

POLAND INTRODUCES CONTROL OVER NON-EU/NON-OECD INVESTMENTS IN CERTAIN SECTORS

On 19 June 2020 the Polish parliament adopted a new act intended to counteract the effects of the Coronavirus outbreak (*Shield 4.0*). Among other things, the act introduces substantial changes to the foreign investment control regime for an interim period of two years. Entities from outside the EU and OECD will have to notify the Polish Competition Authority the acquisition of shares in or control over Polish companies active in certain sectors. Failure to comply could render the relevant transaction invalid and may result in substantial fines and/or imprisonment. The new provisions will enter into force on 23 July 2020.

INTRODUCTION

The Shield 4.0 Act of 19 June 2020 amends the Act on the Control of Certain Investments [*Ustawa o kontroli niektórych inwestycji*] of 24 July 2015. In its previous form, this act already contained certain universal public order limitations relating to the acquisition of specific named Polish companies in certain strategic sectors such as energy, chemicals, and telecommunications. The acquisition of such companies, regardless of the investor's country of origin, require notification to, and may be blocked by, the relevant government authority (by way of an objection to the proposed transaction).

In response to the impact the Coronavirus pandemic may have on valuations of Polish businesses, the new amendment introduced much more complex control of foreign investments (the "FDI Regime"). Any transaction caught by the FDI Regime will have to be notified to the Polish Competition Authority ("PCA") and obtain approval.

INVESTORS AFFECTED BY THE NEW REGIME

The FDI Regime applies to entities:

- a) in the case of natural persons – who are not citizens of an EU/EEA/OECD country;
- b) in the case of other entities – that do not have their registered seat in an EU/EEA/OECD country or have not had their registered seat in EU/EEA/OECD country for two years or more.

Key issues

- The new control regime will apply for two years to non-EU and non-OECD investments in Poland
- Businesses across various sectors will be protected by the new regime
- Notification must be made before the signing of any agreement obliging the investor to make an acquisition
- Transactions cannot be completed without approval
- Failure to notify or closing a transaction without approval may result in fines of up to PLN 50 million or imprisonment for up to five years

(a "Foreign Investor")

In the case of indirect investments (e.g. through subsidiaries or SPVs), the entity (or person) at the top of the structure is taken into account. Similarly, if the investment is made by portfolio managers or other agents, the client is taken into account.

PROTECTED ENTITIES

The list of entities protected under the FDI Regime includes:

- a) all public companies listed on the Warsaw Stock Exchange (the "WSE");
- b) entities that own "critical infrastructure";
- c) entities that conduct economic activity in the following sectors:
 - i. energy;
 - ii. fuels;
 - iii. chemicals,
 - iv. weapons and military technologies;
 - v. transshipment in ports;
 - vi. medical equipment and pharmaceuticals;
 - vii. food processing;
- d) entities active in the development or modification of software used in:
 - i. supply of electricity, fuels, heat;
 - ii. supply of water and waste treatment;
 - iii. transmission of voice or data or processing or storage of data;
 - iv. cash/card payments, securities and derivatives transactions, insurance services;
 - v. hospitals, sale of prescription drugs and laboratories;
 - vi. transportation;
 - vii. supply of food;
 - viii. cloud computing.

The wording used in the Act, especially in relation to entities that develop or modify software used for the transmission, storage and processing of data (i.e. all data, not only personal) broadens the range of entities that may be captured by the restrictions. A literal application of these provisions could result in the protection of almost every business that is involved in software activities, even only as part of ancillary, back-office operations. So far, it is not known how the authorities will interpret these provisions. The government may limit the scope of application of the Act further by issuing a list of exemptions.

TRANSACTIONS TRIGGERING THE OBLIGATION TO NOTIFY THE PCA

A notifiable transaction is one resulting in a Foreign Investor's:

- a) acquiring a stake equal to or greater than 20% or 40% of the total number of votes in a Polish company or, in the case of a Polish partnership, making a contribution to a Polish partnership equal to or greater than 20% or 40% of the total contributions in the partnership;
- b) acquiring a participation in the profit of a Polish company equal to or greater than 20% or 40%;

- c) otherwise acquiring a significant participation in or a dominant position over a Polish entity, e.g. via the acquisition or lease of an organised part of an enterprise from a Polish entity, entering into a control (management) and/or profit transfer agreement over a Polish entity or acquisition of the majority of the votes in a Polish entity.

The FDI Regime applies to various transaction structures. Apart from simple direct acquisitions, this includes also investment through a subsidiary, investment by a portfolio manager for a Foreign Investor and other forms of acquisition.

A de minimis exemption from the FDI Regime applies if the target entity has not achieved EUR 10 million turnover in either of the two years preceding the transaction.

NOTIFICATION

The notification procedure should begin before the signing of a preliminary agreement obliging an investor to make the FDI acquisition or, in the case of the acquisition of a WSE-listed company by way of a public tender offer, before the tender offer is announced. Ensuring this new requirement is complied with without any adverse impact on other applicable requirements may pose certain practical difficulties and logistical challenges.

The FDI Regime will affect transactions already signed but not completed before the new legislation comes into force. However, the moment of notification of such transactions is unclear. Based on the literal wording of the act this obligation would be impossible to comply with. The transaction should be theoretically notified before the act comes into force. So far it is not known what will be the authorities' approach to this issue.

FDI transactions completed before the new legislation comes into force will not be affected.

Once the notification has been filed, the Foreign Investor may sign the preliminary agreement or announce the tender offer, which will be conditional on receipt of clearance from the PCA.

TIMETABLE AND POSSIBLE OUTCOMES

After the notification, the PCA has 30 business days to either (i) approve the transaction or (ii) initiate control proceedings. The control proceedings may last up to 120 calendar days (the clock stops whenever the PCA requests additional information, so in practice the actual timing may be even significantly longer).

At this stage, it is difficult to predict how much time the PCA will actually need to clear transactions. This new requirement may have an adverse impact on deal certainty, especially in M&A transactions that would not otherwise be affected by onerous or time-consuming conditions to completion.

REASONS FOR OBJECTION

The PCA may object to a transaction if:

- a) the investor does not complete the notification fully or fails to provide the additional information/documents/explanations requested by the PCA; or
- b) the transaction leads to at least a potential threat to public order or public safety; or

- c) it is not possible to determine whether the investor has its registered seat (or citizenship) in an EU/EEA/OECD member state;
- d) the transaction could have a negative impact on projects of EU interest.

CONSEQUENCES OF NON-COMPLIANCE

Any FDI transaction made in breach of the Polish FDI Regime (without notification or without approval) will be null and void and the investor will be unable to exercise its rights (including any voting rights) under the shares acquired. In case of taking control over a parent company of a Polish protected entity; only the latter sanction will apply.

Investment made without approval is a criminal offence subject to a penalty of imprisonment from six months to five years and a fine of up to PLN 50 million (approx. EUR 11 million).

Moreover, anyone managing the subsidiary or exercising voting rights on behalf of a Foreign Investor, who fails to notify the PCA of the foreign investment of certain kind (such as cross-border merger outside of Poland) is liable to a fine of up to PLN 5 million (approx.. EUR 1.1 million) or a term of imprisonment of six months to five years.

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Warsaw, Poland

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