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Corporate M&A

Lithuania

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WALLESS

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2021

LITHUANIA

Law and Practice

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CONTENTS

1. TRENDS

1.1 M&A Market

During the first wave of the COVID-19 pandemic in the spring of 2020, the general expectation was that M&A activity would significantly slow down. It did so for a short period of time, but then recovered in the third and fourth quarters. Without delving into detailed statistical data, it can be said that 2020, in terms of both deal volume and value, was similar to 2019. Market players remain cautiously optimistic in their expectations for M&A activity in 2021.

1.2 Key Trends

One of the top trends in Lithuania is the increase in cross-sectoral transactions. It is observed in the telecommunications, logistics, financial services and energy markets.

The main reason for this trend is the integration of technological innovation into traditional business models so that the latest technologies are combined with the products already offered. For example, Opera's Internet browser has acquired Fjord Bank, which will help Opera integrate new fintech service packages with Fjord Bank's infrastructure. Another example is Senukai shopping mall, which bought the leasing service provider Mokilizingas, which was integrated into the settlement systems.

The aim is also to gain a competitive advantage by reducing costs, streamlining processes and expanding the value chain. For example, telecommunications service provider Bite has acquired a number of companies, thus gaining access to strategically important markets: a television company, a telecommunications company and an internet data transmission business.

1.3 Key Industries

TMT was the top sector for deal-making, following the industrials and chemicals sector and financial services. Service industries were the most affected by COVID-19 the most.

TMT

Telecommunications service provider Bite acquired the internet service operations of state-owned broadcaster Telecentras (Mezon brand) in a EUR20 million deal. This was also an example of a cross-sectoral transaction, which is a popular trend in M&A market. Another important TMT deal for the Baltics was the sale of Sweden-based Telia Company's data carrier business – including assets in Estonia, Latvia, and Lithuania – to Polhem Infra.

Financial Services

Landmark financial transaction included Siauliu Bankas acquisition of Danske Bank Lithuanian branch retail loan portfolio for EUR108 million. Lithuanian national energy company Ignitis Grupe was listed on the Nasdaq Baltic exchange and the London Stock Exchange, raising EUR450 million.

Consumer Sector

Despite seeing the largest decline, some major deals in consumer sector shall be noted. First of all, it is the acquisition of Lithuania's sports club chain Gym Plius by Estonia's MyFitness. Lithuanian real estate investor DG21's EUR12 million purchased domestic entertainment group Seven Entertainment. Estonian investment holding UP Invest's acquired, Baltic cinema operator Forum for EUR65 million.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

The primary technique which is used in the vast majority of M&A transactions is a shares acquisition by way of privately negotiated deal. Asset deals are less common, but also used in certain

circumstances. Reorganisations are used more often in internal corporate restructurings rather than M&A deals. For example, 91% of all M&A transactions in 2020 were shares deals, while assets deals and other forms of transactions comprised the remaining 9% (2020 Baltic Private M&A Deal Points Study).

2.2 Primary Regulators

The primary regulators of M&A activity in Lithuania are as follows:

- the Competition Council of the Republic of Lithuania ("Competition Council"), which is responsible for merger control;
- the Bank of Lithuania ("BoL"), which is an authority responsible for supervising Lithuanian financial market, including takeovers and the acquisitions of qualifying holding in financial market participants;
- the Commission for Coordination of Security of Objects Important to Ensuring National Security of the Republic of Lithuania ("Strategic Commission"), which is responsible for conducting national security review of investments in certain entities and economic sectors; and
- Nasdaq Vilnius, which is an operator of a regulated stock exchange in in Lithuania through which takeovers are implemented.

Additional regulators may come into play if the target company is operating in a specific regulated sector (eg, telecommunications, energy).

2.3 Restrictions on Foreign Investments

There are no specific restrictions of foreign investments besides a national security review.

2.4 Antitrust Regulations

The proposed concentration must be notified to the Competition Council and authorised if the total gross income of the entities participating in the concentration in the last financial year before the concentration exceeds EUR20 million and if the total gross income of each of at least two entities participating in the concentration in the last financial year are more than EUR2 million.

