

GETTING THE DEAL THROUGH

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Contributing editor: Mark Greene

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Poland

Tomasz Ludwik Krawczyk and Mateusz Rogozinski

Drzewiecki Tomaszek & Partners

Statutes and regulations

- 1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

In Poland there are three main statutes that apply to the offering of securities:

- the Act on Public Offerings and the Conditions for Introducing Financial Instruments to the Organised Trading System and on Publicly Held Companies (Journal of Laws (JL) 2005, No. 184, item 1539) (the Act on Public Offerings);
- the Act on Trading in Financial Instruments (JL 2005, No. 183, item 1538); and
- the Act on Supervision over the Capital Market (JL 2005, No. 183, item 1537).

By virtue of the last of the above Acts, the Commission for Financial Supervision (Komisja Nadzoru Finansowego, KNF) was established as a body primarily responsible for supervision over the securities market, which includes ensuring safety of trading, observance of fair trading rules and protection of investors and other participants of such market.

Public offerings

- 2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Definition of a public offering

According to the Act on Public Offerings, making a public offer in whatever form of acquisition of securities addressed to no fewer than 100 entities or to undefined recipients shall be considered a public offering. Any offering that does not match the above definitions can be made free of administrative constraints.

General information

There are several filings that must be made in a course of a public offering of securities. They vary depending on the issuer of securities, type of issued securities and existence of the intention to list them on a stock exchange. The most general and the common filings are presented below.

Prospectus

Generally public offering of securities, according to the Act on Public Offerings, requires providing potential investors (purchasers) with detailed information on offered securities, which shall be verified and approved by the entity responsible for supervision

over the market. This obligation means the issuance of a prospectus, which must be approved by the KNF.

Under the Act on Public Offerings, the prospectus shall contain true and diligent information on the issuer and the persons managing it, their legal and financial situation, securities being issued and rules of their introduction to the public trading.

For a detailed description of the required contents of the prospectus, the Act on Public Offerings refers to Regulation (EC) No. 809/2004, which to that extent will directly apply to the execution of prospectuses.

The prospectus shall contain three documents: a registration document; an offer document; and a summary document.

The registration document shall provide all information regarding the issuer and its financial group, held assets, permissions, persons managing the company, its current and historical financial results. The offer document shall describe parameters of public offer – conditions of public offer, planned costs of process, planned destination market. The summary document shall supply the potential investor with most important information summarised from the two previous documents and also shall describe risks connected with issuer's operation.

In some situations there will be no need to issue, approve and publish a prospectus, and the Act on Public Offerings contains some exemptions in that respect (eg, in case of securities whose total issue value within 12 months will not exceed €2.5 million – in such a situation, only an information memorandum shall be issued and published, containing information that is less detailed and more limited).

Application to the court for registering securities

With a joint-stock company, an issuance of shares requires increase of share capital of the issuer's company. The proper authorities of the issuer shall grant consent for increase of share capital (eg, in a form of a resolution of a general meeting of shareholders). Moreover, if shares are to be listed on the Warsaw Stock Exchange, permission must also be sought from the National Deposit for Securities (see below) to deposit shares and list them on the stock exchange.

When the above-mentioned consent is granted, the company shall apply to court for increase of share capital.

Agreement with National Deposit for Securities

According to the Act on Trading in Financial Instruments, all securities in Poland that are being subject of public offering shall be deposited in the National Deposit for Securities; however there are some exemptions from such obligation (eg, in case a joint-stock company which shares were deposited is being transferred into another type of company). Generally, before the public offer-

ing the issuer and the National Deposit for Securities shall conclude contract of deposit by virtue of which all securities shall be deposited and rights resulting from such securities recorded on securities accounts.

Application for admission of securities to listing

After completing public offering, finishing registering proceedings increasing the share capital and depositing securities the issuer shall apply for admission of securities to be listed (in case intends to do so) on the Warsaw Stock Exchange – the only operating stock exchange in Poland (WSE). The above-mentioned applications shall be filed to the entity which runs WSE, namely, to the company under the name Stock Exchange of Securities in Warsaw SA, and application shall be addressed to the management board of such company.

- 3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

There are several steps that shall be taken in order to complete registration and filing process.

