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Regulations governing the acquisition of shares in Polish public companies

The acquisition of shares in a Polish public company is governed by the Act on Public Offerings, Conditions Governing the Introduction of Financial Instruments to Organised Trading and Public Companies of 29 July 2005 (the "Public Offerings Act"), which came into force on 24 October 2005.

This briefing summarises the legislation in force as at April 2012

Key issues

- Consents required prior to acquisition
- Conduct of Due Diligence
- Type of tender offers
- Tender offer procedure
- Form of consideration
- Notification requirements
- Aggregation of interests
- Sanctions for breach of law
- Squeeze-out for public companies
- De-listing procedure

Consents required prior to acquisition

No consent or notification is required prior to the acquisition of shares in a Polish public company and a bidder is free to proceed with the takeover process unless the target company operates in a specially regulated sector, for example banking or insurance. Additionally, a competition law clearance might be required as described below.

Clearance from the Office for Competition and Consumer Protection

Notification to the Polish Office for Competition and Consumer Protection (the "Competition Office") is required in certain circumstances.

Notification is required in the case of a direct or indirect takeover of control of a company or companies by the acquisition of shares or other securities, or in some other way, if the aggregate annual turnover of the parties involved in the transaction exceeds EUR 1 billion worldwide or EUR 50 million in Poland. However, if the turnover of the target company (including its subsidiaries) was not higher than EUR 10 million in Poland in either of the two preceding years, then notification is not required.

If the relevant turnover thresholds are satisfied then instead of notifying the Competition Office the transaction has to be cleared by the European Commission.

A formal application must be filed with the Competition Office, which has 2 months (subject to statutory extensions) to decide whether to allow the proposed acquisition or refuse it. During the proceedings before the Competition Office, the parties are prohibited from closing the transaction. The Competition Office can refuse to permit the acquisition if, as a result of the acquisition, competition on the market would be substantially restricted, in particular if the purchaser could obtain or strengthen a dominant position on the market.

The Competition Office has the right to impose various conditions and obligations on the parties in its decision to meet concerns it may have. These decisions are issued as a result of formal negotiations with the parties. If no agreement is reached, the Competition Office can issue a decision prohibiting the transaction in its entirety.

However, for the purpose of an acquisition of shares by way of a tender offer, the parties are not considered to have closed the transaction if the shares are acquired but no voting rights under them are exercised.

The application has to be submitted to the Competition Office by the purchaser, and it must contain information on the purchaser and its group, as well as on the target company and its group. Acquisitions by members of the same group are aggregated for the purpose of determining whether notification is required.

If the acquisition of shares in a public company is being conducted through a tender offer, competition clearance can either be obtained before commencing the tender offer or the tender offer can be made conditional on obtaining the clearance. However, if the competition law clearance is filed before the commencement of a tender offer, the Competition Office will make an announcement of that fact, thereby giving advanced notice to the market that a tender offer will be made. It is therefore more common practice for the tender offer to be made conditional upon obtaining the competition clearance. The timetable for a tender offer should allow enough time to obtain the relevant clearance provided the Competition Office does not have any particular difficulty with the transaction concerned.

Conduct of Due Diligence

Polish securities law does not specifically regulate the conduct of due diligence in the context of an acquisition of an interest in a public company. However, it does generally restrict disclosure and the use of inside information, with certain exceptions. The conduct of due diligence before any acquisition of shares in a public company requires the specific agreement with the target company to take advantage of the carve-out specified in the Public Offerings Act.

Type of tender offers

Voluntary offers

The acquisition of shares in a public company must be effected by way of a tender offer if the acquisition increases a shareholder's share in the total number of votes by more than:

- 10% within a period shorter than 60 days in the case of a shareholder holding less than 33% of the total votes of the company; and
- 5% within 12 months in the case of a shareholder holding 33% or

more of the total votes of the company.

The tender offer requirements described above do not apply to:

- a purchase of shares on the primary market (i.e. an acquisition of new shares);
- an acquisition of existing shares in a public company by way of a contribution to the capital of a public company;
- an acquisition as a result of a merger or demerger of a public company; or
- 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 Polish State Treasury in the course of an IPO.

