

Target Board's Duties and Available Defence Strategies under Polish Takeover Law

BY PATRYCJA WYSOCKA | KUBAS KOS GAERTNER

Takeover law has been subject to European harmonisation for many decades. The finally adopted 13th Directive of 2004 is widely perceived as a modest compromise. Hence, substantial differences remain among national laws and legal practice. For a successful tender bid or - taking the opposite perspective - for an effective takeover defence, it is crucial to comprehend the legal framework governing takeovers and to understand specificities of domestic law. One needs to bear in mind that the law under which the target company operates determines the target board's duties and available defence mechanisms. Since it is quite seldom the case that a Polish company avails itself of a foreign incorporation, it is the Polish law that applies whenever the acquisition aims at shares of a company operating in Poland. This article analyses the management board's duties and available defence strategies under Polish takeover and company law.

Takeover regulations as regards available defence strategies that would lead to frustrating the tender bid and, ipso facto, taking control of the target company have not been the subject of extensive regulation in Polish law for a long period of time. Even though the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies, dated July 29th 2005 (Journal of Laws of 2009, no. 185, item 1439, uniform text) ("Act on Public Offering") contained in its initial version the provisions implementing the selected provisions of the 13th Directive no. 2004/25/EC (such as, e.g., Articles 82 and 83 of the Act on Public Offering which regulate the right of squeeze-out and the right of sell-out), however, it did not implement the provisions of the 13th Directive in their entirety and, in particular, until 2009 it did not refer to the questions concerning the obligations and rights of the management board of the target company (except for the obligation under Article 80 of the Act on Public Offer concerning the preparation of a document setting out its opinion of the bid) and to the breakthrough rule, which in turn was subject of criticism in the doctrine of Polish law. No sooner than as of 13th January 2009 the Polish legislator implemented the remaining provisions of the 13th Directive, inclusive of Articles 8, 9 and 11 and relevant regulations are currently presented in the amended Article 80 and in added Articles 80a - 80d of the Act on Public Offering.

The Polish legislator used the possibility prescribed in Article 12 of the 13th Directive pursuant to which it may depart from model guidelines and did not implement the general rule – adopted on the grounds of the 13th Directive – of the management board's neutrality. The above means that on the grounds of the Polish law, in a situation of an attempt to acquire control of a public company, the management board of the target company may, as a principle, play an active role. This role has to be limited only to communicating its position on the announced tender bid. However, what should be underlined at this point is that the presentation of a position on the announced tender bid is the obligation of the management board in the case of a summons which may lead to acquisition of control of a company or strengthen the dominant position in a company and the non-presentation of such a communication can result in imposing a fine in the amount of up to PLN 100,000 for each member of the management board by the Polish Financial Supervision Authority. It should also be noted that the opinion of the management board is not binding on the shareholders.

As indicated above, the active role of the management board is a general rule, however the company may

introduce an obligation of the management board to maintain neutrality during the tender bid by implementing a special clause in the company's articles of association. The implementation (opt-in) of the neutrality rule means that during the tender bid, the management board and supervisory board shall be precluded from taking any actions capable of frustrating the bid, unless authorised by the shareholder meeting. However, the obligation to maintain neutrality does not extend to seeking alternative bids. Such actions, as being in the interest of the shareholders, are always admissible. The introduction of the neutrality principle to the articles of association must always be accompanied by the simultaneous implementation into the articles of association of additional clauses abolishing the pre-existing limitations of exercising voting rights and multiple voting rights (one share-one vote) (however, the obligation to exclude the limitations of exercising voting rights does not pertain to these stockholders, who due to these limitations are entitled to special monetary benefits).

The reactive means of defence that may be applied by the management board include, apart from the already mentioned search for an alternative purchaser of company's shares (which could have been friendly towards the said company – the so-called white knight), the following methods:

- the issuance of new shares (within the target capital) which increased the number of shares the offeror would have to acquire in order to take control which, in turn, increases the cost of the takeover;
- the acquisition of the company's own shares (buy back) to prevent harm to the company (Article 362.1.1 of the Code of Commercial Companies; "CCC") which may result from the takeover of control of the company. Since such purchase decreases the liquidity of the shares and increases the demand, it also entails an increase in costs from the point of view of the acquiring company;
- the acquisition of shares of companies from the same sector by the target company in order to create obstacles under the anti-trust law (the so-called anti-trust defence);
- taking up a valuable obligation or the sale of considerable assets of the company in order to decrease its value and attractiveness for the offeror.

