### Global M&A Series
Environmental Law in Poland

<table>
<thead>
<tr>
<th>Seller Liability on Sale</th>
<th>In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?</th>
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</thead>
</table>
| **Asset sale**           | The buyer is at risk of inheriting pre-acquisition liabilities in any asset transaction for two reasons:
|                          | ▪ Under the contaminated land regime, a buyer purchasing land after 1 October 2001 usually assumes regulatory liability for historic contamination. Even if the parties agree to the contrary, the agreement will not be effective against third parties, including the regulatory authorities
|                          | ▪ Under private law, the transfer of a business as a going concern leads to the joint and several liability of the seller and the buyer for all liabilities associated with the business, subject to certain conditions and limitations. Asset transactions that do not transfer a business as a going concern do not result in such risks
|                          | The buyer takes on the obligation to maintain property in an environmentally sound condition, which may require investment in, for example, environmental abatement equipment to comply with regulatory standards. |
| **Share sale**           | In a share sale, the buyer does not directly inherit any pre-acquisition liabilities, but all liabilities remain with the target company being transferred. The value of the target company’s shares acquired by the buyer could be affected by the target’s environmental liabilities. The buyer will be concerned with the target company’s ability to conduct business, namely:
|                          | ▪ The validity of the permits and
|                          | ▪ The company’s historical environmental conduct and environmental investment obligations
| **In what circumstances can a seller retain environmental liability after an asset sale/a share sale?** | **Asset sale**
|                          | Liability for contaminated land under the owner/occupier liability regime transfers to the buyer by operation of law, regardless of any agreement to the contrary by the parties, while the liability under the “polluter pays” regime (concerning contamination that occurred after 30 April 2007) remains with the polluter.
| **Share sale**           | In share transactions, liability does not lie with the buyer or seller but with the target company. The seller should therefore not be at risk of retaining any environmental liabilities post-acquisition. |
### Obligations to Disclose

**Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?**

**Asset sale**
The seller grants the buyer a statutory warranty in an asset sale, unless the sale contract provides otherwise. The statutory warranty establishes liability for material defects affecting the value or the expected use of the assets sold, in circumstances where a seller is deemed to have a duty to disclose. In some circumstances, contaminated land could be seen as a material defect. The seller could have a duty to disclose if, for example, the future use of land would be impossible without the buyer incurring considerable remediation costs. It is rare in asset transactions to exclude the statutory warranty.

**Share sale**
Because only shares are transferred in a share sale, the statutory warranty generally does not apply to the target company’s assets. For this reason, a mechanism is often provided in share transactions whereby the seller makes disclosures concerning the target company’s assets and the parties provide in the contract that the statutory warranty rules apply to such disclosures. This mechanism is therefore not a mandatory disclosure obligation, but a contractual one.

### Due Diligence

**Is environmental due diligence common in an asset sale/a share sale?**

**Scope**
In both share and asset transactions, it is standard practice in Poland to undertake a phase I environmental audit (desk-top survey of environmental information and site inspection) where the buyer is a foreign-owned entity or large company (otherwise they are rare). Phase II investigations (covering intrusive investigation of the soil and groundwater) are increasingly being conducted. This practice originated from the first privatisation deals after 1989, as environmental audits are mandatory in privatisation deals. Real estate transactions usually involve a more thorough study of land contamination. Environmental assessments are gradually extending to domestic transactions. Lenders typically take a more cautious approach to environmental risk than trade buyers.

There is beginning to be an increased focus on climate change and sustainability issues in environmental due diligence processes, with energy efficiency verification becoming a standard procedure in real estate transactions.

**Types of assessment**
A complete environmental assessment covers both phase I and phase II investigations.

In addition, in due diligence on buildings and installations, buyers:

- Review and assess asbestos surveys and PCB reports for compliance with legal requirements
- Check environmental abatement and monitoring equipment against regulatory requirements and
- Scrutinise cooling equipment in buildings for the presence of ozone-depleting substances

**Environmental consultants**
The environmental consultancy market in Poland is fragmented and only a handful of companies have more than ten professional staff employed full-time. Environmental due diligence services are dominated by international players. Environmental consultants are engaged in all significant asset and share transactions. It is advisable to confirm whether consultants have an appropriate level of professional insurance coverage, which may not be the case when local consultants are involved.
Where subsidiaries of multinational consultancies are involved, the engagement letter should be signed by a parent company to ensure its direct responsibility for the project. Environmental consultants usually cap their liability and the cap is sometimes non-negotiable due to the scope of professional insurance coverage. Before engaging an environmental consultant in Poland, it is advisable to verify the consultancy’s capabilities and ensure a conflict check is undertaken, as the same consultant is often engaged by a number of investors.

### Warranties and Indemnities

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<tr>
<th>Warranties and Indemnities</th>
<th>Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?</th>
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<tbody>
<tr>
<td><strong>Asset sale</strong></td>
<td>A buyer can expect to obtain the following warranties and/or indemnities for a limited period of time and up to a certain limit of liability:</td>
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<td>- The soil and subsoil are not contaminated within the meaning of Polish law</td>
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<td>- No waste, hazardous substances, asbestos or PCBs are stored, buried or used on the property</td>
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<td>- The business has continuously held all environmental permits for the last five years</td>
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<td>- All statutory environmental fees and fines have been paid</td>
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<tr>
<td>- There are no threatened or pending regulatory or civil procedures related to environmental liabilities or obligations and</td>
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<td>- Environmental permits have been obtained and, subject to regulatory consent for the transfer of permits, they are valid and in force</td>
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<td><strong>Share sale</strong></td>
<td>Similar warranties and indemnities are expected in a share transaction, although they apply to the target company. Additional warranties focussing on the conduct of the target company may be obtained, for example, that the target company has not caused environmental damage on third-party property by illegally disposing of waste, directly or through an unlicensed contractor.</td>
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**Are there usually limits on environmental warranties and indemnities?**

There are usually time limits and financial caps on environmental warranties and liabilities.