2.5 Labour Law Regulations

With respect to M&A, labour law regulations come into play only in cases where business transfers through asset deals or reorganisations takes place, which happens very rarely (as mentioned, vast majority of M&A transactions are implemented through share deals). In these cases, acquirers should consider that certain consultation obligations with employee representatives apply and employees of the target company have a right to demand to be transferred together with the business to the acquirer on the same employment terms as they had in the target or to terminate the employment contract with the target company. It is generally prohibited for the target company or the acquirer to terminate employment contract solely on the basis of the business transfer.

2.6 National Security Review

The industry sectors most regularly subject to national security reviews are:

- energy;
- transport;
- information technologies, telecommunications and other high technologies;
- finance and credit; and
- military equipment.

An investor has a duty to notify the Strategic Commission about the investment into a company operating in one of the aforementioned industry sectors if both of the following conditions are satisfied:

- the investor acting alone or jointly with other investors seeks to enter into any transaction

that reaches the threshold of 25% of voting rights; and
- the investment may have an impact on critical infrastructure objects, critical technology or security of resource supply, ability to gain access to non-public information or ability to control it.

The second condition is left for self-assessment by the investor. At the moment the applicable laws do not set out any specific criteria which the investor could use to ascertain the impact of the investment to be made. Thus, in practice, investors usually choose to notify the Strategic Commission every time an investment exceeding 25% of voting rights if the activities of the target are related to the sector indicated above.

If the investor has failed to notify the Strategic Commission about the investment and it is later deemed that the investor does not conform to national security interests, the transaction can be declared null and void.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

There have been no significant court decisions or other legal developments in Lithuania in the past three years that have materially affected M&A market.

3.2 Significant Changes to Takeover Law

There have been no significant changes to laws regulating takeovers in Lithuania in the past 12 months.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

It is not customary to build a stake prior to launching an offer for three main reasons:

- first, concealed stakebuilding is difficult to achieve due to strict mandatory disclosure requirements which start at crossing the threshold of 5% of voting rights;
- second, Lithuanian public M&A market is small and very rarely there are more than one bidder (usually, the bidder acquires a controlling stake from the principal shareholders, which then triggers an obligation to launch a mandatory offer); and
- third, stakebuilding locks the minimum price of the tender offer at the highest price paid by the bidder for the target's shares within the last 12 months prior to launching of the tender offer.

4.2 Material Shareholding Disclosure Threshold

A person or several persons acting in concert must notify BoL and the issuer every time the following thresholds of voting rights in a listed company are crossed: 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75% and 95%.

Failure to notify about the crossing of the aforementioned thresholds of voting rights might result in deprivation of the voting rights. As a result, any corporate decisions adopted by way of such voting rights may be later declared null and void.

All shareholdings in private companies have to be disclosed and registered with the Lithuanian Register on Legal Entities. However, EU legal requirements regarding setting up of a register of ultimate beneficial owners is not yet in full implemented in Lithuania, ie, only direct shareholders of private companies have to be disclosed.

4.3 Hurdles to Stakebuilding

The main hurdle to stakebuilding is strict mandatory disclosure requirements. Companies are not allowed to change the disclosure thresholds in their articles of association.

4.4 Dealings in Derivatives

Dealings in derivatives are not prohibited, but it can also lead to an obligation of an investor to disclose acquisition of stake in the target company via indirect means if the relevant thresholds are crossed. The concept of "voting rights" in takeover context is defined broadly to include basically any financial instrument which is comparable to holding shares or voting rights in the company, thus derivatives are not an effective tool for concealed stakebuilding.

4.5 Filing/Reporting Obligations

As described, dealing in derivatives may trigger the same disclosure obligations as ordinary acquisition of voting shares.

4.6 Transparency

Once the one third threshold is crossed, the shareholder is obliged to announce its intention to make a mandatory tender offer.

