or English law (and often issued through an SPV based abroad), with Polish law intervening at the level of the security package, which is not very different from security packages used in

bank finance (see **5.1 Types of Security Commonly Used**).

### 3.5 Private Placements/Loan Notes

The framework for placements in Poland is determined by the European Prospectus Regulation (EU 2017/1129) which sets out common EU rules regarding prospectus exemptions. The Regulation is directly applicable in Poland. However, the prospectus exemption for offers addressed to fewer than 150 natural or legal persons per member state, other than qualified investors, is limited in Poland as follows: in the case of multiple offers of the same type of securities made during 12 consecutive months, a local information memorandum (to be approved by the Polish Financial Supervision Commission) will be required if each of the offers separately would fit under the limit of 150 addressees, but the offers jointly would exceed such a limit.

Due to the Polish regulatory framework, all debt securities issued under Polish law take the form of bonds (*obligacje*). Accordingly, the comments in **3.4 Bonds/High-Yield Bonds** describe the practice applicable to Polish law-governed private placements. It is also possible for Polish entities to issue foreign law-governed notes or similar instruments; in such a case, the documentation and transaction structuring would follow the approach taken in the relevant foreign jurisdiction.

For the same reason, no Polish law-governed loan notes issues occur on the Polish market (though Polish companies may enter into loan notes' issue transactions governed by foreign laws). As an exception, the Polish market has recently witnessed an isolated case of an issue of "investment promissory notes", which, however, immediately drew the attention of the Polish Financial Supervision Commission, because the instruments exploited a gap in regulations and escaped applicability of the Prospectus

Regulation, as well as the supervision of the Polish capital markets' regulator. In view of the legal limitations applicable to the structuring of a promissory note under Polish law, as well as the aforementioned regulatory concerns, this type of financing is not expected to gain any broader acceptance in the Polish market.

### 3.6 Asset-Based Financing

Factoring transactions, usually as part of pan-European or global structures, continue to be popular. On the documentation side, a master agreement setting out the key commercial terms of a transaction is accompanied by local law documents addressing technical points relating to the transfer of local law-governed receivables, notifications to local counterparties (debtors, banks), security interests and re-transfer mechanisms. A recent trend in those transactions is to seek uniformity of documentation across jurisdictions by selecting a single governing law to apply to all transaction documentation, including the local receivable transfer mechanisms. From a Polish perspective, this approach is workable as long as the law governing the transfer and the law governing the receivables operate in a similar fashion (eg, German and Polish law).

The typical security is a pledge over bank accounts of the involved Polish company.

The entry into force of the Securitisation Regulation in January 2019 sparked hopes for a resurrection of securitisations in Poland. After an impressive start (which included a PLN2.5 billion securitisation by a leasing company owned by the largest Polish bank), the COVID-19 pandemic negatively affected hopes for those who appeared to be most interested in securitising their portfolios – non-bank consumer lending companies. COVID-19 relief measures introduced by the Polish government for the benefit of consumer borrowers affected cash-flows of the lending companies and limited their appetite



for larger but more expensive foreign transactions, while domestic transactions remained too small to justify the cost of setting up a proper securitisation structure. Despite the lifting of those measures in March 2021, such foreign securitisations have not picked up, which is likely due to the lack of legal certainty in the non-bank consumer finance sector (caused by various restrictions on consumer lending introduced from time to time by the government).

## 4. INTERCREDITOR AGREEMENTS

### 4.1 Typical Elements

The predominance of simple acquisition financing structures makes it difficult to identify any prevailing market practice in Poland in respect of intercreditor agreements.

For the most part, intercreditor arrangements are limited either to arrangements between the financing banks themselves or between the lenders and the shareholders/sponsors. In the first case, they usually provide for pro rata sharing of proceeds, pari passu treatment, and form part of the syndicated loan documentation. In the second case, they aim at subordinating shareholders' or sponsors' claims to those of the financing banks, and take the form of subordination agreements.

Sharing arrangements are possible and are sometimes used. In such a case, the intercreditor agreement will set out rules for sharing proceeds received from the debtor or from the realisation of security or resulting from any repayment contrary to the loan agreements. However, they are usually purely contractual and it is difficult to identify a typical market practice.

The contractual documentation in most acquisition finance structures involves a subordination

agreement between the lending banks and the investors (and their related entities). The subordination agreement provides that the debtor must generally make payments to the creditors in a specific order and under specific conditions, and that the subordinated creditors cannot accept or seek repayment of their claims, or assign their claims towards the debtor, unless specific conditions occur. In most cases, this also involves the suspension of any distributions and servicing of subordinated debt until completion of the debt push-down, in the case of default, and also when certain financial indicators are not met (even when this does not constitute a default). Repayment of subordinated debt is usually subordinated to the full satisfaction of the lender banks.

However, these subordination mechanisms are of a contractual nature only. As a result, damages are the main remedy for a breach of the parties' contractual obligations, such as contractual subordination or contractual sharing of proceeds. This means that the court will not enforce contractually agreed subordination, but the party breaching the subordination agreement can be sued for breach of contract. In the case of insolvency of the debtor, Polish courts and bankruptcy administrators are reluctant to take into account the contractual ranking, either when allowing claims against the debtor's assets or when distributing proceeds to creditors. Subordination is only a matter of contract; therefore, it does not affect the statutory rules of liquidation of a borrower's assets. As a result, in most cases, only statutory subordination and ranking of claims will be taken into account.

