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C H A N C E

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Public-to-private – implementation in Poland

As stock market values have fluctuated during the financial crisis, investors have seen increasing opportunities for realising value by acquiring listed companies. The Warsaw Stock Exchange ("**WSE**") has been very successful in attracting many new entrants to the market, both from Poland and the wider Central and Eastern European region. As a result, there has recently been increased interest in acquiring shares in companies listed on the WSE. This briefing looks at how a P2P transaction can be implemented in Poland and the specific Polish issues that can arise.

Introduction

We look at the following issues in this briefing:

- How to conduct due diligence
- Introducing leverage
- Stake building
- Mandatory offers
- Aggregation of interests
- Tender Offer Procedure
- Offer conditionality
- Notification requirements
- Timetable
- De-listing procedure

How to conduct due diligence

As with normal buy-out transactions, the prospective buyer usually wants to carry out some form of due diligence review of the Target. In the case of public companies, any such exercise has to take into account regulations concerning access to and use of inside information.

Generally, inside information is any information of a precise nature relating – directly or indirectly – to one or more issuers of financial instruments, one or more financial instruments, or the acquisition or disposal of such instruments, which has not been made public and which, if made public, would probably have a significant effect on the price of the financial instruments or related derivatives. Polish law specifies that information is to be considered of a "precise nature" if it discloses circumstances or events which have happened or may reasonably be expected to happen, and such information is sufficient to assess the potential effect of such circumstances or events on the price or value of financial instruments or related derivatives. Furthermore, inside information, if made public, is considered to be likely to have a significant effect on the price or value of such financial instruments or the price of related derivative financial instruments if such information is likely to be taken into account by a reasonable investor in making an investment decision.

There is a view that business plans and forecasts are not precise enough to be regarded as inside information.

The target is generally restricted in providing the bidder with inside information during the due diligence examination before fulfilling the reporting requirements laid down in Polish securities law. This is to comply with the concept of equal treatment of all participants in a regulated market. Moreover, apart from a ban on the delivery of inside information, Polish law provides that anyone who has obtained inside information but was not allowed to acquire it, is also prohibited from using it (i.e. will not be able to buy shares in a company to which such inside information relates).

In practice, provided the target is cooperative and also provided the information to which any bidder wishes to obtain access is not itself restricted by confidentiality undertakings given to any third party, it is usually possible to carry out due diligence in advance of launching a tender offer for the following reasons:

- the term "inside information" is construed narrowly;
- in any event, a listed company is always required to announce inside information within its possession as soon as it becomes aware of it so, at least in theory, it should have no price-sensitive information in its possession; and
- there is a safe harbour for transferring inside information to a third party if it is pursuant to negotiations with that third party on some transaction. Therefore, a direct confidentiality undertaking is usually put in place between the bidder and the target, with the transfer of information being referenced to a possible transaction between the two.

Acquiring shares when in possession of inside (price sensitive) information is generally prohibited and there is no clear exemption available. Nevertheless, there is a view that there are situations where acquisitions, carried out pursuant to a tender offer, do not constitute a breach of Polish law even when the acquirer is in possession of inside information.

Introducing leverage

If leverage is to be introduced into the structure then, typically, the objective will be to achieve "debt push down". The security can be taken directly over the Target's assets as opposed to just shares acquired in the Target. Subject to certain conditions, a tax deduction against the Target's taxable income might also be available for interest paid on part of the financing.

The conventional structure to achieve this in Poland involves the buyer's using a Polish limited liability company ("**Sp. z o.o.**") as the acquisition vehicle (the "**Bidder**"). The Bidder is the borrowing entity for the purpose of any acquisition finance. After the bid process is completed (including the squeeze-out of minority shareholders as described below), the Bidder (as the sole shareholder of the Target) will be able to convert the Target from a Polish joint-stock company into a Polish limited liability company, thereby removing restrictions that joint-stock companies face in granting financial assistance for the acquisition of their own shares. This also enables the two entities to be merged together, thereby achieving the objective of debt push down.

This process will, of course, be complicated if the Target is itself a holding company for other operating subsidiaries in Poland. However, the tendency in Poland is to have relatively simple group structures, because of the difficulty of creating efficient tax groups in Poland.

Set out below as part of the overall timeline for a P2P transaction is included the timing for the steps to achieve debt push down. Clearly, the inability to complete the squeeze-out procedure will impair both the timing and efficiency of debt push down and lead to potential minority objections to the process. Therefore, achieving the squeeze-out percentage (90% of the total number of votes exercised at the shareholders' meeting) is usually regarded as key to effectively leveraging a Polish P2P transaction. However, financing banks have agreed to an acceptance condition of 80% on previous transactions in the Polish market on the basis that this stake would be enough for the Bidder to increase its shareholding by an issue of new shares disapplying existing shareholders' pre-emption rights in the future.