A bidder launching a tender offer (mandatory or voluntary) have to disclose in the offer documentation the reasons for implementing the tender offer, including its plans and intentions with regards to the target in the event the offer is successful. In particular, in the offer circular the bidder must indicate the following information related to the future operations of the company:

- the bidder's plans and intentions relating to the target company;
- information on continuity of business of the target company;
- information on any anticipated restructuring (change of management structure), rearrangement or winding-up of the target company;
- employment-related policy;
- manager-related policy;
- further capital raising policy;
- dividend policy; and
- any anticipated amendments to the articles of association of the target company.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

This issue is governed by the EU Market Abuse Regulation (MAR), which is directly applicable and binding in Lithuania. If the relevant information is considered an "inside information" according to MAR, the issuer must disclose it to the market, unless certain exceptions apply. Generally, the regulatory perception is that all stages of the deal from negotiations to closing are disclosable information. Relevant exceptions are postponement of the disclosure (subject to conditions of MAR), or reliance on market sounding regime (subject to conditions of MAR).

5.2 Market Practice on Timing

Market practice on timing of disclosure usually corresponds to the applicable legal requirements. Usually, it is in the interest of both the bidder and the target to postpone the disclosure of information related a possible M&A deal for as long as possible. The tools that are used to achieve this (and for how long they are used) depends on the specific factual circumstances of the deal and the risk appetite of the parties involved in the deal.

5.3 Scope of Due Diligence

In private M&A, the scope of the due diligence varies significantly depending on various circumstances of the deal (industry of the target, size of the deal, timing restrictions, etc).

In public M&A, due diligence usually takes place before launching of the offer based on the agree-

ment with the principal shareholders and subject to requirements of MAR. The scope depends on the factual circumstances of the deal, as well as how much information the target can disclose to the bidder whilst at the same time remaining compliant with the relevant obligations established in MAR and competition law requirements, as well as whether BoL allows to delay the disclosure of the deal until definitive transactions documents are signed.

The pandemic did not have a great material impact on the due diligence scope, except that buyers became razor sharp in their evaluations of certain areas of the target's activity which may have been affected by COVID-19 the most, such as whether the target has solid financial fundamentals, is there any need for financial or operational restructuring, are its relations with material suppliers and customers sustainable, etc.

5.4 Standstills or Exclusivity

Both exclusivity and standstill agreements are permissible under Lithuanian law. Their usage depends on the specific factual circumstances of the deal, but in general exclusivity agreements are more common than standstill agreements.

5.5 Definitive Agreements

Definitive agreements are not explicitly prohibited, but they are very rarely used, if at all.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

The length of private M&A transactions varies significantly depending on the specifics of the deal. If it is a small transaction and no regulatory approvals are required, it can be completed in one or two weeks. If regulatory approvals are required or if a transaction is conducted by way of a controlled auction, it can take from several to nine to 12 months.

The length of public M&A transactions also varies. It can take anywhere from a couple of months to a full year or longer. However, the applicable law sets the requirements for minimum and maximum duration for implementation of the mandatory offer, which starts calculating after the offer circular is approved by BoL (the minimum duration is 14 days and the maximum duration is 70 days).

At the beginning of the pandemic there was a noticeable delay in obtaining regulatory approvals, but it seems that regulators have adapted to new working conditions and the delays are not that noticeable.

6.2 Mandatory Offer Threshold

Person or persons acting in concert who have acquired more than one third of all voting rights in the issuer are obliged launch a mandatory offer.

A concept of "persons acting in concert" is defined rather broadly in the applicable law. Any time parties enter into any agreements related to the shares or voting rights of the company listed on Nasdaq Vilnius, they should be vigilant that such agreements do not create a unintended consequence of such parties becoming "persons acting concert" in the eyes of the law.

6.3 Consideration

In public M&A, usually the consideration is cash. In cases where a mandatory offer is launched the law specifically allows only cash as consideration. In voluntary offers it can be cash or securities traded in a regulated market in the EU or a combination of both. However, if in voluntary offer process the bidder is offering securities as consideration it must always propose cash as an alternative to securities.

In private M&A, the consideration is almost always cash. If there is a need to bridge value gaps, the parties usually resort to using an earn out or a form of deferred consideration. However, such tools are used in private M&A only because all matters related to consideration in the context of public M&A are heavily regulated and there is very little room for negotiation.

