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Regulatory changes and the market of initial public offerings (IPO) in Poland

Summary: One of the ways of financing enterprises in Poland may be obtaining proceeds from the issue of shares on the Warsaw Stock Exchange, in particular, through the initial public offering (IPO). The attractiveness of this type of financing is determined by many factors, of which legal regulations are important. The purpose of this article is to analyse and assess the impact of the most important regulatory changes on the attractiveness of initial public offerings on the WSE. In the first place, the new rules in the area of public offerings, which have a direct impact on the perception of IPOs as a form of corporate financing, are examined. In the second, the legal changes concerning the functioning on the stock exchange market, which also indirectly affect the companies' decisions to enter the stock exchange, are investigated. Finally, the significance of legal changes for the IPO market in Poland is presented. The new regulations on public offerings do not restrict access to the stock exchange market, while changes in the sphere of a company's functioning on the stock exchange may be perceived by issuers as a significant nuisance, discouraging companies from making a decision to list their shares on the Warsaw Stock Exchange.

Key words: IPO, capital market, stock exchange regulations, legal regulations IPO

Zmiany regulacyjne a rynek pierwszych ofert publicznych (IPO) w Polsce

Streszczenie: Jednym ze sposobów finansowania przedsiębiorstw w Polsce może być pozyskanie środków z emisji akcji na Giełdzie Papierów Wartościowych w Warszawie, w szczególności w ramach pierwszej oferty publicznej (IPO). O atrakcyjności tego rodzaju finansowania decyduje wiele czynników, spośród których istotne znaczenie mają regulacje prawne. Celem niniejszego artykułu jest analiza i ocena wpływu najważniejszych zmian regulacyjnych na atrakcyjność pierwszych ofert publicznych na GPW. W pierwszej kolejności przeanalizowano nowe przepisy w obszarze ofert publicznych, które mają bezpośredni wpływ na postrzeganie IPO, jako formy finansowania przedsiębiorstwa. W drugiej zaś zbadano zmiany prawne dotyczące funkcjonowania na rynku giełdowym, które pośrednio również mają wpływ na podejmowanie przez spółki decyzji o wejściu na giełdę. Na końcu przedstawiono znaczenie zmian prawnych dla rynku IPO w Polsce. Nowe regulacje dotyczące ofert publicznych nie ograniczają dostępu do rynku giełdowego, natomiast zmiany w obszarze funkcjonowania spółki na giełdzie mogą być postrzegane przez emitentów jako istotna uciążliwość, zniechęcająca spółki do podjęcia decyzji o wprowadzeniu ich akcji na Giełdę Papierów Wartościowych w Warszawie.

Słowa kluczowe: IPO, rynek kapitałowy, giełdowe regulacje prawne, regulacje prawne IPO

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The last four years on the capital market in Poland – starting from the entry into force of the Market Abuse Regulation (MAR Regulation) – have been a period of intensive adaptation of our legislation to EU regulations. This resulted in significant changes, whose one of the main objectives is to protect investors. The question arises, however, as to whether the new regulations do not discourage potential issuers from debuting on the Warsaw Stock Exchange? The purpose of this article is to analyse and assess the impact of the most important regulatory changes that have taken place recently on the attractiveness of the initial public offerings on the WSE.

The decision to enter the stock market, thus to become a public company, is one of the key decisions in the life cycle of the company. The benefits of being a listed company are many, but the decision itself on the initial public offering (IPO) requires an in-depth analysis and compiling together potential benefits as well as costs. Apart from financial costs related to the IPO, there are also non-financial costs, such as the loss of control of the company and the need for increased surveillance, which may act as a disincentive to conduct public offerings (Besless et al., 2017). Some authors suggest that these issues can lead to abandoning the IPO (Helbing, 2019). Additionally, there can be an agency conflict in the IPO process, where potential investors, former owners, or the management of the company may have divergent goals (Signori, 2018). Moreover, the listing of the company affects the cost of capital and the funding structure (Brau, Fawcett, 2006). At the same time, the opportunity for the existing founders to sell their shares to increase their wealth constitutes an important issue (Lewellyn, Bao, 2014). Being a public company is also prestigious for the company (Certo et al., 2009). Still, the asymmetry of information that is present in public companies raises the risk for new investors (Cai, Zhu, 2015). In recent decades, many works in the research of finance have been devoted to the studies into the relations between various determinants affecting the long-term performance of the IPO processes, understood as the increase in the value of investments and development of the company (Bray et al., 2000). The decision-making motives concerning the IPO, valuation, and their development after the transaction, financial results after becoming a public company, or motives leading to the withdrawal from becoming public were examined. What is important to the decision to enter the public market are legal regulations, which encourage or discourage becoming a public company. The rest of this article constitutes an analysis of legal changes introduced in recent years and an evaluation of their potential impact on the market of initial public offerings in Poland.