Stake building

Stake building in advance of launching a tender offer is restricted. When holding below 33% of the target's shares, the purchase of more than 10% of its issued shares in a period shorter than 60 days must be carried out through a tender. For any shareholder holding 33% or more, acquiring more than 5% of the target over a period of less than 12 months has to be carried out through a tender offer. For example, if the bidder wished to acquire a 15% shareholding over a period of say, 30 days (and does not currently hold any shares in the target), it would have to then launch a tender offer addressed to all shareholders. To the extent acceptances exceed the 15% threshold, acceptances would be scaled down. These tender offer requirements mean that it is very difficult to stake build by acquiring an identified stake from one shareholder exceeding 10% over a short period of time. One way around this restriction is to indirectly acquire the shares (e.g. by acquiring an SPV holding the shares). However, this does not avoid the disclosure requirements or the mandatory tender offer provisions. Furthermore, many Polish institutional investors (such as pension funds) will also have regulatory problems in holding listed securities via an unlisted vehicle. Caution should also be exercised when undertaking any stake building exercise after commencing any due diligence exercise. This is because acquiring shares on the basis of inside information is prohibited. After having commenced due diligence there would therefore always be a risk that some part of the information received could be regarded as price sensitive and therefore a prospective investor should act with caution.

In any event, it is not possible to buy shares exceeding the 33% or 66% mandatory tender thresholds except through a tender offer other than by way of an indirect acquisition of shares, which is described further below.

Mandatory Offers

The mandatory offer provisions provide two thresholds for a mandatory tender offer:

- The first threshold is 33% of the total votes of a public company. This threshold can only be exceeded if the relevant shareholder makes a tender offer for 66% of the total votes of a public company or all of the target company's shares. (In the latter case, the offer must be conducted on the same basis as when just crossing the 66% threshold.)
- The second threshold is 66% of the total votes of a public company. This threshold can only be exceeded by way of a tender offer to acquire all the remaining shares in the target company.

If the threshold of 33% is exceeded as a result of any action other than the acquisition of shares in the secondary market (for example, the indirect acquisition of shares in a public company, subscription for new shares in a public company or the acquisition of shares in the course of a public offering), the shareholder concerned has a choice: it can either make a tender offer or it can avoid the mandatory tender offer requirements by selling down below the 33% threshold within a 3-month interim period. The shareholder concerned does not have this choice when exceeding the 66% threshold, i.e. in this case it has to make the tender offer for all outstanding shares in the company.

Certain additional specific provisions apply to a mandatory tender offer and are required when exceeding the 66% threshold. In particular:

- in addition to the other minimum price requirements described below, the price proposed may not be lower than the average market price for the 3-month period preceding the announcement of the tender offer; and
- if within 6 months of a tender offer made pursuant to this provision the bidder acquires further shares in the company for a price higher than the price set out in the tender offer other than by another tender offer or reverse squeeze-out, then within a month of that acquisition the bidder must pay the difference in the share price to the persons who sold shares by accepting the earlier tender offer.

The tender offer requirements for exceeding the 33% threshold of total votes do not apply to a purchase of shares from the Polish State Treasury, either during the course of an IPO or during the 3-year period following the sale of shares by the State Treasury in the course of an IPO.

The requirements for voluntary and mandatory tender offers do not apply to a purchase of shares from members of the same capital group.

Aggregation of interests

For the purpose of determining whether or not any of the tender offer obligations or notification-of-interest obligations are triggered, there are provisions requiring the interests of various entities to be aggregated. In summary, the aggregation requirements apply to members of the same capital group and also to those entities which satisfy the "concert party" definition in the Public Offerings Act. This is defined as a written or oral agreement between shareholders concerning any of the following:

- acquisition of shares in a publicly traded company; or
- voting in concert at general shareholders' meetings of a publicly traded company; or
- conducting a long-term policy with regards to a publicly traded company.

This definition is extremely broad and there is virtually no guidance given either by the regulator or any applicable case law as to how this definition is to be interpreted in practice. In particular, there is no guidance given as to whether or not voting in concert covers a one-off arrangement or is intended to cover a longer term agreement or course of conduct.

Tender Offer Procedure

A tender offer has to be announced and carried out through the agency of an entity authorised to carry out brokerage activity in Poland (the "**Brokerage House**"). This entity is required to simultaneously notify the Polish Financial Supervision Authority (the "**PFSA**") and the Warsaw Stock Exchange not later than 14 business days before the opening of the subscription period for any tender offer.