6.4 Common Conditions for a Takeover Offer

It is prohibited to make a mandatory offer conditional upon existence or satisfaction of conditions established by the bidder. With regards to voluntary offers, the most common condition used is the minimum acceptance condition.

6.5 Minimum Acceptance Conditions

Minimum acceptance conditions are permissible only in the context of voluntary offers. The required thresholds depend on the size of a stake in the target the bidder has acquired prior to launching a voluntary offer. The most commonly targeted control thresholds are 66.7%, 75% or 95%. With 66.7% of voting rights, the bidder may exercise an operational control of the target and adopt most of the corporate decisions at its general meeting of shareholders. With 75% of voting shares, a shareholder is considered to have acquired full control of the company and can adopt most of the material decisions of the company. With 95% of voting shares, a shareholder obtains a right to implement a statutory squeeze-out of the remaining minority shareholders or delist the company from Nasdaq Vilnius.

6.6 Requirement to Obtain Financing

A bidder is precluded from making an offer (either voluntary or mandatory) which is conditional upon obtaining financing. The bidder must ensure (and provide relevant evidence in the offer circular) that it will be able to fulfil its obligations towards the shareholder who have accepted the offer. For this purpose, the bidder must provide evidence to BoL that it has enough funds to settle for shares sold in the bid process.

There are no such requirements in private M&A where the closing of the transaction can be made conditional on basically any circumstances agreed upon by the parties.

6.7 Types of Deal Security Measures

A bidder generally is allowed to seek deal security measures from principal shareholders. Bidder and the principal shareholders can agree on any measures they deem fit to particular circumstances of the deal (of course, subject to all relevant legal requirements, such as restrictions set forth by competition law), but the most common ones are break-up fees, exclusivity and voting arrangements (eg, an obligation of the principal shareholders to accept the offer if it meets certain pre-agreed requirements). The management of the target company has fiduciary duties towards the target company and must always act in its best interests, which effectively precludes the target company from entering into any agreements favouring any one particular bidder.

6.8 Additional Governance Rights

The bidder can obtain additional governance rights only through agreements with the remaining shareholders (eg, veto rights, transfer of voting rights, voting agreements).

Additional governance rights cannot be provided by the company itself via provisions in the articles of association or otherwise due to a general principle requiring the company to ensure equal treatment of all shareholders.

6.9 Voting by Proxy

Voting by proxy is allowed.

6.10 Squeeze-Out Mechanisms

Several mechanisms could be employed to squeeze-out the minority.

Statutory Squeeze-Out

If the bidder has acquired at least 95% of voting shares, it can implement a statutory squeeze-out and force the remaining shareholders to sell their shares. It is the most common mechanism attempted by the bidders.

Delisting from Nasdaq Vilnius

If the bidder has acquired at least 75% of voting shares, it can initiate delisting of the company, which in theory may force the minority to sell their shares in fear of becoming locked up in the company without being able to exit by selling the shares in the regulated market.

Business Transfer

The bidder may agree with the principal shareholders on an alternative acquisition structure whereby the target sells to the bidder its business as a going concern, which effectively makes the target an empty cash shell. After such transfer is implemented, liquidation of the target company is initiated during which the remaining cash reserves are distributed to all the shareholders pro rata to their shareholdings. So far, no one has attempted to implement such acquisition structure in Lithuania, but it remains theoretically possible.

6.11 Irrevocable Commitments

Irrevocable commitments are permissible under Lithuanian law, but not very common. Instead of obtaining irrevocable commitments, it is more common to acquire a controlling stake from the principal shareholders and then launch a mandatory offer. If irrevocable commitments are agreed upon, they are negotiated and obtained through agreements entered into by the bidder and the principal shareholders prior to formal launching of the offer. If such agreements are entered into, they usually contain an obligation of the principal shareholders to accept the bidder's offer if it meets certain pre-agreed requirements. Agreeing on other conditions could be at risk because it may be in breach of the principle of equal treatment of shareholders.