KNF's approval of prospectus

When the prospectus is made, it shall be approved as mentioned above by the KNF. The KNF examines whether the prospectus is in conformity with the law and contains all required information that enables potential investors to assess the attractiveness of, and risks connected to, the investment.

Publication

After obtaining approval of the KNF, the prospectus shall be published. Publication shall take place within such time limit prior to a beginning date of subscription which enables potential investors to become acquainted with such prospectus, but not later than on the date of beginning of subscription. In case of first public offering (IPO), prospectus shall be made publicly available at least six days before subscription.

Publication is to be made in one of the following ways:

- in a national newspaper;
- in a form of written information available in the office of the company running the stock market (WSE);
- on the website of the issuer; or
- on the website of the company running the stock market (WSE).

The issuer shall inform the KNF of the manner and terms of publication of the prospectus.

Dematerialisation of securities

As mentioned above, the public offering of securities requires depositing them in National Deposit for Securities and recording rights from such securities on securities accounts. It is done by virtue of contract of deposit concluded with National Deposit. However, depositing securities may take place only after obtaining Commission's approval for prospectus.

Public subscription

A public subscription shall last from one up to three months. When a public subscription is pending potential investors have opportunity to submit application for purchase of securities. Manner of filing such applications shall be described in prospectus.

Subscription of securities may be made as:

- fixed price subscription with pro-rata basis reduction – the most common manner of sale. If after completion of public subscription there is over-subscription amount of sold securities will be reduced proportionally to amount of ordered securities;
- fixed price subscription according to order of applications – if all securities are sold, subscription is completed; or
- minimal price subscription – after completing public subscription, the issuer may indicate a purchase price basing on the amount of applications.

Application for admission of securities to listing

Afterwards, the issuer shall apply to the management board of Stock Exchange of Securities in Warsaw SA for admission of securities to list them on the Warsaw Stock Exchange. There are several markets on the stock exchange (eg. Main Market, New Connect) and the issuer may apply for listing its securities on a one of them. Requirements of admission to particular market are described in the Regulations of the Warsaw Stock Exchange (adopted as a resolution of Council of the Warsaw Stock Exchange on 4 January 2006).

- 4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

In Poland, publicity of securities is not fully free of any constraints. There are two particular regulations that shall apply, namely, Regulation (EC) No. 809/2004 and the Act on Public Offerings.

The advertisement may be made publicly available in the shape of printed materials addressed to undisclosed recipient, electronic messages or adverts sent to mobile phone, letter correspondence, press advertisement with enclosed application for subscription of without it, telephone advertisement, presentations, by radio, fax, television, poster, brochure, and in the internet (including banners).

It is important to include into all advertising materials information: that such materials have only promotional or advertising character, that prospectus has been published or will be published, on places where prospectus will be available for the public.

Information included into advertisement cannot be contrary to information included in prospectus or misleading in any other way.

The KNF verifies whether the advertising campaign is conducted in conformity with law regulations and, if it discovers irregularities, can: delay commencement of the promotional campaign or stop such campaign and indicate irregularities to be corrected; forbid continuation of campaign if the issuer avoids to correct irregularities; and publish, at the cost of the issuer, information that the issuer's campaign is contrary to the law.

Moreover, with respect to publicity, the general provisions of Polish law shall apply, such as the Act on Combating Unfair Competition (JL 2003, No. 153, item 1503). This Act obliges the issuer to provide in its publicity true and diligent information regarding its enterprise and products. The term 'information' in the Act includes information on persons in charge of the company, services or products offered and the economic and legal situation (hence, also information regarding offered securities). Use of misleading information is also deemed as not using diligent results of research.

Consequently, underwriters' reports shall be made in conformity with the above regulations and may be issued only when

they are true and diligently performed, do not provide misleading information and do not conceal any important information in scope of offered securities.

- 5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Secondary offering of securities is generally connected with some entitlements of current shareholders of the company. According to Polish law regulations (ie, the Commercial Companies Code, JL 2000, No. 94, item 1037) purchase of shares within secondary offering may be enabled only for current shareholders on the pro-rata basis (consequently there will be no possibility for other investors to enter into the company). However current shareholders may be deprived of such right by decision of the proper company's authorities.

