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Poland's new weapon against hostile takeovers

On September 30 2015, the Act on Control of Certain Investments (the “Act”) came into force. The Act aims to create mechanisms to protect against hostile takeovers of companies operating in key sectors of the Polish economy. However, this piece of legislation leaves a large margin of discretion for governmental authorities to give a “green” or “red” light to future investments without clear guidelines.

According to the Act, prior to the acquisition of shares in strategic companies (including the acquisition of proprietary interests in entities and/or their enterprises) the purchaser will need to notify the Minister of the State Treasury and get the required approval. The obligation to inform the Minister of the State Treasury is to apply to transactions involving the acquisition of at least a “material stake” in companies doing business in the sectors that are deemed strategic for the Polish economy (i.e. companies operating in the gas, power generation, chemical, petrochemical and defense sectors). Furthermore, the Act gives the Minister of the State Treasury the opportunity to create, by way of a decree, a list of entities subject to protection under the Act.

Unfortunately, no such regulation has yet been issued. It would possibly make the Polish market more predictable, considering that the Act provides for broad and general criteria for the assessment of the impact of a given acquisition on the strategic sectors of the Polish economy (“the market share of the entity in question;” “the scale of the business,” as well as the transaction’s potential to “upset public order or public security”). This means that the Minister has a large margin of discretion when deciding about the faith of the transaction. As a rule, an objection made by the Minister of the State Treasury will block the transaction. Any acquisition performed

against the negative decision or without notification will be null and void. Furthermore, the Act stipulates that failure to comply with the notification obligation carries a fine of up to PLN 100,000,000 (+/- €25,000,000) or a penalty of imprisonment between 6 months and 5 years (or both punishments together) for a person acting on behalf of a legal person or an organizational unit without legal personality that acquires at least a material stake without prior notification. It is worth mentioning that objection decisions will be subject to judicial review by way of a complaint to the administrative court.

It is likely that the list of entities “protected” by the Act would be welcomed by foreign investors. Nevertheless, one should keep in mind that it is a highly sensitive political issue and such a “list” would probably be subject to amendments according to the election calendar in Poland. ♦



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