Consequently, structural subordination is often used, including by way of assignment of claims to senior creditors or by granting a loan to an operating company to bring it closer in the capital structure to the assets and income stream



than loans granted to the parent entity, establishing in rem security.

In practice, however, the most efficient manner of ensuring subordination is through the use of in rem security. This is because, in a bankruptcy, secured claims will rank ahead of unsecured claims by operation of law and also certain securities (eg, registered pledges) can still be enforced despite bankruptcy. Subordination can also be achieved through the priority ranking of security (for example, the senior creditor holds a mortgage with higher priority than the mezzanine or junior creditor), where the rules governing in rem security instruments generally provide for clear rules on priority.

## 4.2 Bank/Bond Deals

In most cases, when a bond component is used, the bonds issue is usually post-acquisition, with the actual acquisition being funded from a bridge-to-bond facility, which is repaid from the proceeds of the bonds issue. As a result, there is rarely need for an intercreditor agreement, with the seniority of the bridge-to-bond facility secured through the use of first-ranking in rem security.

## 4.3 Role of Hedge Counterparties

In the Polish acquisition finance market, hedging arrangements are most often offered as part and parcel of the acquisition financing package, which means that the lender is also the borrower's hedge counterparty. As a result, the use of intercreditor agreements with respect to hedge counterparties is limited and there is no uniform market practice.

# 5. SECURITY

## 5.1 Types of Security Commonly Used

In the case of non-recourse acquisition finance, the lender will typically obtain security on the

shares in the acquisition vehicle and over all its assets (by way of a floating charge). Once the acquisition is completed, the lender will typically obtain security on the acquired assets (in the case of an asset acquisition) or over the acquired shares and all or most of the assets of the target (often also specifically over bank accounts). If the target is part of a group, the lender will usually seek to obtain security over all the group companies involved in the structure. As a result, lenders typically require the establishment of a security package that constitutes a combination of various types of security instruments – the most frequent being financial/civil and registered pledges, mortgage, and assignment of receivables; a voluntary submission to enforcement, which is not a security interest in a strict sense (see **5.7 General Principles of Enforcement** for more details), is usually also a mandatory part of the package. Borrowers can seek to exclude certain assets or types of assets from the security package, but usually without significant success.

## Shares

The most common forms of security over shares and other financial instruments are as follows.

- A registered pledge (*zastaw rejestrowy*) which is established by execution of a written agreement and registration in the (centralised) register of pledges.
- A civil pledge (*zastaw*) which is established by an agreement between the pledgee and the pledgor, and requires a handover of the subject matter of the pledge to the pledgee (usually used if a financial pledge is not available). Handover is not applicable to shares in a Polish limited liability company as such shares are not reflected in a physical document.
- A financial pledge (*zastaw finansowy*) which is established by mere execution of a pledge agreement. However, a financial pledge can

only be granted in favour of certain types of financial institutions, such as central banks, commercial banks or pension funds; it is not entered into any register.

All such pledges give rise to a right in rem which gives priority to the pledgee in the satisfaction of its claims against the owner of the pledged assets. Upon registration, the registered pledge enjoys priority over any registered pledges that are subsequently created, as well as over other, subsequently created, rights in rem. Only the registered pledge allows for securing more than one claim (receivable) with a single pledge; civil and financial pledges permit securing only one receivable per pledge, which requires employment of parallel debt (or German-law *abstraktes Schuldanerkenntnis*) structures in more sophisticated transactions where several receivables (claims) are to be secured concurrently or by a security interest(s) being established for the benefit of a security agent/security trustee. In addition, the registered pledge also allows for a negative pledge mechanism that is effective vis-à-vis third parties. Financial and civil pledges are mainly (although not exclusively) used as an interim security (pending registration of the registered pledge). The pledges in principle survive insolvency of the pledgor(s).

### **Inventory**

The most common form of security over inventory is a registered pledge which can be established over movables (eg, vehicles, machines), transferable rights (eg, shares and receivables) or aggregates of movables and/or rights (a pledge over assets). A registered pledge over an aggregate of movables and/or rights bears certain, though limited, resemblance to the English law floating charge. In some instances, security (fiduciary) transfer of ownership of movables is also used.

### **Bank Accounts**

Security over bank accounts is most commonly established through a registered (and financial) pledge or, less frequently, a security (fiduciary) assignment of receivables. Rarely, bank accounts are covered, together with other rights and assets of the pledgor, by a registered pledge over an aggregate of movables and/or rights (floating charge).

### **Receivables**

The most common forms of security over receivables consist of either a registered pledge (which can cover either specified receivables or portfolios of receivables) or a security (fiduciary) assignment of receivables.

The security (fiduciary) assignment of receivables consists of a temporary transfer of ownership of certain receivables by the security provider (who can be either the borrower or a third party) to the lender(s) until the repayment of the secured loan. The assignment is usually unconditional – ie, the transfer is effective upon the execution of the security agreement and becomes final upon the debtor's default (while the debtor is authorised to collect payments as long as there is no default). Very rarely it is structured as a conditional assignment, ie, the transfer is only triggered by occurrence of an event agreed on by the parties (usually a default). Conditional assignment is typically avoided by lenders in Poland, because there are significant doubts as to whether it gives protection in the case of bankruptcy of the security provider under applicable Polish bankruptcy regulations (arguably it does not). The assignment can concern a single receivable, as well as a pool of receivables (existing and future).