As to the secondary offering the rules of liability of the sellers are the same as in the primary offering. This means if someone provides misleading information or conceals some important information with regard to the offered securities, they are responsible for the damage suffered by the purchaser of such securities.

- 6 What is the typical settlement process for sales of securities in a public offering?

As securities being subject to public offering shall be dematerialised by virtue of contract with the National Deposit for Securities and rights resulting from them recorded into securities account any settlement process concerning sale of such securities involves change of entries in securities accounts.

A potential investor intending to purchase securities shall participate into subscription and pay the amount that equals the value of securities being purchased. As soon as securities are registered in proper court of law (authority proper for registering of shares in Poland) they shall be recorded onto investors securities account, however subject to reductions described above (resulting from amount of submitted offers). If overpayment with regard to such reduction occurs, the overpaid amount shall be returned to the investor upon record of securities.

Private placings

- 7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Because private placing would be an offer addressed to few or selected individuals, under condition securities are not pretending to be listed, for such placing general obligations resulting from Act on Public Offerings do not apply (since the Act on Public Offerings applies only for an offer submitted to not fewer than 100 entities on undefined recipient or securities pretending to be listed). It simplifies such offering and means, for example, the waiver of obligation of dematerialisation of shares, providing detailed financial information or issuance of prospectus.

However, even if offer is addressed to fewer than 100 entities, when securities from private placing are to be listed the above-mentioned Act on Public Offerings applies (and all obligations in respect of offering securities resulting from such Act arise). It shall be noted that, with regard to the fact that in private placing securities are not offered to undisclosed recipients and the group of recipients of the offer is rather specific, there is a possibility that exemptions mentioned in such Act shall apply, for example, in situations when securities are addressed only to qualified investors (such as banks) or investors which will purchase securities with value at least €50,000.

- 8 What information must be made available to potential investors in connection with a private placing of securities?

With regard to private placing, as long as securities are not subject to application for admission to listing on the Warsaw Stock Exchange, there is no obligation of executing and publishing a prospectus. However waiving such obligations does not release the issuer from the general obligation of providing true and diligent information on the enterprise whose securities are being issued.

If securities are subject to application for admission to listing them such application raise all obligations regarding information to be included into prospectus, however with exemptions resulting from Act on Public Offerings.

- 9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no restrictions regarding transferability of securities acquired in a private placing in Poland. However, in a situation when the company constitutes a publicly held company (at least part of its shares are listed) there are some general restrictions regarding transfers of shares of such public company, for example, if by planned acquisition of shares the purchaser would exceed the threshold of 33 per cent of possessed shares, the obligation of executing a call option would arise.

A statute of a privately-held company can provide restrictions concerning disposal of its shares; however, it cannot be fully excluded.

Offshore offerings

- 10 What specific rules (if any) apply to offerings of securities outside the home jurisdiction made by an issuer in your jurisdiction?

The Act on Public Offerings applies only to offering of securities on a Polish market. However, there are some provisions of the Act from which it result that securities offered on the Polish market may be also offered abroad (Polish issuers often explicitly exclude possibility of selling securities abroad). When offering securities outside Polish jurisdiction, the law of country in which securities are offered shall be applied.

Particular financings

- 11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

The offering of different type of securities varies in respect of, eg, corporation's decisions to be made, the obligation of conducting court's proceedings in order to register such securities, possibility of listing them on the Warsaw Stock Exchange. The most popular convertible securities in Poland are rights to shares. This financial instrument is to enable the issuer to avoid freezing of its equity when proceeding concerning introducing shares is pending. Rights to shares can be recorded on the securities accounts of investors and listed even before shares are registered in court and listed on the Warsaw Stock Exchange. Rights to shares are converted into shares as soon as proceeding connected to introducing shares on the market is finished.

Update and trends

The main Polish statutes concerning offering of securities are relatively new – they were published in September 2005. As a result they follow international standards and EU regulations. Hence, currently there are no proposals for amendments of major importance.

Underwriting arrangements**12** What types of underwriting arrangements are commonly used?

In Poland, according to Act on Public Offerings, there are two types of underwriters that affect underwriting arrangements: standby commitment underwriters (SCU) and firm commitment underwriters (FCU). The issuer or sponsor may enter into agreement with an SCU or an FCU.