7. DISCLOSURE

7.1 Making a Bid Public

In case of crossing of one third threshold, the relevant shareholder is obligated to announce its intention to launch a mandatory tender offer within four days after crossing the threshold and to submit this information to the target company, BoL and Nasdaq Vilnius.

In case of voluntary offer once a formal decision to launch an offer is made, information on it must be announced publicly within four days and submitted to the target company, BoL and Nasdaq Vilnius.

Within 20 days after making the bid public, the bidder must submit the circular of offer conditions for the approval of BoL.

7.2 Type of Disclosure Required

If securities are offered as consideration during a voluntary offer, the same disclosure and prospectus rules apply to such offer of securities as to any other public offering of securities.

7.3 Producing Financial Statements

Bidders are not required to produce financial statements in their disclosure documents, unless securities are offered as consideration during a voluntary offer in which case the relevant prospectus must include financial statements prepared in a manner consistent with the accounting policies applied by the issuer in recent annual financial statements.

7.4 Transaction Documents

The bidder's offer circular has to be disclosed in full, as well as the opinion of the target's management on the bidder's offer conditions.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

Directors owe fiduciary duties towards the company. Directors have a duty to act in good faith towards the company, duty of care and duty of loyalty, which includes a duty to avoid conflicts of interest and always act in the best interests of the company. Interests of the company are usually understood as long-term interests of the shareholders as a whole.

In the context of takeovers, the directors have a special duty to not deprive the holders of securities issued by the company of the opportunity to decide on the usefulness of the tender offer.

8.2 Special or Ad Hoc Committees

If directors have conflict of interest, they usually inform the shareholders and other management bodies of it and recuse themselves from taking part in the relevant decision-making. The idea of setting up special committees is not ruled out, but it does not occur often in practice.

8.3 Business Judgement Rule

A version of the business judgment rule is recognised in Lithuanian. The Supreme Court of the Republic Lithuania in one landmark case has formulated a presumption that the directors is acting bona fide in the best interests of the company entrusted to them until proven otherwise. This presumption is intended for indemnification of directors against personal liability from business judgments made in good faith which meet the standards of a duty of care. A person seeking a remedy has to prove the fact of losses and a breach of fiduciary duties, clear exceeding of reasonable commercial risks, clear negligence or exceeding of powers entrusted to the director.

However, it should be noted that the application of the business judgement rule in takeover situations so far has not been confirmed by Lithuanian courts.

8.4 Independent Outside Advice

In takeover situations directors usually turn to lawyers and other consultants seeking outside advice on the business combination. Assistance is usually needed for the business combination itself, risk assessment, employment issues, conduct of due diligence, assessment of the offer documents, assistance in preparing an opinion of the offer, etc. Seeking outside advice is extremely beneficial for directors because it helps to establish that they complied with the duty of care, which is crucial in making sure that directors are protected by the business judgment rule.

8.5 Conflicts of Interest

Conflicts of interest have been subject to judicial scrutiny in Lithuania, however, not in the context of takeovers. There are many case law precedents which have formed in cases where actions of directors were challenged due to alleged breaches of duty to avoid conflict of interest. Breach of this duty precludes the director from enjoying the protection of the business judgement rule.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

In theory, hostile tender offers are possible in Lithuania, but not common. Most of the companies listed on the stock exchange have controlling shareholders, which practically eliminates the possibility of a hostile takeover.

9.2 Directors' Use of Defensive Measures

In general, directors are prohibited from taking any action that would artificially worsen the financial condition of this company or otherwise impede the implementation of the tender offer. However, limited defensive measures may be employed provided that the general meeting of shareholders has approved them in advance (except for employing a "white knight" defence, which does not require an approval of the general meeting of shareholders).

9.3 Common Defensive Measures

Defensive measures are not common in Lithuania. As mentioned previously, most of the companies listed on the stock exchange have controlling shareholders, which practically eliminates the possibility of a hostile takeover. Thus, there is basically no use in employing additional defensive measures since the controlling shareholder can just refuse to sell to a bidder.

9.4 Directors' Duties

Directors are prohibited from taking any action that would artificially worsen the financial condition of this company or otherwise impede the implementation of the tender offer.