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 when exceeding the 33% threshold of the 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.

Tender offer procedure

Collateral requirement

A tender offer may only be announced after collateral has been created for no less than 100% of the value of the shares subject to the tender offer. This has to be documented by a certificate issued by the bank or other financial institution that granted the collateral or acted as an intermediary in the granting of the collateral.

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 the particulars of the tender offer in a national newspaper.

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 the Competition Office.

These conditions are not permitted if an obligation to make a mandatory offer arises out of any action other than the acquisition of shares in the secondary market – for example, by acquiring an intermediate holding company or during 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 tenders offers which are announced during a de-listing process or as a result of any action other than the acquisition of shares in the secondary market.

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.

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 tender offers connected with crossing of 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.

Minimum pricing

The Public Offerings Act provides for the concept of a minimum price applicable to tender offers. The price offered may not be less than the average market price for the last 6 months prior to the date the tender offer is announced. Furthermore, it may not be lower than the highest price paid for the shares by the bidder, its dominant companies or subsidiaries during the 12 months preceding the announcement of the tender offer. Additional requirements also apply to mandatory tender offers as described above. There is also one exception to this minimum price requirement, whereby anyone holding 5% of the company's shares can agree with the bidder to accept a lower price.

The bidder does not have to comply with the minimum pricing rules if the price that would have to be offered differs significantly from the fair value of the shares in certain limited circumstances and the PFSA approves such lower price. Circumstances which justify lowering the price for shares in a tender offer, subject to the approval of the PFSA are as follows:

- the shareholders of the target receive pre-emptive rights, rights to a dividend or the right to purchase shares in the company acquiring the listed company in connection with its spin-off of the target or other rights attached to the shares of the target;
- there is a material deterioration in the financial and economic situation of the target due to unforeseen and unpredictable circumstances; or
- a risk of permanent insolvency of the target.

The decision of the PFSA is publicly disclosed.

Information requirements

The management board of the target company is obliged to give its opinion on any mandatory tender at least 2 business days before its commencement by delivering it to the PFSA and making it publicly available. Additionally, this opinion must simultaneously be disclosed to representatives of any employee associations active at the target company (such as trade unions) or, if there are no such associations, directly to its employees.

The Public Offerings Act requires the target's management board to include in its opinion its view on the effect of the tender offer on the target company's interests, including its work force and also on the bidder's strategic plans for the target and their likely effect on the target's work force and the place where the target will conduct its business activity. Furthermore, it must also state whether or not it considers that the price proposed reflects the company's fair value. Any external expert opinions obtained with regard to fair value (if any) must be disclosed.

Clearly, this requirement will encourage the boards of target companies to seek independent "fair value" opinions, although it is not mandatory. At the moment, in Poland it is not established practice to seek "fair value" opinions, except in hostile takeovers.

Form of consideration

The Public Offerings Act restricts the type of financial instrument that – instead of cash – may be offered in exchange for shares tendered in a tender offer. The only instruments that can be offered in voluntary offers or mandatory offers for up to 66% of the total votes must be shares in another company, depositary receipts or mortgage bonds (in each case existing in book-entry form) or Polish treasury bonds. Furthermore, only shares registered with the Polish national depositary of securities (but not necessarily listed) can be offered in a mandatory offer for all outstanding shares in a company.

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;
- 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.

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 regard 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.

Sanctions for breach of law

The Public Offerings Act provides for sanctions for a breach of the tender offer requirements. Generally, voting rights cannot be exercised in respect of shares acquired in breach of the relevant obligation. However, if the 33% or 66% thresholds have been exceeded without a tender offer being made in accordance with the Public Offerings Act, then none of the shares held by the relevant shareholder can be voted. Furthermore, a fine of up to PLN 1,000,000 may be imposed.

Squeeze-out for public companies

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 3 months from when 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 3 months from when 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, 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 the 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.

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