Legal changes concerning public offerings

One of the very important factors that may affect the decision on the initial public offering are regulatory issues. In this respect, it is necessary to look at these issues in a broad sense, namely both at the legal conditions for the listing of the company on the stock exchange itself, including the public offering, as well as the regulatory issues related to the functioning of an entity that is already a listed company. Recently, several new legal regulations have emerged which may be relevant to the issuer's decision to conduct an initial public offering.

With regard to the listing of companies on the stock exchange, the new Regulation (EU) 2017/1129 of the European Parliament and of the Council

of June 14, 2017, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (Prospectus Regulation) is crucial. To the greatest extent, it entered into force on July 21, 2019. Before that date, however, some provisions of the Prospectus Regulation became effective, which were also relevant from the practical point of view (exemption concerning the threshold for non-prospectus admission to trading of securities of an already listed company and exemption from the application of the Prospectus Regulation or publication of a prospectus for public offers not exceeding certain amounts).

One such change, which came into effect after July 20, 2017, is a modification concerning the possibility to introduce to trading of securities identical to those already admitted to trading on the same regulated market, provided that they represent, within 12 months, less than 20 percent of the number of securities admitted to trading on the same regulated market. These provisions replaced the regulations resulting from the Act of July 29, 2005, on public offerings and conditions for the introduction of financial instruments to organised trading, and on public companies ("Act on Public Offering"), which provided that making the prospectus available to the public is not required for the admission to trading on a regulated market of the issuer's shares which constitute less than 10 percent of the same type of the issuer's shares admitted to trading on that regulated market, and together with the shares admitted to trading on that regulated market in that manner within the previous 12 months do not reach or exceed that value. Thus, the threshold was effectively increased from 10 to 20 percent, and the scope of application of the exemption was extended to include not only shares, but all securities.

Another change, which became effective earlier, namely as of July 21, 2018, is the exemption from the application of the Prospectus Regulation for public offerings of securities with a total value in the European Union of less than EUR 1,000,000, where such restriction is calculated for a period of 12 months. At the same time, the Prospectus Regulation provides that Member States may introduce their possible additional disclosure obligations at a national level (e.g. drawing up an additional offer document). Even before the Prospectus Regulation came into force, the Polish legislator amended the Act of July 29, 2005, on public offering, conditions for the introduction of financial instruments to organized trading, and on public companies, by introducing a threshold of EUR 1,000,000, which replaced the existing threshold of EUR 100,000, and decided that in the case of such offer, the issuer should make available a document containing a specific package of information. Then, as a result of another amendment, already after the entry into force of the whole Prospectus Regulation, the Act on Public Offering was amended (in the analysed scope very slightly), so that finally public offers of securities, as a result of which the assumed gross proceeds of the issuer or the offeror on the territory of the EU (calculated according to the issue price or sale price) constitute not less than EUR 100,000 and less than EUR 1,000,000 (taking into account the offers of the last 12 months), require making available to the public of a document (in Polish) containing, among others, basic information about the issuer, planned use of funds obtained from the issue of securities, significant risk factors, as well as a statement of responsibility with regard to information contained in the document. As a result of these changes, there has been an increase in the threshold from which it is not necessary to draw

up a prospectus, but it is mandatory to draw up a much simpler offer document.

Apart from the above-mentioned change, at the same time, the provision of the Prospectus Regulation entered into force excluding the obligation to publish a prospectus for offers not covered by the notification procedure between the home and host state (local offers) when the total value of the offer in the EU is lower than a monetary amount calculated over a 12-month period which does not exceed EUR 8,000,000 (with the final amount of the exclusion being decided at a national level). In this respect, it is worth noting that in the case of the Polish capital market, at the moment of the entry into force of this part of the Prospectus Regulation, an exemption from the prospectus obligation was already in force for public offerings of not less than EUR 1,000,000 and less than EUR 2,500,000, provided that an information memorandum (a slightly wider document than the offer document indicated above and narrower than the prospectus) was made available. Now that the entire Prospectus Regulation has come into force, the Polish legislator has adjusted the provisions of the Act on Public Offering, maintaining the principle of exemption from the prospectus obligation and publication of the information memorandum, with the above-mentioned thresholds. The detailed scope of data disclosed in the information memorandum is determined as part of the regulation issued by the minister responsible for financial institutions.