It should be underlined that the actions undertaken by the management board must comply with the interest of the target company. In particular, at this point one should consider the provision of Article 377 of the CCC pursuant to which the member of the management board shall abstain from participating in deciding the cases in the event of a conflict of interest between him and the company. Non-compliance to the requirement of this provision may lead to compensatory liability of a member of the management board towards the company. It should also be noted at this point that on the grounds of Article 483.2 of the CCC, pursuant to which "a management board member, supervisory board member and liquidator shall, in discharge of his duties, exercise a degree of diligence proper for the professional nature of his actions", the fault of the management board member is implied which considerably aggravates his procedural position. The above is significant in the scope that the objection of the management board concerning the takeover bid and the actions undertaken in connection therewith, are usually the source of questions concerning the reasons behind the management board's actions – whether it is the care for the interest of the target company or just the will to retain one's position.

Apart from the reactive means, the company may also use preventive methods of defence against the takeover. They may be regulations included in contracts or articles of association which restrict the freedom of disposal of shares as well as the articles of association's provisions which vest certain personal rights in an individually named shareholder which may relate in particular to the right to appoint and recall members of the management

board and supervisory board. In comparison to the preventive measures applied by target companies, the 13th Directive contains a regulation referred to as breakthrough of restrictions provided for in contractual agreements and in the articles of association of the target company (Article 11 of the 13th Directive). The Polish legislator similarly as in case of the management board's neutrality, used the possibility to opt-out of the breakthrough rule and did not fully implement Article 11.2 – 11.4 of the 13th Directive. The possibility to adopt these provisions of the 13th Directive was left to the companies themselves, which may introduce relevant provision to the articles of association. Thus, by virtue of the internal corporate regulations one may exclude the restrictions – provided in the articles of association and in contractual agreements as well – in the scope of the limitations of transferability of shares in the case of disposing shares consequently to tender bid. At this point, it is worth pointing to the questions as to the effectiveness of such provisions in the articles of association in the context of civil-law contracts. Regulations of the articles of association are not of a universal nature and the acquiring party in the case of share selling may be an entity which is not a target company shareholder. The sale of shares in such a situation would be apparently effective, but it could lead to the rise of compensatory liability on the part, who is a seller towards the party who is a creditor in the contractual relationship (what is more, the seller would not be compensated for such a damage in the frames of the compensation paid by the offeror; for the compensation pertains only to the damage incurred by stockholders by limiting their rights in relation to the tender bid).

In light of the aforesaid, if a company decides to implement the neutrality rule or breakthrough rule in its articles of association, it may – by virtue of a shareholder meeting's resolution – exclude the applicability of these provisions if the offeror company does not apply the breakthrough rule and neutrality rule (reciprocity principle). Since such a resolution partly modifies the provisions of the articles of association, in the passing of such a resolution one should apply the manner relevant for amendments of the articles of association. Furthermore, the exclusion of the application of the neutrality rule or breakthrough rule may be implemented to the articles of association. It is also indicated that the exclusion in the articles of association could pertain also to the companies which apply only one of the two aforesaid rules, e.g., that adopted the neutrality rule but have not implemented the breakthrough rule.

The analysis of presented thoughts leads to the conclusion that the Polish legislator did not implement the regulations facilitating the takeover of companies; in particular, the management board's neutrality rule has not been implemented. Thus, the model solution of the 13th Directive which considerably limits the possibility of the target company and its board to take actions which could frustrate a bid, have not been adopted. On the grounds of the Polish law, it is possible to use both the reactive and preventive means of protection against the takeover. The reservation of the Polish legislator is not unique in Europe, as many countries decided to opt-out of many of the Directive's provisions.

Patrycja Wysocka is an Associate at Kubas Kos Gaertner.



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