### **Intellectual Property Rights**

The most common form of security over intellectual property rights is a registered pledge. Pledges over patent rights, industrial designs,

trademarks and integrated circuit topography must also (ie, in addition to being entered in the register of pledges) be entered in a register kept by the Polish Patent Office.

## Real Property

Security over real property is usually established by way of a mortgage (*hipoteka*) which is a right in rem effective vis-à-vis third parties and gives priority to the mortgagee in the satisfaction of its claims against the owner of the mortgaged real estate. Establishment of a mortgage requires a declaration of the real estate's owner made in the form of a notarial deed and registration in the Land and Mortgage Register by the court with proper jurisdiction for the location of the real estate. Upon registration, a mortgage enjoys priority over any mortgages or other rights in rem that are subsequently created. Land and mortgage registers are publicly available, and nobody can claim to have been unaware of the registered particulars.

A mortgage can also be established on receivables secured by a mortgage (*subintabulat*) in which case, in principle, payments under the original mortgage should be made directly to the hands of the second mortgagee.

Importantly, more than one claim (receivable) may be secured with a single mortgage.

## Movable Assets (Trucks, Trains, etc)

Security over tangible movable property is most commonly established in the form of a registered pledge. In cases where a pledge is established over a pool of assets (an aggregate of movables and/or rights), any such registered pledge can be structured either as a fixed charge (where the pledged assets remain unchanged throughout the security period) or a floating charge (where the subject matter of the pledge can vary over the security period). A registered pledge over individual assets is always a fixed charge.

## 5.2 Form Requirements

Form requirements depend on the type of security instrument and the type of assets on which the security interest is established. They vary from simple written form to notarial deeds. In addition, some security instruments – in particular, registered pledges and mortgages – require registration in certain public registers in order to be effective.

## 5.3 Registration Process

The registration process varies, depending on the public register involved. Generally, however, it requires filing an application with the relevant registry court using official forms. The time of registration varies from a couple of weeks for pledges to even several months for mortgages over real property (this may vary significantly depending on the location of the registry court, with the Warsaw Land and Mortgage Register having the longest waiting times).

Typically, the filing of an application to register security is a sufficient condition for loan disbursement, as the date of application either has retroactive effect (for mortgages) and/or determines priority (for pledges). The retroactive effect in the case of mortgages means that while the relevant mortgage will only come into being at the moment of its registration in the land and mortgage registry book, by operation of law it is deemed to be retroactively in force from the time (date and precise time) the application for its registration was filed with the court.

Additional registrations and/or notifications may be required, depending on the type of security interest and asset being encumbered; however, such registrations or notifications are typically not required for the purposes of perfection or validity of an instrument, but to ensure it is properly evidenced or to achieve a specific additional legal effect. For example, a financial pledge over bank accounts requires registration on the

account by the account bank. A pledge (whether registered, financial or civil) over shares in a limited liability company should be revealed in the company's share ledger and a list of shareholders filed with a commercial court. Unless an assignment of a receivable has been notified to the debtor, the latter may effectively discharge the obligation to the original creditor.

#### **5.4 Restrictions on Upstream Security**

The provision of upstream security is generally possible, but it may be subject to financial assistance rules (see **5.5 Financial Assistance**). In principle, upstream security should be established on market terms and for consideration.

As a transaction between related parties, upstream security has an increased potential of being challenged in insolvency, or under the fraudulent conveyance (*Actio Pauliana*) rules set out in the Civil Code, as suspicious and harmful to the creditors.

#### **5.5 Financial Assistance**

Financial assistance restrictions under Polish law are limited to joint-stock companies (*spółka akcyjna*) and limited joint-stock partnerships (*spółka komandytowo-akcyjna*), while they do not apply to limited liability companies (*spółka z ograniczoną odpowiedzialnością*) or other partnerships.

Under the current regulations of the Commercial Companies Code, a joint-stock company can directly or indirectly finance the acquisition or take-up of its own shares, particularly by extending loans, making advance payments or establishing security, subject to a number of conditions. These conditions are as follows.

- Financial assistance can only be extended after examining the debtor's solvency.
- The financing is extended on arm's-length terms (in particular, in relation to the interest

accruing to the company and the security established in favour of the company under loans extended or advance payments made).

- The shares are acquired at a fair price.
- The company has previously created reserve capital for this purpose from an amount which can be allocated for distribution.
- The financing is extended on the basis of and within the limits provided in a previously adopted resolution of the general meeting of shareholders. This is decided on the basis of a written management board report providing the rationale for the planned financing and its anticipated impact. The management board report requires filing with the commercial court and a public notice.

Financial assistance rules apply to both private and public companies. Because of their relatively restrictive nature, acquisition finance transactions are typically structured in a manner which falls outside their purview. The definition of financial assistance is very broad, and includes the granting of guarantees by the target group. As a result, establishment of security over the target's assets post-acquisition is usually preceded by a corporate restructuring of the target (transformation into a limited liability company or an upstream merger).

#### **5.6 Other Restrictions**

Although the concept of corporate benefit is not recognised in the Polish legal system, under the Commercial Companies Code, board members must act for the benefit of the company and represent the company's interests rather than the interests of the company's shareholders/group (subject to civil and/or criminal liability). Group interest per se is not recognised under Polish law. As a result, when a commercial company grants security as a third-party security provider, its board members should be able to justify that such action is not to the company's detriment. In practice this is addressed by establishment

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of adequate (arm's-length) consideration for the provision of security. Such consideration does not necessarily mean that the company should receive a cash fee. The term is generally understood in a broader context and includes anything which presents real value to the company, eg, access to intragroup financing, access to technology/know-how, which the group acquired thanks to obtaining funds guaranteed by the Polish entity, etc.