The largest scope of changes contained in the Prospectus Regulation – as indicated earlier – entered into force on July 21, 2019. A new definition of a public offer has been introduced, according to which a public offer of securities is a communication addressed to the public in any form and by any means, providing sufficient information on the terms of the offer and the securities offered to enable an investor to decide to purchase them or to subscribe for them. This is a particularly important change as nowadays every offer addressed to more than one investor will be a public offering.

For public offers, the drawing up, approval, and publication of the prospectus is a rule. At the same time, however, the Prospectus Regulation introduces a number of exceptions to the requirement to provide a prospectus, which counterbalances the negative burden on issuers associated with such a broad definition of a public offering in the context of the prospectus obligation. These exceptions include, but are not limited to, offers to qualified investors, offers to less than 150 natural or legal persons, offers to investors acquiring securities with a total value of at least EUR 100,000 per investor for each separate offer, etc. In this context, the changes in this respect as compared to the current legal system in Poland are not so significant.

In the context of initial public offerings, it is worth considering what changes are introduced as part of the Prospectus Regulation in relation to the preparation of the prospectus. Among the issues that are worth noting is the summary, which is generally shorter and provides space only for selected most relevant risk factors. The risk factors themselves described in the prospectus are presented in a small number of categories depending on their nature, and the most significant risk factors are listed first. Instead of annexes to the prospectus, the Prospectus Regulation provides for the preparation of supplements, while the promotional action is called advertising.

One of the interesting changes worth noting is the introduction of the so-called universal registration document. Any issuer whose securities are admitted to trading on a regulated market or an alter-

native trading system may draw up every financial year a registration document in the form of a universal registration document describing the company's organisation, activities, financial position, financial results and prospects, governance and shareholding structure. The document is submitted for approval to the supervisory authority; however, if the issuer obtains the approval for two consecutive financial years, subsequent universal registration documents may be submitted to the supervisory authority without prior approval. If such a prospectus is not submitted, the privilege of submitting the documents without prior approval is lost in the following year. After the submission or approval, the issuer may update the information in this document at any time. The major advantage of this solution is the fact that the issuer can issue securities on a regular basis, because the universal registration document remains valid all the time. In addition, once certain conditions are met and appropriate information is disclosed in the universal registration document, the issuer may take advantage of the exemption in relation to the publication of annual and half-yearly financial statements. Irrespective of this, an issuer may also obtain the status of a frequent issuer and benefit from faster approval of prospectuses in the future. The requirement to prepare a universal registration document is obviously a cost, but it may nevertheless encourage issuers to seek capital through the possibility of exemption from the obligation to publish an interim report (Nowosad, 2018).

Another solution, provided for in the Prospectus Regulation, is to draw up the so-called EU development prospectus. It is a document with a unified format, which is written in a simple language and which issuers can easily fill in. The condition for the issuer to take advantage of such a benefit is that none of its securities have been previously admitted to trading on the regulated market, and that, among others, the issuer had the status of a small or a medium-sized enterprise (SME) or that the securities of such an issuer were to be traded on the SME growth market provided that its average market capitalisation was EUR 500,000,000 or that the total value of the public offer in the EU did not exceed EUR 20,000,000 (calculated over 12 months and provided that none of the securities of that issuer are traded on an alternative trading system and the average number of employees during the previous year did not exceed 499 persons). It is worth noting that the regulations apply only to the prospectus drawn up in connection with the intention to carry out the offer. On the basis of this prospectus, it is not possible to apply for admission of the securities to trading on the regulated market (Pieczyńska-Czerny, 2018). Such a prospectus consists of a special summary, a special registration document, and a special offer document (parts of a limited scope).

Legal changes concerning the functioning on the stock market

It should be noted that the decision to enter the stock exchange is also influenced by regulations concerning the presence on the capital market. It is precisely in terms of operation of companies on the stock exchange that changes regarding information obligations and market abuse are important. Directive 2014/57/EU (MAD II Directive) of the European Parliament and of the Council of April 16, 2014, and Regulation 596/2014 of the European Parliament and of the Council of April 16, 2014, on market abuse (MAR Regulation) and other accompanying legislation were adopted in this respect. The most important of these is the MAR Regulation, which came into force on July 3, 2016. It covers issues relating to the substance of confidential informa-

tion, its use and unlawful disclosure, as well as market manipulation. It clarifies the requirements related to the disclosure of confidential information to the public. It sets out administrative measures and sanctions for non-compliance with the provisions of the MAR Regulation and the obligations imposed on market operators, investment firms, and persons professionally arranging transactions or executing orders on the financial market.