Once announced, a tender offer cannot be abandoned unless another entity announces a tender for the same shares (generally speaking). During the period between the notification of the PFSA and the Warsaw Stock Exchange of the tender offer and the closing of the tender offer, a bidder can only acquire shares as part of the tender offer, i.e. it cannot acquire shares directly or indirectly and cannot dispose of any shares in the target company.

As the next step in the tender offer procedure, the Brokerage House submits a copy of the tender offer to an information agency and then publishes details of the tender offer in at least one national newspaper.

The tendering of shares may begin no earlier than 14 business days and no later than 37 business days after the notification to the PFSA and the Warsaw Stock Exchange, and in no event earlier than one business day after the publication of particulars of the tender offer in a national newspaper.

Although the consent of the PFSA is not required for a tender offer itself, the PFSA reserves the right up to 3 business days prior to the opening of the subscription period to request amendments to (in order for the tender offer to comply with the law) or clarifications of the tender offer. Continuation of the tender offer is suspended until any request has been complied with.

Depending on the type of tender offer, the tender period may last between 14 and 70 calendar days (for a voluntary tender offer or a tender made as a result of crossing the 33% threshold) or 30 and 70 calendar days (for a mandatory tender offer for all the shares) and may be extended in justified circumstances up to 120 calendar days.

Offer Conditionality

Voluntary and mandatory tender offers can be conditional upon the occurrence of the following events:

- the passing of a specific resolution by the shareholders' meeting or the supervisory board of the target company;
- the success of another tender offer for shares of a company forming part of the same capital group as the target company carried out by a company forming part of the same capital group as the bidder;
- the conclusion by the target company of a specific agreement; and/or
- the satisfaction of any legal conditions required to close the tender offer, including clearance from any competition regulator.

A tender offer cannot be conditional if it is a mandatory offer which arises out of any action other than the acquisition of shares in the secondary market, for example, by acquiring an intermediate holding company or in the course of a de-listing tender offer.

In addition, the bidder may establish a minimum acceptance threshold and will be obliged to purchase shares offered by other shareholders only if this threshold is reached or exceeded. This rule does not apply to tender offers which are announced in the course of the de-listing process or as a result of any action other than the acquisition of shares in the secondary market.

As mentioned above, with a P2P transaction, it is highly desirable to achieve a 90% level of acceptances in order to facilitate the squeeze-out of any minority shareholders. However, an acceptance condition of 80% (or even 75%) is often imposed. (Please see above.)

No other conditions are permitted, so a tender offer cannot be made conditional on, for example, a material adverse change in the financial condition of the target.

The most common condition relates to Polish competition law clearance. Once a filing is made with the Polish competition law authority in relation to any acquisition, it is publicly announced. Therefore, it is usually undesirable for the filing to be made prior to commencing a tender offer. However, there is generally enough time within the timetable for conducting a tender offer for clearance from the Polish competition regulator to be obtained before it is required to close. Complications can arise, however, if clearance in other jurisdictions with different timelines is required. If, for some reason, all the relevant clearances cannot be obtained within the maximum timetable for conducting the tender offer, then that tender offer would elapse. However, there would be no restriction on subsequently relaunching another tender offer on the same terms.

Notification requirements

Under the Public Offerings Act, material holdings of shares in public companies and changes to those holdings must be publicly disclosed and notified to the PFSA and the company itself.

The notification requirement applies to any shareholder who:

- directly or indirectly reaches or exceeds the thresholds of 5%, 10%, 15%, 20%, 25%, 33%, 33 1/3%, 50%, 75% or 90% of the total votes in a public company; or
- held at least 5%, 10%, 15%, 20%, 25%, 33%, 33 1/3%, 50%, 75% or 90% of the total votes exercisable in a public company and, as a result of a reduction of its equity interest, holds 5%, 10%, 15%, 20%, 25%, 33%, 33 1/3%, 50%, 75% or 90% or less of the total votes, respectively.

Notification has to be made within 4 business days from the date of the change or from the date on which the shareholder became aware of the change or, acting diligently, should have been aware of the change, or 6 trading days (for transactions executed in the regulated market) from the date of the transaction.

The notification requirement also applies to a shareholder who:

- held over 10% of the total votes and this shareholding has changed by at least:
  - 2% of the total votes, in the case of a public company whose shares have been admitted to official listing; and
  - 5% of the total votes, in the case of a public company whose shares have been admitted to trading on a regulated market; or
- held over 33% of the total votes and this shareholding has changed by at least 1%.