On 13 October 2022, a new regulation on groups of companies will enter into force. Under the amended Commercial Companies Code, it will be possible to establish a formalised group-of-companies structure (*grupa spółek*) that will be subject to a separate set of rules. The new rules seem to permit a company (being a member of such a group) to act in the interest of the group. As such, these rules could be used as an additional argument in favour of admissibility of intra-group financing models in which subsidiaries do not directly benefit from the financing on par with the parent company. However, the new regulation will presumably not affect companies/groups who decide not to formally create a group in accordance therewith.

A further restriction is the concept of "over-collateralisation" (*nadzabezpieczenie*). Several decisions of the Polish Supreme Court indicate that in cases of over-collateralisation it may be theoretically possible to challenge the validity of collateral security deemed excessive (also outside of bankruptcy proceedings). However, the criteria for application of this concept are still unclear, and in practice there have not been any notable cases of invalidation of security through its application.

## 5.7 General Principles of Enforcement

Most security instruments can be enforced via court proceedings. This means that, in principle, the creditor first needs to obtain an enforce-

ment title (in practice, an enforceable judgment against the main debtor).

In financing transactions this route is usually shortened by including in the security package a so-called "declaration on voluntary submission to enforcement". A declaration on voluntary submission to enforcement is not strictly a security instrument. It does however constitute an instrument which accelerates the satisfaction of the creditor, as it replaces a court judgment adjudicating the receivable for the benefit of the creditor. By way of the declaration, which is made by the debtor in front of a notary public, the debtor acknowledges its obligation to the creditor and undertakes to pay the same (together with interest and other costs, as applicable) up to a specified amount, and submits to enforcement in respect of that payment obligation. Following the lapse of a deadline set forth in the declaration or upon the occurrence of circumstances described therein (usually, non-payment and notice thereof by the creditor to the debtor), the creditor becomes entitled to demand that the court declare the declaration enforceable and, subsequently, that it commence the enforcement proceedings. It should, however, be noted that the courts' practice is not uniform in declaring enforceability of such documents (although theoretically the process should in principle be automatic).

Enforcement is done through public bailiffs (*komornik*) who have a variety of instruments at their disposal to seize and monetise a debtor's (or third-party security-provider's) assets, including via public auction. The proceeds are then distributed by the bailiff among creditors in accordance with the priority of their claim:

- expenses of court-enforcement proceedings;
- alimony claims;
- employee pay (not exceeding the amount of three months' minimum remuneration), annui-



- ties and compensation for the impairment of health, costs of the debtor's ordinary burial;
- claims secured by a maritime mortgage or privilege over a ship;
- claims secured by mortgage, pledge, registered pledge and treasury pledge or claims accorded priority by pertinent laws and rights encumbering real property prior to making an entry into the pertinent land and mortgage registry book on commencement of enforcement;
- employee pay not satisfied in the third order (in the third point above);
- taxes and other public burdens (including interest), unless satisfied in fifth order (in the fifth point above);
- claims of the creditors who initiated enforcement proceedings; and
- other claims.

In the case of some instruments – such as civil law pledges and mortgages – court proceedings are the only means of enforcement available.

However, financial pledges and registered pledges also allow for out-of-court enforcement mechanisms such as foreclosure, private sale, satisfaction out of the proceeds of a lease of the encumbered enterprise (business) or profits generated by the business.

## 6. GUARANTEES

### 6.1 Types of Guarantees

Guarantees are commonly used. They can take the form of either a suretyship (an accessory guarantee governed by the Civil Code) or an independent guarantee (an abstract, non-accessory undertaking permitted under the principle of freedom of contract). In acquisition finance transactions, this will usually be an independent guarantee delivered either upstream (by the

target) or downstream (by sponsors in the case of recourse-financing).

### 6.2 Restrictions

Restrictions on guarantees are similar to restrictions applicable to upstream security generally – see in more detail **5.4 Restrictions on Upstream Security** to **5.6 Other Restrictions**.

In principle, both upstream, downstream and cross-stream guarantees are permitted under Polish law. Corporate benefit is not a restriction in itself because the concept is not recognised under Polish law. However, the personal liability of management board members who are required to act for the benefit of the company (which may be different from that of the company's shareholders) can in practice act as a deterrent. Consequently, the transaction must be made on market terms and for consideration. See **5.6 Other Restrictions**.

However, transactions between related parties have an increased potential of being challenged as suspicious and harmful to the creditors, either in insolvency or under fraudulent conveyance rules (*Actio Pauliana*).

Financial assistance restrictions under Polish law are limited to joint-stock companies and limited joint-stock partnership only and permit such companies directly or indirectly to finance the acquisition or take-up of their own shares (particularly by extending loans, making advance payments or establishing security), subject to a number of conditions discussed in more detail in **5.5 Financial Assistance**.

### 6.3 Requirement for Guarantee Fees

The transaction must be made on market terms and for consideration. Although it is not a legal requirement, from a tax perspective in the absence of such a fee (calculated at arm's-length level), the tax administration frequently



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determines deemed taxable income on the side of the guarantee's beneficiary.

back rules that can affect parties in an acquisition finance context.

