

Changes in the tender offers

■ LEGAL ALERT 2/2022

On 9 March 2022, the Sejm (lower chamber of the Polish Parliament) adopted an act amending the Act on Mortgage Bonds and Mortgage Banks and certain other acts, which modifies selected provisions of the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and on Public Companies regarding tender offers (the “**Act**”).

Most importantly, the Act:

- > introduces one type of mandatory tender offer;
- > introduces a statutory regulation regarding voluntary tender offers;
- > provides that the minimum price to be determined in a tender offer should take into account the indirect share purchase price;
- > requires that the minimum price in a tender offer is based on the fair value of shares in companies with low liquidity.

One type of mandatory tender offer:

Under the current law, there are two thresholds for tender offers:

- > **33% of the total number of votes** (this threshold imposes an obligation to announce a tender offer to subscribe for the sale or exchange of shares in the number ensuring the achievement of **66% of the total number of votes held**);
- > **66% of the total number of votes** (this threshold imposes an obligation to announce a tender offer to subscribe for the sale or exchange of **all of the remaining shares in the company**).

These thresholds are sometimes deemed inconsistent with the directive on takeover bids (2004/25/EC).

Once the Act comes into force, a tender offer to subscribe for the sale or exchange of **all of the remaining shares in a public company will have to be announced if the threshold of 50% of the total number of votes in such company is exceeded**.

The purpose of introducing one type of mandatory tender offer (having the nature of a follow-up tender offer) is to harmonise Polish law with regulations prevailing in other EU member states and with the requirements of the directive on takeover bids. The threshold of 50% of the total number of votes provided for in the Act is much higher than the thresholds applicable in major European markets (approximately 30% as a rule) and may be seen as too high.

Voluntary tender offers

The Act introduces a statutory regulation regarding voluntary tender offers that is not provided for in existing legislation. Once the Act comes into force, voluntary tender offers will, just like mandatory tender offers, be announced and carried out using the services of a brokerage firm and following the establishment of security with a value corresponding to at least 100% of the value of the shares to be covered by the tender offer.

Indirect share purchase price

The Act expressly provides that the price offered in a tender offer may not be lower than the price already paid by the bidder and its controlling entities when indirectly purchasing the shares. Accordingly, the Act clearly reinstates the position set out in the controversial judgment of the Supreme Court of 18 July 2019 (I CSK 587/17).

Fair value of shares

In the case of companies with low liquidity, the minimum price in a tender offer will be determined based on the fair value of the shares determined by an audit firm selected by the bidder. This solution will be applied if, in the periods for which the aver-

age market price of the shares (calculated based on the average daily prices weighted by the volume of trade) is provided as a basis for determining the minimum price in the tender offer (i.e. in the periods of three and six months preceding the notification of the Polish Financial Supervision Authority (the "PFSA") of the intention to announce the tender offer), the shares were traded during fewer than one-third of the sessions and if during at least one-third of these sessions there was at least a 5% difference in the closing price for these shares compared to the closing price during the previous session in that period.

Other changes

Additionally, the Act introduces many changes with respect to regulations involving technical and procedural aspects of announcing and conducting tender offers. In particular, the procedure for notifying the PFSA of modifications to the contents of tender offers has changed.

Transitional provisions

The Act regulates in detail certain intertemporal issues and determines the impact of its entry into force on pending tender offers that have been announced on the basis of existing laws. It also regulates the situation of shareholders that will have more than 50% and less than 66% of the total number of votes at the time the Act enters into force. Such entities will be required to announce tender offers if they increase their share in the total number of votes in the relevant companies after the Act comes into force.

The Act has been passed to the Senate. The changes are expected to become effective on **30 May 2022**.

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