In case of arrangement with the FCU, the underwriter undertakes to acquire all or a part of securities of given issue, offered exclusively to him, in order to further transfer them in the primary trading in the IPO.

In case of arrangement with the SCU, the underwriter undertakes to acquire all or a part of securities offered in the primary or IPO that have not been subscribed for within the time limit for doing so.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

In Poland, apart from a few provisions of Act on Public Offerings there are no particular provisions regarding underwriting arrangement regarding offering of securities. As a result such arrangements are subject to provisions of Polish Civil Code. From Polish Civil Code its source has the rule of contractual freedom which stipulates that parties of contract may arrange the content of the contract in any manner which will be not contrary to law provisions or essence of the contract.

14 What additional regulations apply to underwriting arrangements?

To underwriting arrangement the provisions of the Act on Public Offerings shall apply. It provides that SCU is obliged to obtain a consent of issuer for its activity.

As to the FCU arrangement, according to the abovementioned Act, the FCU shall be entitled to sell its right to acquire

securities. Such sale shall be deemed as a primary trading.

Only a qualified entity according to the above-mentioned Act may act as an FCU or SCU (eg, bank, investment firm).

Ongoing reporting obligations**15** In which instances does an issuer of securities become subject to ongoing reporting obligations?

According to the Act on Public Offerings the issuer of securities shall report as well as at the stage of applying securities for admission to listing them as when such securities have obtained approval for listing. Such obligations regard informing the KNF and the entity which conducts the Warsaw Stock Exchange. After informing both abovementioned entities information shall be made accessible for the public.

16 What information is a reporting company required to make available to the public?

Detailed description of information that shall be made available for the public is mentioned in the decree of the Ministry of Finance of 19 October 2005, issued on the basis of Act on Public Offerings. The scope of information that must be reported is very wide (eg, division of the issuer, appointment of managing person).

The information to be reported is current, periodical and, in some situations, confidential information. Information shall be passed immediately after action (which shall be subject to report) took place. The Act provides also specific manner in which information shall be made publicly available.

Anti-manipulation rules**17** What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Act on Public Offerings sets forth a general obligation of providing true information on offered securities. In case of violation of such obligation, the KNF can suspend the introduction of securities into the market, withdraw securities from the market, impose a fine, etc. Moreover according to the Act on Combating Unfair Competition, the issuer is obliged to provide to the public true and diligent information regarding its enterprise and products.

Additionally, any action taken deliberately by persons responsible for issuance of securities, which manipulates information which shall be made accessible to the public, is penalised by fine or imprisonment.

Drzewiecki Tomaszek & Partners

Tomasz Ludwik Krawczyk**krawczyk@dt.com.pl**

Belwederska Street 23

Tel: +48 22 840 95 00

Belvedere Plaza

Fax: +48 22 840 95 10

00-761 Warsaw

www.dt.com.pl

Poland

Consequently it is legally forbidden in Poland to provide false or misleading information regarding offered securities.

Liabilities and enforcement

18 What are the most common bases of liability for a securities transaction?

The Act on Public Offerings regulates liability of entity which participates in a securities transaction and by act of such entity, as providing misleading information the investor suffered damage. The liability arises also if there was no information provided which was indispensable in case of public offering.

Moreover the liability may be based as well on the basis of Polish Civil Code and provisions regarding damage caused by act of third person. Such person is obliged to redress the damage in a full extent.

In practice chasing for damage based on the security transaction is rather rare.

19 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

The main mechanism which allows the investor to seek remedies is a civil litigation. Possibilities of pursuing redress of damage result from Act on Public Offerings and generally from Polish Civil Code. With regard to abovementioned regulations the entity which caused the damage by its act is obliged to redress the damage in the full extent. In case there were a few persons or entities which caused the damage their liability is joint and several.

Moreover, in case of any acts taken with regard to public offering of securities contrary to law provisions (ie, Act on Public Offerings) the KNF in the course of administrative proceedings can impose a fine on any person or entity which acted contrary to law (generally 1 million zlotys (€300,000)).

Also, according to the abovementioned Act, if damage was caused deliberately by persons responsible for issuance of securities (for providing information in respect of offered securities) penal proceedings may be conducted and a fine of 5 million zlotys may be imposed on such persons, or even five years' imprisonment.