## 7. LENDER LIABILITY

### 7.1 Equitable Subordination Rules

In principle, lender liability is not an issue under Polish law, which does not allow for substantive consolidation, equitable subordination, or any other form of piercing the corporate veil.

As mentioned in **5.6 Other Restrictions**, the Polish Supreme Court has indicated that in cases of “over-collateralisation” it may be theoretically possible to challenge the validity of collateral security deemed excessive (also outside of bankruptcy proceedings), but the criteria for this are vague and this is not something that happens often in practice (if at all).

Loans granted by a shareholder to a limited liability company or a joint-stock company that is subsequently declared bankrupt within the two-year period preceding the date of filing the bankruptcy motion will be included in the last category of claims. Generally, claims of a shareholder under actions of a similar effect to a loan (such as a sale of goods with a deferred payment deadline) will also be included in this last category of satisfaction. These rules will also apply to loans granted to the bankrupt and transactions carried out with the bankrupt by a majority shareholder of a direct shareholder of the bankrupt (subject to some limited exceptions).

### 7.2 Claw-Back Risk

Security established to the benefit of lenders can in some cases be challenged in bankruptcy.

Polish bankruptcy law does not address claw-back specifically in the context of acquisition finance. However, it provides for general claw-

In particular, there is automatic claw-back in respect of the following.

- All disposals of assets effected by the bankrupt within one year prior to the filing of a bankruptcy petition, if that disposal was gratuitous or for consideration which was significantly lower than the value of the bankrupt's performance.
- Securing and payment by the bankrupt of a debt not yet due within six months prior to the filing of a bankruptcy petition.
- Related-party transactions (even when they provided for equivalent consideration) within six months prior to the filing of a bankruptcy petition. The affected related-party transactions include:
  - (a) transactions with a spouse, relative by blood or marriage in direct line, relative by blood or marriage in collateral line to the second degree, or an adopted child or adoptive parent, as well companies where such persons are members of the management board or sole shareholders;
  - (b) transactions with a company where the bankrupt is a member of the management board or the sole shareholder;
  - (c) in the case of legal persons or partnerships, transactions with partners, shareholders, representatives or their spouses, as well as with affiliated companies, their shareholders, representatives or spouses; in addition to
  - (d) transactions between companies or partnerships which are in a parent-subsidiary relationship or where both parties share the same parent.

In principle, each of these actions is deemed ineffective towards the bankruptcy estate by operation of law.

In addition, the judge-commissioner can declare, at the request of the bankruptcy trustee, certain securities (encumbrances) ineffective towards the bankruptcy estate if:

- the bankrupt was not a personal debtor of the secured creditor;
- the encumbrance was established within one year prior to the filing of a bankruptcy petition; and
- the bankrupt did not receive any consideration for the creation of such security or if the consideration was disproportionately lower than the value of the security.

If the security was established to secure the debt of the bankrupt's related parties (see above), the judge-commissioner can declare it ineffective towards the bankruptcy estate irrespective of the consideration received by the bankrupt, unless the other party demonstrates that it did not harm the interest of other creditors.

## 8. TAX ISSUES

### 8.1 Stamp Taxes

Bank loans are exempt from stamp duty. Loans made by non-banking entities are, as a rule, subject to a 0.5% tax on civil law transactions. The tax is applicable irrespective of the existence of capital relations between transacting parties except for loans granted by shareholders to their direct subsidiaries. Several stamp duty exemptions are also available, including exemption applicable to loans granted by foreign companies which engage in business activity in the area of lending and crediting to Polish lenders.

### 8.2 Withholding Tax/Qualifying Lender Concepts

The withholding tax (WHT) on interest amounts to 20% in Poland. Double tax treaties may provide for a reduced WHT rate, or WHT exemp-

tions in some cases. The formal condition for enjoying any such withholding tax reduction or exemption is delivery of a certificate of tax residence of the interest recipient prior to interest distribution, and evidence that the interest recipient is its beneficial owner (in the form of a statement of the beneficial owner management board).

A WHT exemption on interest distribution could be enjoyed if payments are made between related parties on the grounds of the EU Interest and Royalty Directive (assuming specified formal conditions are met).

A new WHT regime applies from 1 January 2022. Under the new WHT rules, Polish companies (tax remitters) must withhold the WHT on interest, unless:

- the payments do not exceed the threshold of PLN2 million per taxpayer per year; or
- the management board of that tax remitter has submitted a statement that the payment recipient is its beneficial owner; or
- an opinion has been obtained from the Minister of Finance confirming that the payment recipient is its beneficial owner.

The PLN2 million threshold applies to aggregation of dividends, interest, licence fees, advisory fees, accounting and legal fees, market research, advertising, management and control, data processing, recruitment fees, insurance premiums, guarantee fees and fees for any similar services made to the same recipient since January 2022.

The statement of the board could be issued only if the board conducts a verification procedure which assures that the conditions for the preferential tax rates are met (eg, beneficial owner status, conducting genuine economic activity). The verification procedure must be pursued in a diligent manner and assure collection of docu-

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ments confirming the right to enjoy WHT exemptions or rates' reductions. A false or incorrect statement is submitted under the pain of penal-fiscal liability and a financial sanction amounting to 10% to 20% of the additional WHT burden.

The Minister of Finance may issue an opinion upon request of the taxpayer or the tax remitter within six months from the application date. The opinion is valid for 36 months. The opinion is available only for WHT exemptions stemming from EU Directives (dividends, interest and licence fees paid to the parent company in the case that certain requirements are met).