9.5 Directors' Ability to "Just Say No"

Lithuania does not allow directors to "just say no" to the offer.

10. LITIGATION

10.1 Frequency of Litigation

Litigation in connection with M&A is rather uncommon in Lithuania. In most cases disputes are settled amicably. In other cases, disputes are resolved through arbitration, because most M&A agreements contain arbitration clauses.

10.2 Stage of Deal

In those rare cases when a claim in connection with M&A is brought, they are brought after closing and usually relate to warranty breaches or post-closing purchase price adjustment. In the context of public M&A, minority shareholders usually challenge the offer prices proposed by the bidders.

10.3 "Broken-Deal" Disputes

As far as we know, there were no disputes that have reached the court, but we are aware of several deals where one party walked away from the deal and the other party invoked a break-up fee clause contained in the exclusivity agreement. The main lesson is that break-up fees are now of paramount importance in negotiating M&A deals, because so far Lithuanian law does not contain any other effective tools preventing the parties from opportunistic behaviour. As long as the final binding transaction documents are not signed, there is no way to force the party to enter into M&A transaction.

11. ACTIVISM

11.1 Shareholder Activism

Recent changes to the Law on of Companies (2017) were meant to accelerate shareholding engagement in the participation. This, however, did not lead to a publicly declared goals of increased shareholder engagement and activism. Therefore, reported level of shareholder activism in Lithuania is rather minor. Despite that, some cases appear in the public.

Activists mostly focus on solving their issues if other measures do not work. Disagreements arise from the amount of dividend payments, ie, company has accumulated tens of millions of euros in retained earnings but pays almost no dividends. Conflict of interest also arise, ie, company lends money to the ultimate share-

holder, that he or she could buy the company's decreased in price shares.

Few years ago, Rokiškio sūris applied to the Bank of Lithuania to investigate whether the company's minor shareholder East Capital had not manipulated the market. This was a response to the lawsuit against Antanas Trumpa, the largest shareholder of Baltic Fund, managed by the Swedish investment company East Capital, which owns 4.96% of Rokiškio sūrio shares.

The recent case involves Ignitis group. Minority shareholders filed lawsuits seeking annulment of the decisions made by the extraordinary general meetings of shareholders of Energy Division Operator (ESO) and Ignitis Gamyba to delist the shares of the companies from trading on the NASDAQ Vilnius Stock Exchange.

11.2 Aims of Activists

There are no examples of activists who seek to encourage companies to enter into M&A transactions, spin-offs or major divestitures.

11.3 Interference with Completion

There is no public information regarding activists who seek to interface with the completion of announced transactions in your jurisdiction.

WALLESS is a Baltic law firm with offices in Vilnius, Riga, Tallinn and Tartu. The WALLESS Baltic legal team unites 100 lawyers with top-tier professionals as leading partners across all major practices in three Baltic countries. The team provides the full scope of specialised region-wide seamless business law services, with a particular strength in the areas of mergers and acquisitions, capital markets, banking and finance, fintech, commercial and regulatory, real estate, tax, dispute resolution, white-collar and government investigations.

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Trends and Developments

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General M&A Market Condition and Expectations for 2021

In terms of both deal volume and value, COVID-19 did not have a material negative effect on the Lithuanian M&A market in 2020 and, despite the ongoing pandemic, market players remain cautious but largely optimistic for 2021. There are some who even hope that 2021 will be a record-setting year similar to 2018.

The main driver for deal activity in 2021 may be investments by private equity funds which have accumulated large cash reserves and now are eagerly looking to employ them somewhere. Some business owners in industries heavily affected by COVID-19 may look to divest, which may also create a spike in deal volume in these market sectors. Moreover, a further increase of venture capital investments in high-technology start-ups is expected in 2021, which is a continuing trend for the past few years.

Cybersecurity and GDPR Compliance Becoming a Key Issue in Legal Due Diligence and M&A Negotiations

Prior to the entering into force of the General Data Protection Regulation (GDPR), cybersecurity and data protection were a rather neglected area by businesses in Lithuania. Once GDPR became effective, the situation changed, and companies invested in at least a minimum level of compliance largely because of fear of potentially large fines. However, the local data protection authority did not have appropriate resources to carry out individual inspections in all industries.

