

# ALERT

## INVESTMENT CONTROL

### New rules concerning control over certain non-EU investments in Poland

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On 22 May 2020, a new draft anti-COVID law<sup>1</sup> was proposed by the Polish government.

The draft introduces, *inter alia*, new rules concerning the control of the Polish antitrust authority (the “**Authority**”) over investments resulting in the acquisition of control or a significant shareholding in a protected entity by a foreign (non-EU) entity. Please note that further changes may be implemented into the draft law in the course of the legislative process thereon.

It is intended that the Authority will be granted such power of control for a period of 24 months only and that the new rules will apply to transactions effected after the entry into force of the regulation.<sup>2</sup>

1.  
i.e. the law on subsidies to interest rates of bank loans granted to ensure the financial liquidity of entrepreneurs affected by COVID-19 and changing certain other laws.

2.  
It is envisaged that the regulation will enter into force as a law 30 days from the announcement thereof.

The Authority should be notified of any acquisition requiring its review in accordance with the newly introduced procedure, but the Authority will also be entitled to review a case of which it is not notified *ex officio*. **The Authority will be entitled to object to an acquisition being subject to its analysis – also upon the completion of such acquisition.**

An acquisition made without the submission of the required notification to the Authority or in respect of which the Authority issues an objection will be deemed invalid by virtue of law, and the entity that made such acquisition will be subject to a pecuniary fine of up to PLN 50 million or imprisonment of up to five years.

3.  
A physical person not being a citizen of a member country of the EU or a country being a party to the EEA Agreement is also considered to be a foreign (non-EU) entity.

4.  
The list of sectors and entities over which protection will be established as proposed in the draft is long and diversified, but exhaustive.

5.  
In particular, the following events qualify as the acquisition of a significant shareholding or control over a protected entity: (i) reaching or exceeding the thresholds of 20% or 40% of the total number of votes in a protected entity, share in the profits of a protected entity or the share capital of a protected entity; or (ii) the ability to exert influence on the activities of the protected entity – either as a result of the subscription for or acquisition of shares or rights arising from shares.

## **A FOREIGN (NON-EU) ENTITY AND A PROTECTED ENTITY**

**An acquiring entity qualifies as a foreign (non-EU) entity** if it does not have, or did not have for at least two years before the day immediately preceding the submission of a relevant notification, its registered seat in a member country of the EU or a country being a party to the EEA Agreement.<sup>3</sup>

**A target entity qualifies as a protected entity** if it has its registered seat in Poland and it: (i) is a publicly-listed entity; or (ii) has assets qualifying as critical infrastructure in accordance with the relevant laws; or (iii) designs or modifies software utilised in certain types of business activity; or (iv) conducts certain types of business activity.<sup>4</sup> In any case, a target entity will not be deemed a protected entity unless it achieved turnover exceeding EUR 10 million within the territory of Poland in any of the two financial years preceding the submission of the relevant notification.

## **EVENTS RESULTING IN THE ACQUISITION OF CONTROL OR A SIGNIFICANT SHAREHOLDING**

The draft introduces **a wide range of cases that constitute acquisition of control or a significant shareholding**.<sup>5</sup> This suggests that the intention is to cover the widest possible range of transactions with the obligation to notify the Authority thereof.

## **SUBMISSION PROCEDURE**

**The obligation to make a submission will arise for a foreign (non-EU) entity if it intends to acquire or has already acquired control over or a significant shareholding in a protected entity.**

A notification concerning any acquisition that requires the conduct of a review by the Authority will need to be submitted thereto by the potential acquirer or, in certain cases, by the protected entity or the entity directly having control over the protected entity. Such notification will

need to be submitted, in principle, **before the implementation of such transaction**, e.g. prior to the performance or conclusion of any contract or legal action leading to the acquisition of control or a significant shareholding in the entity or in the case of a tender offer prior to the publication of the relevant tender offer document.

As a result of such notification, the Authority will initiate preliminary examination proceedings, which proceedings will conclude with the issuance of a decision within 30 business days in which the Authority will either not object to the planned acquisition, or initiate control proceedings – in which case within the next 120 days, the Authority may, by way of a decision, object to a notified acquisition. The draft stipulates that **such objection may be issued if in connection with the notified acquisition there exists at a least potential threat to public order, public security or public health in Poland**. An objection may also be issued if it is not possible to establish whether the acquiring entity has, or has had for at least two years before the day immediately preceding the submission of the relevant notification, its registered seat in a member country of the EU or a country being a party to the EEA Agreement, or the documents, information or explanations requested by the Authority are not provided thereto by the indicated deadline.

The Authority will also be entitled to review a case which was not notified *ex officio* if there are indications of an abuse or circumvention of the law that may lead, in particular, to the avoidance of the obligation to make a submission. Such *ex officio* review may be initiated with respect **to an acquisition that was effected no more than five years prior to the commencement of such proceedings**.

## SANCTIONS

**An acquisition effected without the required notification to the Authority being made, or to which the Authority issues an objection, will be deemed invalid by virtue of law**. Moreover, the entity making such acquisition will be

subject to a pecuniary fine of up to PLN 50 million or imprisonment of up to 5 years, or to both penalties jointly. Additionally, an entity required by law or by an agreement to manage the affairs of its subsidiary will also be subject to a pecuniary fine of up to PLN 5 million or imprisonment of up to five years, or to both penalties jointly, if it was aware of such acquisition being made by its subsidiary.

#### **ADVISORY OF RYMARZ ZDORT**

Rymarz Zdort will be happy to assist you in respect of any cases related to the issues covered by this Alert. Our in-depth and varied experience in merger control proceedings will allow us to help you to assess whether a given transaction may require the submission of a notification, with drafting such notification and in the course of the relevant proceedings. We will also assist in the preparation of the economic assessment of the case.

We remain at your disposal should you have any inquiries.



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For many years Paweł Zdort has been recognised by international legal rankings as one of the leading lawyers in Poland for corporate and M&A, equity capital markets, private equity and energy & natural resources, and one of Poland's best lawyers for stock exchange debuts, capital markets and securities, as well as M&A and restructuring.



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A specialist in antitrust, M&A and corporate law, Iwona has significant experience in Polish and European Union competition law matters, including in respect of merger control proceedings, cartels or abuses of dominance, and consumer protection. She has also advised on distribution agreements, co-operation agreements, joint ventures and state aid.



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A specialist in commercial, corporate and capital markets law, he has advised Polish and international clients on complex public and private M&A transactions, including ground-breaking transactions in the financial institutions sector that were later used as benchmarks for other transactions of the same type on the Polish market. Moreover, he has advised financial institutions on regulatory matters and in respect of proceedings before the Polish Financial Supervision Authority, as well as on bancassurance transactions.



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A specialist in commercial, corporate and antitrust law with a strong educational background in law and economics, Leszek has advised various types of clients, including Polish and international strategic investors and private equity funds, in connection with complex M&A transactions. In addition, he has advised on numerous complex antitrust proceedings, in particular merger control proceedings, conducted by the Polish antitrust authority and by the European Commission.



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A specialist in antitrust law, Weronika has experience in competition law matters, including in relation to merger control and state aid issues, as well as Polish consumer law, specifically matters connected with the use of abusive clauses. She has participated in concentration proceedings before the Office of Competition and Consumer Protection. She has also been involved in advising on M&A transactions and has participated in due diligence processes.

**The law firm of Rymarz Zdort is seamlessly continuing, under a new brand, the operations and legacy of Weil, Gotshal & Manges – Pawel Rymarz sp.k., the Warsaw branch of a New York-based law firm.**

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