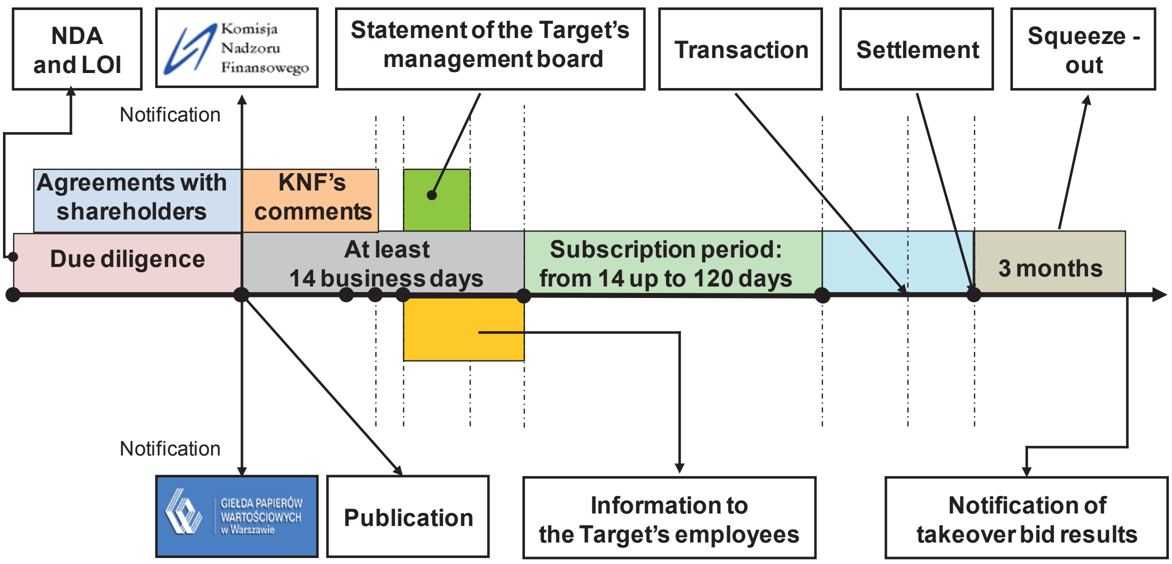
The notification must include the following:

- the date and type of event which led to the change in the share in the total votes which is the subject of the notification;
- the number of shares held prior to the change and the percentage share of the company's share capital they represent, and the number of votes attached to these shares and the percentage share of the total votes they present;
- the number of shares currently held and the percentage share of the company's share capital they represent, and the number of votes attached to these shares and the percentage share of the total votes they represent;
- information on any intention to further increase the shareholder's share of the total votes within 12 months of the notification date, and the purpose of any such increase - in the case of a notification submitted in connection with reaching or exceeding 10% of the total votes; and
- information on subsidiaries of the notifying shareholder which hold shares in the company.

Timetable

A typical timetable for a P2P transaction is set out below:

Public to private – model time-schedule



Squeeze-out

The Public Offerings Act gives a shareholder whose holding reaches or exceeds 90% of the total votes in a public company the right to demand that the other shareholders sell all their shares in the company. The time frame for exercising this right is limited to a period of 3 months after the threshold of 90% of the total votes is reached or exceeded. The price offered must be no less than the price that would apply to a tender offer when exceeding the 66% threshold. If the threshold of 90% of the total votes is reached or exceeded as the result of a tender offer for all outstanding shares, the price of the squeeze-out cannot be lower than the price proposed in the tender offer for all outstanding shares.

Similarly, each minority shareholder has the right to require another shareholder who has reached or exceeded the 90% threshold to make such a tender offer (reverse squeeze-out). This mandatory tender offer requirement applies to both the shareholder concerned and members of its capital group. The time frame for exercising this minority shareholder right is limited to a period of 3 months after the threshold of 90% of the total votes is reached or exceeded by the majority shareholder. If the threshold of 90% of the total votes is reached or exceeded as the result of a tender offer for all outstanding shares, the minority shareholders have the right to receive a price not lower than the price proposed in the tender offer for all outstanding shares.

De-listing procedure

If the bidder decides to delist a public company, the following steps need to be taken:

- a public tender has to be announced for all outstanding shares in the company;
- a shareholders' resolution has to be passed to approve the de-listing, with a majority of 80% of votes cast by shareholders present at the meeting where shareholders representing 50% of the share capital of the company are present;
- the PFSA's approval for de-listing has to be obtained; and
- all the de-listing formalities of the Warsaw Stock Exchange and the National Depository of Securities have to be completed.

On the day indicated by the PFSA in its de-listing approval, the company becomes a private company which is no longer regulated by the Public Offerings Act and related secondary legislation. Usually the squeeze-out is completed before commencing the de-listing procedure. This is because the squeeze-out threshold for listed companies is 90%, as opposed to 95% for a non-listed company, and also, the squeeze-out of de-listed companies has been challenged as being in breach of the constitution.

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