As a result, only 30 companies were fined in the three years since the entry into force of the GDPR. The maximum fine imposed due to data protection breaches up until now amounted only to EUR61,500. Thus, the attention to GDPR was greatly reduced in the past few years, especially by the SMEs.

Some practitioners in M&A negotiations even started using an argument that the buyer should accept the risk of target's data protection non-compliance because it is a general market risk (a different way of saying "if everybody does it then it is ok"). If any specific indemnities in connection with data protection breaches were given at all, they were usually capped at the amount of the largest fine impose by the local data protection, which is still very small compared to the potential risk exposure (small fines in the past do not guarantee small fines in the future).

Recent changes

However, this approach is likely to radically change in 2021 due to recent events. In February, a car-sharing company confirmed that over 100,000 of its customer data had leaked online. Leaked data included customer names, surnames and personal codes, telephone numbers, e-mail addresses, residential addresses, driver's license numbers and encrypted passwords. It is the first data theft of such magnitude in Lithuania.

The potential large fines that will be imposed on and the lawsuits that it will have to fight or settle in the near future, as well as the damage that will be done to its brand, will hopefully shake up the Lithuanian market and businesses will start paying more attention to this area and start actually implementing the GDPR principles in their core business activities rather than just adopt-

ing the required documentation and forgetting about until the data protection authority knocks on the door.

Data protection concerns and M&A transactions

A survey by Euromoney showed that 55% of respondents had worked on M&A transactions that had not progressed because of data protection concerns. Moreover, the landmark decision of the Marriott case in 2019 concluded that organisations must carry out proper due diligence when making a corporate acquisition and putting in place proper accountability measures to assess not only what personal data has been acquired, but also how it is protected.

Data protection and cybersecurity should gain a similar importance in Lithuanian M&A deals as well. Hopefully, the recent scandal of car sharing company will force the Lithuanian businesses to learn from the mistakes of others rather than their own. It is expected that, in 2021, the M&A negotiation dynamics regarding data protection and cybersecurity issues will change in favour of the buyers.

Standardisation of Private M&AD Deal-Making and the Associasted Risks to Investors

In the last few years a very clear trend towards a more standardised private M&A process can be observed. More and more sellers are opting to conduct sale of their businesses by way of controlled auctions in order to create a competitive situation between the bidders and extract a higher price as a result of the bidders fighting to acquire the target, as well as to force the buyers to accept more seller-friendly terms of the share purchase agreement (SPA). Based on the 2020 Baltic Private M&A Deal Points Study, compared to 2018 the percentage of deals conducted via controlled auctions in 2020 almost doubled, percentage wise, from 10% to 19% of all recorded M&A deals.

The auction control process

The typical controlled auction process in Lithuania looks as follows:

- distribution of information memorandum to prospective bidders;
- collection of indicative bids and shortlisting of the top bidders;
- due diligence conducted by the short-listed bidders;
- submission of final binding bids together with mark-ups to seller's draft SPA;
- selection of the winning bidder and entering into exclusivity agreement; and
- signing of SPA and closing of the transaction after fulfilment of conditions precedent (if any).

Sellers typically establish very short deadlines for each stage of the auction process that often border on unreasonable. Bidders have to be ready to submit their final binding bids without having conducted a thorough due diligence (DD). It is not unusual that submission of the most important DD materials is postponed until the last stage of the auction, which means that bidders have to come up with the valuation of the target's business with having significantly less information that they would normally prefer to have. Sellers usually also expect very little to no mark-ups to the first draft of SPA prepared by their counsel.

Bidders can gain a big competitive advantage if they are willing to accept the seller's draft SPA. If the particular seller is looking for a clean exit from the target with as less post-closing deal "tails" as possible (eg, purchase price adjustments, earn-outs), acceptance by a bidder of the seller's SPA may even trump an offer with a

slightly higher price but more redlined version of seller's SPA.

