

## The distribution of financial instruments and the new definition of offering

**In March of this year, the Polish Financial Supervision Authority (the “PFSA”) published its opinion on the new definition of offering financial instruments which was added by the amendment of the Act on the Trading of Financial Instruments, which entered into force on 21 April, 2018 (further, the “Act”). The main purpose of the amendment was both the implementation of the MIFID II Directive into the Polish legal system, as well as strengthening market security and protecting investors in cases where they rely on the services of financial intermediaries.**

### What has changed?

In accordance with the new wording of Art. 72 of the Act, the offering of financial instruments is understood as undertaking activities for the benefit of securities issuers, financial instrument issuers, or financial instrument sellers, leading to the acquisition of these instruments by other entities, which may take the form of one of the following activities:

- (a) presenting, in any form or manner, information disclosed by the securities issuer, financial instrument issuer, or the financial instrument seller, concerning the financial instruments, and the conditions for their acquisition, being a sufficient basis to decide on the acquisition of these instruments, and which actions may be directed to individually designated recipients, as well as to the general public; or
- (b) intermediating in the sale of financial instruments acquired by entities as a result of the information, referred to above, being presented; or
- (c) presenting in any form or manner, information disclosed by the securities issuer, financial instrument issuer, or the financial instrument seller, aimed at:
  - promoting, directly or indirectly, the acquisition of financial instruments; or
  - encouraging, directly or indirectly, the acquisition of financial instruments.

Previously, offering could be undertaken, as rule, only in respect of securities, and not all financial instruments (applying to financial instrument only where they were being sold on a regulated market). The new definition removes all doubt that offering can be undertaken in respect of both all securities and all financial instruments. Moreover, the previous definition of offering was limited only to the acquisition and sale of certain instruments.

### When we are dealing with offering?

Currently, offering consists of both the mere “disclosure of information” aimed at promoting the acquisition of financial instruments, or encouraging the acquisition of financial instruments. According to the PFSA’s opinion, as a rule, all marketing activities undertaken to the benefit of a securities issuer, financial instrument issuer, or financial instrument seller, which consist of presenting information to individually designated recipients of such information, will be qualified as an offer of financial instruments. Among the examples given by the PFSA are meetings held with potential investors, or invitations to free training courses, whose actual goal is the promotion of the acquisition of particular financial instruments.

According to the PFSA, putting such promotional information on a publicly accessible website does not qualify as offering, on account of the lack of an individual recipient of such activities. However, email correspondence could be viewed otherwise, if it is sent to particular recipients which contain promotional materials, which encourage them, directly or indirectly, to acquire financial instruments.

Multiple times in its opinion, the PFSA underlines that the key to the assessment of a given act will be determining whether it was undertaken to the benefit of a securities issuer, a financial instrument issuer, or a financial instrument seller.

Therefore, for example, the presentation of the current or historical price of financial instruments on a website will qualify as an offering of financial instruments if it was undertaken for the benefit of one of the above entities.

Businesses undertaking activities based on the acts described in the amended Art. 72 of the Act were given a 12-month period in which to bring their activities into line with these provisions. Thus, these entities had until 21 April, 2019, to obtain a permit (or at least submit a motion for its issue) if they wanted to continue their business as before. Those businesses which continue to offer financial instruments without the relevant approval from the PFSA are at risk of a fine in the amount of 5 million Polish zlotys.

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If you would like to receive more information about the proposed changes, please contact us.



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