Going-Private: Delisting of the Acquired Company in Polish Law

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The paper reviews the legal requirements and processes associated with the going-private transaction. Since delisting dramatically changes the investors' position, the law imposes certain mechanisms aimed at minority investor protection, which – correspondingly – the controlling majority needs to observe. These legal mechanisms equip the minority with an exit option so as to mitigate the liquidity loss of their original investment. Correspondingly, this trade-off imposes on the acquirer additional transaction cost that needs to be taken into account.

For a couple of consecutive years the Warsaw Stock Exchange (WSE) has been among the European leaders to attract new stock issuers, and usually ranked second after the London Stock Exchange in terms of successful IPOs. Not surprisingly the going public process has occupied lawyers much more frequently than the reverse process, i.e., the withdrawal from the exchange (going private, delisting). However, there have been cases, particularly in the time of economic slowdown, where the economic rationale persuades corporate decision makers to delist their company. As a matter of fact, most companies in Poland have been delisted either because they were acquired by another company, they merged or they experienced solvency problems. From the beginning of 2000 until the end of 2009, as many as 111 companies have been delisted from the Warsaw Stock Exchange.

In case of a successful takeover bid of a listed company, the acquirer is likely to be interested in grabbing the entire voting stock of the corporation. It might be inclined to delist the company for a variety of reasons. First of all, one avoids bearing the costs associated with the stock listing (charges for exchange quotations, annual financial statements) that is difficult to justify with low market capitalisation. Second, presence on the stock market is connected with a duty of information, which may place the company in a position inferior to its non-listed rivals. If the acquirer is a foreign listed company, the maintenance of dual listing as a consequence of corporate merger may give it doubtful benefits. Furthermore, as a consequence of low free float, presence on the stock exchange does not necessarily accurately reflect the company's market value nor sufficiently promote the company's reputation both on the stock market and on the markets of goods and resources.

Delisting of an acquired company in the Polish legal system is regulated by the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies (the "Act") and the Rules of the Warsaw Stock Exchange (the "Listing Rules"). Poland as a member of the European Union is also bound by the Directive 2004/25/EC of the European Parliament April 21, 2004 on takeover bids (the "Directive"), which however allows for a number of opt-outs.

If the acquirer starts from the point where it holds a modest block of shares not exceeding 33% of the total vote, it must first be confronted with the rule on mandatory takeover bids, once it surpasses the said threshold. The regulation, as provided for in Polish law, is somehow unusual in the European perspective and it might be doubted whether the rule is in line with the Takeover Directive. Current regime law provides for a dual threshold:

- firstly, according to art. 73 of the Act, the exceeding 33% of total voting rights in a public company triggers off a mandatory tender offer to acquire or exchange the company shares, concerning a number of shares conferring the right to at least 66% of the total vote (a compulsory partial bid).
- secondly, in case of an acquisition of shares resulting in surpassing the threshold of 66% of the total vote in a public company, the Act mandates a takeover bid aimed at acquiring all the outstanding shares of the target company (art. 74 of the Act).

The mandatory takeover bid pursues several goals, but the priority objective is to protect those with minority interest against the risk of becoming dominated by the majority shareholders and provides them with an opportunity to exit the company before they become marginalised. Additionally, the tender offer plays an information role by presenting knowledge about changes in the shareholder structure.

Passing the second threshold and the second mandatory bid resulting thereof accelerates the going-private process. This, in the end, leads to the concentration of ownership.

Now we arrive at the core of delisting. In accordance with Art. 91 of the Act and Art. 31 of the Listing Rules, upon request of an issuer with a registered office in Poland, the FSA shall authorise restoration of the certificated form of shares if the following conditions are fulfilled:

- The issuer may submit the request only, if the general shareholders assembly adopts a resolution on the so called "rematerialisation" of shares, to which goal a qualified majority of four-fifths of the votes cast in the presence of shareholders representing at least half of the share capital is required. Articles of association may set the standards for such a resolution in a more rigorous manner.
- The adoption of the resolution may be included in the agenda of the general shareholders assembly only through the procedure provided in Art. 400 (1) of the Commercial Companies Code. Hence, only the shareholder or shareholders representing at least one-tenth of the share capital may request that the extraordinary general assembly be convened, as well as that certain matters be placed on the agenda.

Here, an additional exit option is granted for the benefit of minority investors, namely the shareholder requesting that the adoption of the resolution be included in the agenda of the general meeting (i.e., usually controlling shareholder) shall first announce a tender offer to acquire the company shares from all other shareholders and shall have the right to acquire shares in the company in the period between the submission of the request and the closing of the tender offer (article 91 subsection 6 of the Act).

At this point yet another associated mechanism must be mentioned. Once a shareholder in a public company, who individually or acting in concert with another person, has reached or exceeded 90% of the total vote in the company, he shall be entitled within three months from the day on which this threshold has been reached to demand that other shareholders sell the residual shares held in the company. This procedure is also known as mandatory acquisition or squeeze out. As an efficient tool for the acquirer to finalise a takeover, it renders takeover bids more attractive. Forcing minorities out of the company liberates the acquirer from costs and risks, which the continued existence of minorities could cause in future, e.g., blockage by means of continuous complaints filed against resolutions of the general assembly. Squeeze out is the construction of a claim by a shareholder who bears a particular amount of votes in the general assembly. Once the claim is raised, the minority shareholder becomes obliged to tender the shares. The conclusion is that solely the declaration of will of an entitled person is sufficient.

On the other hand, the law provides for a symmetrical rights conferred upon minority investors. Namely, they may demand that his shares be acquired by another shareholder who reaches or exceeds 90% of the total vote in the company. This regulation provides yet another possible way of exit for minority shareholders. Such a demand shall be made in writing within three months from the day on which the threshold has been reached or exceeded. A shareholder who demands that his shares be acquired should be entitled to receive a share price not lower than the price determined pursuant to Art. 79 of the Act.

Now, for the tender to be effective and not an illusory exit way granted to the advantage of minority investors, certain price guarantees and other safeguards are needed. First, Article 77 of the Act stipulates that a tender offer is to be announced after collateral is created for at least 100% of the share value covered by the tender offer. The collateral should be documented with a certificate issued by a bank or another financial institution. A tender offer shall be announced and carried out through the agency of an entity conducting brokerage activities in Poland, which shall be obligated, no later than within 14 days before the opening of the subscription period, to simultaneously notify the Financial Supervision Authority ("FSA") and Warsaw Stock Exchange.

The purchase price of acquired shares plays a key role in the procedure. The equitable price is an instrument of protection for minority shareholders. EU Directive in Article 7 provides that Member States shall ensure that a fair price is guaranteed. In Polish law this obligation is fulfilled by provisions of Art. 79 of the Act, which constitutes that the share price offered in the tender offer may not be lower than the average market price from the six months preceding the announcement of the tender offer in which the shares were traded on the main market, or average market price from a shorter period, if the shares were traded for a period shorter than six months.

Furthermore, the share price proposed in the tender offer may not be lower than the highest price paid for the shares, by the entity obligated to announce the tender offer or a person acting in concert with him, it may also not be lower than the highest value of assets or rights which the entity obligated to announce the tender delivered in exchange for the shares tendered in the tender offer, within 12 months preceding the announcement of the tender offer.

The entity announcing the tender offer may apply to the FSA for consent to the price proposal that fails to meet the above-mentioned criteria. The FSA may grant its consent, unless the proposed price is lower than the fair value of those shares and the announcement of such a tender offer breaches the legitimate interest of the shareholders.

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