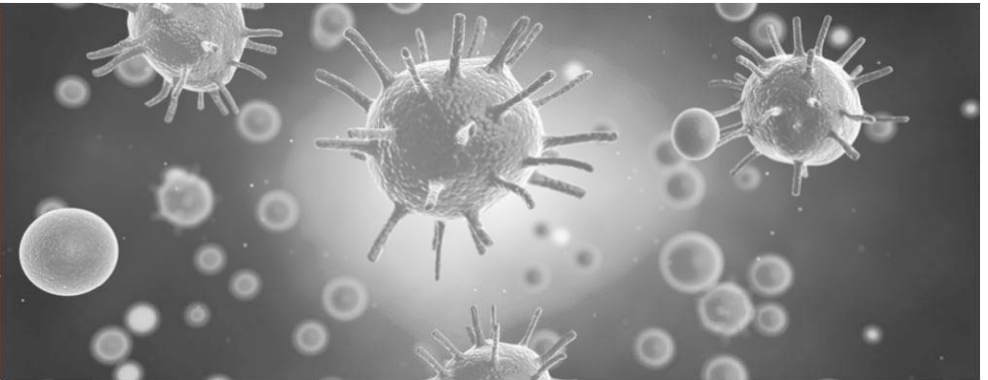


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Post COVID-19 legislation - New Polish regulations on controlling certain foreign investments

The Polish Parliament is working on new regulations to control certain foreign investments. The new law (if adopted) might have a significant impact on M&A transactions contemplated by non-EEA investors in relation to Polish based companies. Under the new law, the powers of the Polish Competition Authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*) will also expand as it will receive far-reaching competences to authorize foreign investments that do not fall under the domestic merger control regulations. The new regulations are to apply for a period of 24 months starting from 2 months after its publication.

Main assumptions of the draft act

The protection of an extensive portfolio of Polish based companies

According to the Polish Government (which drafted the bill), the new regulations are designed to strengthen the protection over certain Polish companies against investors with their origins outside the EEA. The group of entities protected under the bill ("**protected entities**") includes:

- companies publicly listed in Poland (but only those with their registered seat in Poland)
- companies holding assets defined under Polish law as "critical infrastructure"
- companies operating among others in the following sectors: telecommunication, electrical energy, production of fertilizers and chemicals, production or distribution of explosives, weapons, ammunition or other products intended for the army and police, production of medical equipment or medicines and other pharmaceutical products, processing of meat, milk, cereals, fruit and vegetables.

Under the draft act, the acquisition of 20% or crossing the threshold of 20% or 40% of participation (including profit-sharing) in a protected entity will require the prior authorisation of the Polish Competition Authority. The same is true in the case of the acquisition or lease of the enterprise or an organized part of it from a protected entity. The obligation referred to above will not arise if the turnover generated by the protected entity was below EUR 10 million in each of the two financial years preceding the notification.

Investors that fall under the screening procedure

Are only direct investments covered ?

In principle, the bill pertains to: a) investments made by non-EEA citizens, and b) legal entities that do not or have not had a registered seat in a EEA-Member State for at least two years. However, the new law also extends to:

- foreign-to-foreign transactions if they result in the indirect acquisition of at least 20% of participation in a protected entity, i.e. where a non-EEA based investor acquires control over a company which in turn holds at least 20% of participation in the protected entity.
- investments in protected entities implemented by EEA-based companies that do not carry out any material activity on an EEA territory other than that related to the transaction in question or which do not have permanent establishment (enterprise), office or personnel in the territory of any EEA-signatory state.

The draft act also covers investments in protected companies commissioned by another entity, including performing the management of a portfolio investment for the account of the client.

Procedure, sanctions and presumptions of consent

How quickly can you receive consent and what happens if you do not?

A transaction falling under the new regulations will require the prior authorisation of the Polish Competition Authority. The failure to receive such consent will result in making the investment null and void. Implementing a reportable investment without securing consent will be also subject to strict financial sanctions - up to PLN 50,000,000 or imprisonment for up to 5 years.

The bill sets out a two-stage screening procedure like that applied in merger control proceedings.

- If the investment does not raise concerns, the authority will issue consent within 30 working days.
- In complex cases, an in-depth inquiry lasting up to 120 days will be opened.

The Polish Competition Authority will object to the investment if it concludes that:

- it is likely to threaten public order, public security, or public health in Poland
- it is likely to affect projects or programmes of EU interest on grounds of security or public order
- the applicant did not submit the information requested during the proceedings
- it is not possible to determine whether the investor is a citizen of EEA-Member State or - in the case of legal entities - if they have been established on the territory of an EEA-Member State for at least 2 years.

DZP's comments on the draft act

The suggested proposals have the potential to be self-harming

The proposed regulations are supposedly designed to protect Polish companies against hostile takeovers by non-EEA based investors. Conversely, adopting the bill might result in the slowing down of many M&A transactions that are necessary for Polish companies who need external financing to develop further or even to remain competitive on the market. Indeed, this might interrupt the management of the negative effects of COVID-19 pandemic. This issue can be expected to be taken into consideration during the legislative process.

The draft act raises doubts as to its compatibility with the Polish Constitution and EU law under which limiting the freedoms set forth in the TFEU on the basis of the requirements of public policy and public security is legitimate only if there is a genuine and sufficiently serious threat to a fundamental interest of society.

Interestingly, the bill does not specify in what way the acquisition of 20% of participation might create a material threat for public order or safety. It is legitimate to expect clarification on this issue as a great number of transactions covered by the draft act will constitute “portfolio investments” that do not confer the investors’ effective influence over the management and control over the protected company. This aspect was noted in comments on the proposed regulations submitted at the very beginning of the parliamentary work. Accordingly, the need to amend the draft act seems to have been well identified.

Furthermore, the proposed catalogue of protected Polish entities seems to be overly wide and imprecise. This asks the question about how proportional the new regulations are. While protecting companies holding strategic infrastructure for the security and safety of the State and citizens should not raise doubts, it is hard to justify extending the protective shield across all Polish listed companies.

Another important issue pertains to the assessment criteria used in the draft act. According to the bill, the Polish Competition Authority is to be authorised to object to an investment if there exists at least a potential threat to public order, public security, or public health in Poland. The ambiguity of the presumption to object to an investment means that the authority may be granted wide discretionary powers, while investors (provided that the draft is not amended) may face difficulties in identifying the circumstances in which consent will not be granted. The very low threshold to object to the investment (likelihood of the threat) can be expected to be changed by the Polish parliament as otherwise it may prove to be incompatible with EU law.

Work on the draft act is still underway and at this stage it is difficult to assess the scope of the amendments that will be submitted to the original wording of the proposed regulations by either the lower or the upper chamber of the Polish parliament. We consider that the issues indicated above are the minimum which should be addressed during the legislative process.

We are at your disposal



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