In the case that the PLN2 million threshold is exceeded while the statement or the opinion has not been collected, the WHT may be refunded upon confirmation of the beneficial ownership status of the payment recipient, performance of genuine business activity, and satisfaction of the remaining eligibility criteria for CIT exemption/reduced rate. The refund procedure should be completed within six months.

### 8.3 Thin-Capitalisation Rules

Thin-capitalisation rules (which in their current form apply fully as of 1 January 2019) impose restrictions on the tax deductibility of interest irrespective of (i) the existence of any capital relations between lender and borrower or (ii) the nature of the debt (loan, bond, credit, commercial indebtedness, trade credit, etc). The tax deductibility of interest is denied in relation to an excess of aggregated amount of interest over 30% of the EBITDA of the borrower. This restriction does not apply to the extent that the aggregated amount of interest payable by the borrower does not exceed the PLN3 million threshold. Tax deductibility on interest related to capital expenses (purchase of stock, shares or the like) is denied.

## 9. TAKEOVER FINANCE

### 9.1 Regulated Targets

There are a number of regulated industries in Poland. However, in most cases the regulation is at the level of the company that conducts a given regulated activity rather than at shareholder level. A notable exception is in the financial services industry, where acquisitions of qualifying holdings usually require regulatory clearance, particularly for banking, payment, insurance, fund management, pension funds, and investment firms.

This has a number of implications from an acquisition finance perspective.

First, where regulatory control also includes the ownership structure of a company, transactions are usually structured conditionally, with regulatory clearance constituting a condition precedent which can impact financing terms and the scope of available security.

Second, one of the suitability criteria assessed by the financial services regulator (*Komisja Nadzoru Finansowego* – KNF) when considering a potential investor acquiring a qualifying holding is the investor's financial situation and its ability to ensure the financial stability of the target. Historically, KNF has interpreted this in a way that limits (although does not entirely exclude) the ability to employ acquisition finance in acquiring qualifying holdings in banks, payment institutions, insurance companies, and investment firms. KNF has also taken a dim view of establishing security on shares in a target financial institution.

Finally, in the case of fund management companies and pension funds, the funds for the acquisition of shares cannot originate from a loan or credit.

## 9.2 Listed Targets

Direct and indirect acquisitions of shares in listed companies that involve crossing certain thresholds are subject to a specific regulatory regime as provided in the Polish Public Offer Act, which generally implements Directive 2004/25/EC on takeover bids (Takeover Directive).

As of now there are two such thresholds. Crossing the 33% threshold of votes in a listed company can only occur via a tender bid for 66% of votes, except where the 33% threshold of votes is to be crossed within a tender bid for all the remaining shares. Crossing the 66% threshold of the votes in a listed company can only occur within a tender bid for 100% of shares. If the thresholds are crossed indirectly, the relevant bid must be launched post-acquisition.

Commencing from 30 May 2022, a tender bid will be mandatory only after a direct or indirect acquisition of shares resulting in crossing a 50% threshold of votes in a listed company. It will also be possible to launch a voluntary tender for acquisition of shares not linked to any threshold.

Prior to the launch of a tender bid, a guarantee “performance bond” in the form of a bank guarantee or a cash deposit covering the entire price for all shares intended to be acquired in the tender bid must be established. As a result, funding must be certain.

This requirement also applies to tenders launched in connection with a minority-shareholder squeeze-out or with a delisting of the company.

In addition, all listed companies are automatically considered a protected entity for the purposes of the provisional FDI clearance regime described in **1.3 COVID-19 Considerations**.

## 10. JURISDICTION - SPECIFIC FEATURES

### 10.1 Other Acquisition Finance Issues Brexid

Following the United Kingdom’s exit from the European Union, which became effective on 31 December 2020, UK banks are treated in the EU and Poland on a par with non-EU banks. As such, in providing cross-border activities in Poland, UK banks can no longer rely on passporting under Article 39 of CRD IV. Thus, while lending as such is not a regulated activity in Poland, UK banks (just like other non-EU banks) are permitted to extend loans to Polish entities only on an occasional basis, pursuant to the freedom of capital principles under the EU treaties or, in situations where it was the borrower who approached the bank for a loan, under a broader concept of “reverse solicitation”.

Further, following Brexit, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has, among others, ceased to apply in relationships between the EU member states (including Poland) and the UK. Accordingly, judgments rendered by UK courts are recognised and/or rendered enforceable in accordance with the Polish Code of Civil Procedure, similarly to judgments from other non-EU countries, including the United States or Korea.

The foregoing resulted in certain adjustments to the loan documentation and legal opinions pertaining to transactions involving English law-governed documents. However, thus far no significant remodelling of transaction structures or documentation for the sole reason of Brexit has been observed.

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## Additional Acquisition Controls

Acquisition of shares in a company by an owner or perpetual usufructuary (*użytkownik wieczysty*) of any agricultural real property with an area of at least five hectares or real properties with a total area of at least five hectares, located in Poland, is subject to the pre-emptive right of the National Support Centre for Agriculture (*Krajowy Ośrodek Wsparcia Rolnictwa*, NASC).

In practice, in order to enable the NASC to exercise its pre-emptive right, the parties usually first enter into a conditional sale (purchase) agreement which is subject to the condition that the NASC does not exercise its pre-emption right. The NASC may exercise its right within two months, counted from the notification of the contemplated sale. After the lapse of the foregoing “waiting period” the parties are free to enter into the final sale (purchase) agreement.

