

Legal Alert

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Anti-Takeover Shield – New M&A Control Rules for Non-EU/EEA/OECD Investors

On 19 June 2020 the Polish parliament adopted a new act referred to as the Anti-Crisis Shield 4.0 which provides for further development of the takeover control regime protecting companies of strategic significance. The amendments extend the control regime to additional sectors which are considered essential from the perspective of the public order, security and health as well as implementation of EU projects and programs.

Which transactions will be subject to the new regulation?

- The current takeover control mechanism (enclosed in the Act on Control of Certain Investments) encompasses transactions pertaining to entities which meet the following criteria:
 - they conduct activity in industries deemed as strategic (i.a. energy, fuel, armaments, mining and telecommunications industries);
 - are included in the list adopted in the regulation of the Polish Council of Ministers (as of now, the list contains only 9 entities);
- The act provides for the following changes in the scope of application of the control mechanism:
 - an extension of the abovementioned list of industries by addition of i.a. owners of critical infrastructure, producers or developers of software used in energy, transport, supply and medical sectors, as well as producers of medical products and devices, gas traders, heat plants and distributors and food processing industry;
 - the control mechanism will include all listed companies, regardless of what activity they conduct;
 - there will be no need to include an entity in the official list (the control mechanism will apply by operation of law);
- the new control mechanism will only cover entities the income of which reached €10 million in any of the last 2 financial years;
- New obligations will be related to acquisition of shares entitling to at least 20% of votes in a protected entity or its enterprise or an organized part of its enterprise by:
 - an investor with its seat outside of the European Union and the European Economic Area as well as member-states of the Organisation for Economic Co-operation and Development;
 - subsidiaries of such investors, even if their seat is located in the EU/EEA/OECD (so called indirect acquisition);
- New provisions do not expressly exclude transactions made between members of the same corporate groups from the scope of application of the new control mechanism;
- The new regime will apply for 2 years after its entry into force.



What are the additional obligations to be fulfilled in relation to a transaction?

- The potential acquirer of a protected entity will be obliged to file a notification with the President of the Polish Office of Competition and Consumer Protection (other than the concentration notification if necessary in that case) pertaining to the transaction (in most cases – prior to the closing of the transaction);
- The President will be competent to raise an objection to the transaction if it causes at least potential threat to the public order, security or health in the Republic of Poland as well as if it may negatively affect projects or programs of the European Union's interest;
- The President will have 120 days to raise such objection which will be preceded with preliminary proceedings with duration up to 30 business days. In case the notification is incomplete, the course of the time limit to raise objection becomes suspended until the notification is supplemented.

What are the consequences of inobservance of new obligations?

- If the notification is not filed within deadlines set by the proposed provisions, the transaction shall be null and void;
- In case of an indirect acquisition the sanction is a prohibition on exercising corporate rights from the acquired shares, apart from the right to dispose of them;
- The person which takes over a protected entity without observance of the notification duty or exercises corporate rights attached to shares when it is prohibited (in case of a legal entity – persons acting on its behalf) may incur criminal liability (suffer penalty of a fine even up to PLN 50 million and/or incarceration from 6 months to 5 years).

How to prepare for the new regulation?

- The new regulation constitutes a new transactional risk – before the M&A transaction is initiated, it should be determined whether the target is subject to the takeover control regime (e.g. as part of the due diligence analysis);
- If it is determined that the target is a protected entity, the lack of objection by the President of the Polish Office of Competition and Consumer Protection before the statutory deadline may constitute a condition precedent to the closing of the transaction;
- In case of ongoing transaction processes it is worth considering whether their timelines can be expedited – unlike other anti-crisis regulations the new takeover control regime will enter into force upon 30 days after their publication (i.e. on 24 July 2020).

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