The purpose of the MAR Regulation is to protect a consistent and efficient capital market, where transactions are undertaken on an equal basis. It is supposed to prevent the use of misinformation of other trading participants, because a better-informed party may purchase financial instruments on favourable terms at the expense of the other party (Rycerski, 2018). It is worth noting that the key element of the regulation is the definition of confidential information, with the main focus on the related regulations concerning confidential information, i.e. the prohibition to use and the obligation to disclose confidential information to the public (Woźniak, 2018). From the point of view of Polish legal regulations, the MAR Regulation has largely replaced the selected provisions of the Act on Public Offering and the then binding Regulation of the Minister of Finance of February 19, 2009, on current and periodic information provided by issuers of securities and conditions for recognizing as equivalent the information required by laws of a non-member state, which was subsequently replaced by a new Regulation of the Minister of Finance of March 29, 2018.

Other important changes that may be significant for entities considering an initial public offering are those introduced in the Act on Public Offering, which entered into force on November 30, 2019. They are related to the adjustment of the contents of the Act on Public Offering to the Prospectus Regulation directly applicable in the Polish legal system (these changes have been analysed above), but also to the implementation of (EU) Directive 2017/828 of the European Parliament and of the Council of May 17, 2017, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement. The latter changes include, among others, the introduction of rules on remuneration policy and remuneration reports in companies whose shares are admitted to trading on a regulated market or a special approach to transactions with related entities.

In terms of the remuneration policy – companies whose shares are listed on a regulated market will be obliged to implement the remuneration policy with respect to members of the management board and the supervisory board, adopted by the general meeting by way of a resolution. It is worth noting that regulations concerning the remuneration policy are not foreign to the Polish financial market. As an example, we can point to similar obligations imposed on banks or investment companies in this respect (Okoń, 2012). The solutions adopted in the remuneration policy should contribute to the implementation of the business strategy, long-term interests, and stability of the company. Such a policy should include, among others, a description of fixed and variable components of remuneration, an indication of the proportion of remuneration components, the duration of contracts, termination terms, a description of supplementary pension schemes, a description of the decision-making process for the establishment, implementation and review of the remuneration policy, etc. The company publishes the resolution on the remuneration policy and the policy itself on its website. A temporary departure from the

remuneration policy is foreseen if this is necessary to pursue the long-term interests and financial stability of the company or to guarantee its viability. It is also worth noting that regardless of the adoption of the remuneration policy, the company's supervisory board is obliged to prepare an annual remuneration report, presenting a comprehensive remuneration review, which is examined by a statutory auditor. The company publishes such a report on its website.

The changes also include certain restrictions with regard to transactions with related entities. Companies whose shares are introduced to trading on the regulated market are obliged to post information about a significant transaction (transaction with a related entity, the value of which exceeds 5 percent of the total assets) on their website at the time of its conclusion at the latest. Such information should contain a number of details, such as the name of the related entity, a description of the nature of the relationship, the date and value of the transaction, information on the market relevance of the transaction. As a rule, the supervisory board should give its consent to the conclusion of such a transaction; however, the statute may provide that the consent may also be given by the general meeting. Additionally, a simplification is introduced, according to which when a transaction is disclosed under the MAR Regulation there is no need for disclosure under the new regulations. Other exemptions provide that there is no need to provide information on a material transaction when it is concluded at arm's length in the ordinary course of business, with a subsidiary in which the issuer is the sole shareholder or member or when the material transaction is related to the payment of remuneration to members of the management or the supervisory board (granted under the remuneration policy).

A change that may also be relevant to the decision on the initial public offering is the introduction of an increased threshold for the so-called squeeze-out of shareholders. So far, the threshold has been 90% of the total number of votes in a public company. Currently, such a right is vested in a shareholder of a public company who alone or jointly with other entities has reached or exceeded the 95% threshold of the total number of votes.

Another important new element is the introduction of a rule according to which the issuer is obliged to have procedures for anonymous reporting by employees to the designated member of the management board, and in special cases to the supervisory board, of violations of law, in particular, of the provisions of the Act on Public Offering, the Prospectus Regulation, and ethical procedures and standards.