Acquisition of shares in breach of the foregoing restriction (ie, omitting the NASC’s pre-emptive right) would result in the transaction being null and void.

The NASC’s pre-emptive right would not apply in the case of the acquisition of listed shares (ie, shares traded on a stock exchange), sale for the benefit of close relatives, a local government unit or the State Treasury, and in the case of other limited exceptions expressly stated and set forth in the Act on the Agricultural System (*ustawa o kształtowaniu ustroju rolnego*). Acquisition of listed shares is, however, subject to the FDI clearance regime described in **1.3 COVID-19 Considerations**.

## Tax Reporting

In parallel with the implementation of the DAC 6 Directive, Poland has introduced a set of specific hallmarks, which also require statutory reporting in relation to domestic transactions. Such reporting is required even in the absence of tax benefits stemming from a reportable arrangement (transaction). For example, these specific hallmarks relate to transactions leading to:

- the occurrence of a double taxation agreement (DTA) amounting to at least PLN5 million;
- the application of a double tax treaty withholding tax reduction/exemption amounting to at least PLN5 million; or
- the incurring by foreign taxpayers of revenue sourced in Poland and exceeding PLN25 million in a tax year.

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**Sołtysiński Kawecki & Szlęzak** is one of Poland's leading full-service law firms. With more than 170 attorneys, the firm provides the highest standard of legal services in all areas of business activity, and is reputed for the quality

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## Trends and Developments

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### Year in Review

Market reports show that the number of mergers and acquisitions in Poland in 2021 increased by one third compared to 2020, which – despite being the year of the COVID-19 pandemic breakout – was also abundant in transactions. Approximately 328 transactions were recorded, compared to 229 in 2020. Interestingly, as much as 88% of these transactions have ultimately not been completed, with the pandemic, geopolitical tensions and regulatory concerns being given as the reasons for this failure.

Among completed deals, the most active sectors on the target side were TMT, including e-commerce, followed by FMCG and biotechnology/healthcare. Increased activity in the TMT industry should not come as a surprise. The COVID-19 pandemic accelerated the trend of digitisation of virtually every sector of the economy and changed the behaviour of customers who massively transitioned to online shopping and services. This has resulted in a rapid growth of the sector. Not being able to organically grow at the desired pace, businesses and investors alike turned to acquisitions.

Similar reasons drove acquisitions in the healthcare sector, where consolidation is expected to allow instant improvement of the market position as well as increasing customer base and the offering of new services.

In the real estate sector, logistics has consistently remained a strong area in Poland throughout the entire COVID-19 pandemic, and its future looks bright. A number of new players have entered the market and teamed up with local developers to pursue new projects.

While the buy side of transactions in principle reflected the target structure (except for an approximately 10% share of private equity/venture capital investors), on the sell side private investors comprised as much as 62% of the pool, followed by 9% of private equity and venture capital sellers. This reflects generational changes in private businesses founded after the transition to a market economy. After three decades of growing their businesses, many original owners are struggling to find the right successors and no longer have the stamina to lead their business through the current turbulent and uncertain times. Thus, they have decided to exit their business by selling it, either to a sector bidder or to a private equity buyer.

Many market participants positioned themselves for significantly more distressed transactions, which were supposed to flood the market as a result of the pandemic's impact on the economy and limited access to bank financing. As in many other jurisdictions, the anticipated proliferation of distressed deals has not occurred, presumably thanks to the protective effect of various COVID-19 measures introduced by the Polish government upon the outbreak of the pandemic, as well as a relatively lenient approach taken by Polish banks in respect of defaults. The situation may, however, change in the coming months as the economic turmoil continues due to the war in Ukraine. Interest rates and inflation in Poland pumped up to levels not seen in decades, combined with sanctions-restricted access to Russian and Belarusian markets, may leave a number of companies particularly vulnerable. A recently revamped legal environment for distressed transactions, including favourable pre-

pack provisions, provides a good environment for such deals.

## Deal Financing

Given that local “mega-deals” are rare in the Polish market, acquisition financing structures have for years remained rather simple. Private equity investors often finance acquisitions solely with their own funds, while corporates’ approach varies and depends on the size of the deal and a corporate’s own financial position (though own-equity/excess cashflow deals are not rare here, either).

A typical financing structure involving an external element consists of an investor’s equity coupled with a bank loan or other source of financing (eg, bonds or a private loan). The proportion of equity to bank loan varies depending on the general market situation and the relevant bank’s credit policy. Since the outbreak of the pandemic and, currently, the war in Ukraine, Polish banks have generally taken a more conservative approach both as regards the loan-to-value ratio at which they are willing to provide financing and their appetite to finance certain industries or businesses. They have also increased scrutiny when it comes to verification of a sponsors’ experience in the relevant field, as well as of the financial model in the context of required financial covenants. A loan-to-value ratio exceeding 60% for an acquisition loan is currently rarely offered, while financial covenants are specifically tested against increased interest rates in several worst-case scenarios (in particular if financing is to be provided in Polish zlotys).

In terms of documentation, banks in Poland remain relatively conservative and, thus, bank funding is almost exclusively on full documentation. An acquisition finance package will typically involve loans granted to the acquisition vehicle (for acquisition of the target) as well as loans granted to the target (at closing or post-acquisi-

tion) for refinancing of its existing indebtedness and financing of its activities. A debt push-down at the target level could also be an option given that Polish financial assistance regulations apply only to joint stock companies and limited joint-stock partnerships, which are rarely used as transaction vehicles. The prevailing practice in the Polish market is for bank lenders to insist on currency-hedging arrangements to accompany loans where the financing is provided in foreign currency. Since October 2021 when the interest rates of loans in Polish zlotys started to rise rapidly, interest-rate swaps have again become a mandatory part of financing documentation.