Buyer vigilance

However, buyers should beware and be vigilant in the auction process. Sellers may not adhere to the rules of the controlled auction which they themselves have drafted and approved. Being selected as the winning bidder and entering into an exclusivity agreement with the seller does not at all guarantee that the SPA will be signed at the end of the day. Other bidders may still keep bidding after the auction has ended with hope that the seller will disregard the exclusivity obligation assumed towards the winning bidder and accept a higher offer. If it is high enough, there is a real risk that the seller may accept it and the "winning" bidder will be left empty-handed. Recently there have been deals where the sellers have done that at very last day before the fully negotiated SPA was supposed to be signed.

Break fees

So far, there are no hard law or case law rules preventing the sellers from such behaviour. There is no way to force the seller to enter into a transaction even if it is fully negotiated and approved by the parties and the only thing remaining is a ceremonial signing of the SPA. The only really effective tool for the buyers to fight against such opportunistic behaviour is agreeing in the exclusivity agreement on a break fee applicable in case the seller breaks off negotiations.

The break fee has to be high and "painful" enough for the seller so that it effectively performs its function and incentivises the seller to honour its commitment to the winning bidder. However, buyers should be aware that the concept of liquidated damages is unknown in Lithuanian law. A break fee agreed by the parties is considered a penalty for contractual breach, which in certain circumstances can be decreased by the court at its discretion. Thus, it should always be made sure that the break fee provision in the exclusivity agreement is drafted very carefully and precisely.

The Growing Use of W&I Insurance

More and more buyers are opting to acquire W&I insurance policies to protect themselves against unknown risks associated with the acquired target. It is almost a must for the buyers in controlled auction situations if they want to remain competitive and have a sufficient level of protection against the seller's breaches of SPA. It is not unheard of that in controlled auction situations sellers even demand the bidders to arrange the W&I insurance if they want to stay in the process at all.

W&I is still a rather new instrument in the Lithuanian M&A market and not all market participants are familiar with its peculiarities and the challenges that the involvement of the insurer and broker brings to the entire process (particular attention should be paid to risks which are not covered by insurance policy). However, everyone will be forced to quickly adapt to this trend as it should continue into 2021 and more deals will be seen where the parties employ the benefits of W&I insurance.

The Anticipated Rise in Volume of Distressed M&A Transactions

There was the expectation of more distressed M&A transactions in 2020. However, this was not the case and it is now projected that it will happen in 2021 when the pandemic ends and the financial support from the government runs out. However, Lithuania will most likely not experience as big of a spike in distressed M&A volumes as some other jurisdictions as the Lithuanian legal environment is not designed to facilitate distressed M&A transactions, especially of businesses which are on the verge of insolvency or already insolvent. Such legal mechanisms as schemes of arrangement or pre-packaged

administrations applied in UK or the Section 363 sale applied in US do not exist in Lithuania.

These legal restrictions mean that the Lithuanian market should see a spike in distressed M&A primarily with regards to businesses that have solid revenue streams but require financial or operational restructuring to continue their business after the pandemic ends. For example, family business owners may look to divest from their businesses in sectors heavily affected by the pandemic due to decreased risk appetite or lack of diversification.

Distressed M&A in Lithuania will largely be possible in out-of-court restructuring situations only, which may take place only if the company's financial condition allows to keep itself out of formal insolvency proceedings for the time required to complete the transaction or if there is a consensus amongst the creditors regarding implementation of the transaction. Once the target enters formal in-court insolvency proceedings, it becomes increasingly hard to implement a distressed M&A transaction and in majority of such cases the company is liquidated, and its assets sold piecemeal.

WALLESS is a Baltic law firm with offices in Vilnius, Riga, Tallinn and Tartu. The WALLESS Baltic legal team unites 100 lawyers with top-tier professionals as leading partners across all major practices in three Baltic countries. The team provides the full scope of specialised region-wide seamless business law services, with a particular strength in the areas of mergers and acquisitions, capital markets, banking and finance, fintech, commercial and regulatory, real estate, tax, dispute resolution, white-collar and government investigations.

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