Assessment of the significance of the changes introduced

From the point of view of the decision to make the company public, the regulations concerning public offerings, including those directly related to the IPO, are certainly crucial. Here, in principle, the changes should be evaluated positively. The adoption of the possibility of an admission to trading of securities without a prospect, including in particular the increase of the threshold to 20% is a considerable simplification. Furthermore, the exemption from the application of the Prospectus Regulation for offers of public securities with a total value in the European Union of less than EUR 1,000,000, provided that a simplified document is published, or the regime of exemption from the prospectus obligation in relation to public offers of less than EUR 2,500,000, allows companies to approach the processes much more flexibly with less formalised procedures. In addition, this limit of up to EUR 1,000,000

is intended to stimulate the development of equity crowdfunding, which can be a new source of financing for companies at an early stage of development.

As regards the regulations directly related to initial public offerings, including the preparation of prospectuses, it is important to express the view that the legislator has also taken the correct direction from the point of view of issuers. A shorter summary or presentation of only the key risk factors seems, on the one hand, to provide sufficient investor protection and, on the other hand, to make the document more concise, which should be assessed positively from the company's perspective. The introduction of the so-called universal registration document is also an element that may be attractive to issuers. This is because it allows for a situation where the issuer will be able to carry out public offerings practically at any time for a long time, which may enable it to raise capital in a very flexible way, depending on the market situation. In addition, by drawing up such a document, the issuer may be exempt from the obligation to publish a periodic report, which may also be seen as an advantage. From the perspective of simplification, the possibility of drawing up a so-called EU development prospectus should also be viewed positively.

However, a slightly more critical view must be expressed with regard to the introduced definition of a public offering. This one is very broad and covers many states that have not yet been covered. Compiling such a broad definition with the so-called mandatory brokerage, i.e. the obligation to engage an investment firm in a public offering, we come to a situation where issuers interested in raising capital can only do so with the use of professional intermediaries, which in a sense may restrict their access to investors. They cannot involve other entities that may have relations with potential shareholders. On the other hand, such an approach is intended to provide a greater degree of security for participants interested in acquiring or subscribing for securities.

As far as legal changes concerning the operation on the stock market are concerned, it is worth pointing out here to the different types of changes. With regard to the MAR Regulation relating to reporting, it should be noted that it did not cause such significant difficulties as were assumed immediately before its entry into force. In the course of its application, efforts are made to take into account, to a large extent, the approach and experience gained from the previous legal regulations. In this respect, it must therefore be said that this change is not so important for issuers from the point of view of the perception of the capital market as an attractive source of finance.

The introduction of rules on remuneration policy and remuneration reports in companies whose shares are admitted to trading on a regulated market or a specific approach to transactions with related parties may be much more important. Imposing additional obligations on issuers certainly cannot be positively perceived by companies considering an initial public offering. It seems that the mere entry into the regime of fulfilling information obligations is a challenge for these entities, and reporting on remuneration and transactions with related entities is another significant nuisance. It is similar in the case of other obligations introduced, including having a procedure of anonymous reporting of violations of law by employees to the designated member of the management board and, in specific situations, to the supervisory board. Excessive formalism certainly discourages companies from the stock market.

Another important factor from the point of view of the decision to conduct an initial public offering is the increase of the squeeze-out threshold from 90 to 95% of the total number of votes in a public company. The squeeze-out procedure is naturally accompanied by the process of delisting a company from the stock exchange, but in this context, it may also be important for those entities who intend to debut on it. When deciding to enter the stock exchange, it is worth to be clear about the possibilities of retreat. For this reason, increasing this threshold may have a major impact when deciding on an initial public offering. On the Polish capital market, in the processes aimed at withdrawing shares of a public company from the stock exchange, reaching the threshold of 90% of the total number of votes that would entitle to conduct a squeeze-out procedure was sometimes a big challenge. It will therefore be all the more difficult to achieve an even higher threshold, namely 95% of the total number of votes. It should therefore be clearly stated that the consequences of this change will also be very important for the entities considering their debut on the stock exchange.

In summary, it should be noted that since the entry into force of the MAR Regulation, there have been significant changes for companies from the point of view of IPOs and the functioning of these entities on the market. While the new solutions related to public offerings should, in principle, be assessed positively, as they are associated with many simplifications, still, the changes concerning companies already present on the WSE may be a significant factor in favour of the decision not to make the company public. In the latter respect, the introduction of additional obligations connected with the remuneration policy and reporting of transactions with related parties should be highlighted. These are the areas that require companies to perform additional tasks. With the huge amount of obligations imposed, the change of the status to public can become a huge challenge. In addition, increasing the squeeze-out threshold to 95% of the total number of votes may also be a significant limiting factor for the IPO. In such a case, when a company becomes a listed company, it will be difficult for it to reverse this process in practice, which may also act as a disincentive to carry out the initial public offering.

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