Most loans are vanilla loans, and it is uncommon to see other types of facilities taking on different levels of risk, seniority or rates. Mezzanine financing is still not very popular in Poland, mainly because of the limited number of financing providers and a relatively high minimum financing threshold. It is extended mostly by private equity funds, including some dedicated Mezzanine funders; only a few banks offer the instrument. There is no specific market practice applicable to PIK loans and such products are very rarely, if at all, visible on the market. When a bond component is used, the bonds issue is usually post-acquisition, with the actual acquisition being funded from a bridge-to-bond facility.

Private financing providers usually take a more flexible approach than bank lenders but at the cost of higher pricing and an even more onerous security package, often involving – apart from the “standard” security over shares and assets – direct equity participation in the target and/or the borrower, or even controlling rights over them.

## Future Outlook

According to a recent survey, as many as 71% of Polish CEOs expect to actively look for an acquisition opportunity within the next 12 months. Interestingly, 20% of them perceive acquisition

as a tool to bolster their company's ESG capabilities. This makes the latter goal second to none, on par only with the goal of increasing the market share. CEOs believe that an acquisition could help them improve the company's ESG KPIs and lower the risks stemming from omissions in the implementation of an ESG strategy.

The survey demonstrates that Polish CEOs have finally embraced the constantly increasing importance of ESG factors in business – and there are good reasons for that.

Changes to the legal environment stemming from EU regulations already directly affect large companies employing more than 500 employees. Starting from 2022, these companies are required to expand their non-financial disclosures made pursuant to Directive 2014/95/EU on the disclosure of non-financial and diversity information (the Non-financial Reporting Directive, NFRD) with additional disclosures required under Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation). Within that framework, in the first year of reporting, businesses are required to disclose the proportion of economic activities included in the Taxonomy Regulation (Taxonomy-eligible activities) to activities not included in the Taxonomy Regulation in their total turnover, CapEx and OpEx.

In 2023 and subsequent years, these disclosures will become more comprehensive, and companies will have to report on whether their economic activities are environmentally sustainable (ie, Taxonomy-aligned) by disclosing detailed information on the proportion of the Taxonomy-aligned activities in their turnover, CapEx and OpEx. In order to accurately disclose the data, each company will have to evaluate its economic activity pursuant to meticulous criteria set out in the Taxonomy Regulation and its delegated acts.

The new Corporate Sustainability Reporting Directive (CSRD), which is expected to enter into force in 2024, will expand the scope of the Taxonomy Regulation disclosures to all large companies and all companies listed on regulated markets (except listed micro-enterprises).

In parallel, Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR), which entered into force last year, requires financial market participants to take sustainability factors into account in their investment decision-making process, and to disclose sustainability information with respect to their investments and financial products. Additionally, under the Taxonomy Regulation, banks, insurance companies, investment firms and asset managers will be required to make additional disclosures on the alignment of their assets or, as applicable, investments with the Taxonomy Regulation. The KPIs to be disclosed depend on the type of disclosing entity. For example, banks will be required to calculate the so-called green asset ratio (GAR) showing the proportion of their assets financed or invested in Taxonomy-aligned economic activities to their total assets, whereas asset managers will have to present the value of their investments in Taxonomy-aligned economic activities of investee companies based on the KPIs disclosed by the latter.

Even if the regulations briefly outlined above do not seem to directly affect a given business, it is very likely that they will do so indirectly. In order to ascertain that their KPIs (in particular, OpEx) are Taxonomy-aligned, businesses required to perform mandatory disclosures pursuant to the Taxonomy Regulation will demand that their contractors' (goods and service providers) activity is Taxonomy-aligned as well. Banks will be interested in showing a "greener" GAR and thus will prefer to finance borrowers and targets whose economic activity is Taxonomy-aligned. Inves-

tors, in turn, will prefer to invest in Taxonomy-aligned businesses in order to mitigate potentially negative consequences their investment decisions may have on sustainability factors, which they will need to reveal to customers and in their disclosures.

It is, therefore, not unreasonable to predict that although, *prima facie*, the scope of application of the Taxonomy Regulation and the mandatory disclosure regulations is currently limited to the

largest businesses and financial market participants, the market will shortly cause expansion of their practical application to include other participants of the economic chain. We expect that ESG and the Taxonomy Regulation will play a remarkable role in reshaping the acquisitions market by redirecting investments towards sustainable projects and activities in accordance with the objectives of the EU's European Green Deal.

**Sołtysiński Kawecki & Szlęzak** is an independent Polish law firm with a team of over 170 lawyers, offering legal services to Polish and international clients for over 30 years. Its banking and finance practice focuses on financial regulatory work, financial sector M&A, and finance. It is recognised in the market for its ability to handle financial sector M&A in a way that combines top competence in both corpo-

rate and regulatory matters. Its finance work is varied, but revolves primarily around acquisition finance, as well as corporate refinancing and bonds/notes issues. It has an established position as a local counsel firm in multi-jurisdictional deals. For some institutions it is also the go-to firm for advising on more complex legal issues prior to or within the context of financing transactions.

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