



Draft new law extending control of foreign investments into selected sectors (prevention of COVID19-related “hostile takeovers”)

The Polish government is working on yet another “anti-crisis” regulation. The new so-called Anti-Crisis Shield 4.0, which is currently being drafted, includes, among others, provisions significantly extending the government’s control over M&A transactions in some strategic sectors. These provisions, as explained by Minister Jadwiga Emilewicz, have been prepared in order to protect Polish industry against “hostile takeovers” from outside the EU.

MAIN ASSUPMTIONS OF THE DRAFT LAW

- » The list of sectors covered by the above-mentioned regulations (so-called protected entities) is relatively broad and includes, among others, entities which hold assets listed as “critical infrastructure”, and entities in the IT sector (software developers dedicated to certain specified sectors), entities involved in electricity generation (both conventional and renewables), entities involved in energy transmission and storage, telecommunications companies, and entities in the medical and pharmaceutical industry (manufacturing of medical devices, pharmaceuticals, etc.).
- » Any transaction which may lead to the acquisition of dominant control of a “significant participation” (which means a 10% shareholding or crossing the 20%, 30% or 40% shareholding threshold) by a non-EU entity will require prior notification to the President of Office of Competition and Consumer Protection (UOKiK). The law covers not only direct acquisition of shares, but also asset deals, and any types of non-direct means of taking control or influence over another entity (e.g. mergers, demergers, amendments to articles of association, redemptions of shares, indirect acquisitions of controlling entities, etc.).
- » The President of UOKiK may object to the transaction if the applicant did not provide all the required information or if there is even a “potential threat” to public policy or public security and/or public health.
- » The law is, however, a bit ambiguous, and so it is not clear whether a transaction in which the purchasing entity is based in EU, but which is ultimately controlled by persons/entities from a non-EU member, would be obliged to seek clearance (in respect of the indirect acquisition by a non-EU member) or not. The law clearly stipulates that the clearance will be required if the structure, albeit with a EU based purchasing entity, is artificial (e.g. entities based in the EU not carrying out their own activity other than with respect to the acquisition of the interest in question (query if holding entities holding multiple investments will be captured here or not) or entities based in the EU but without a permanent establishment (no office, personnel, etc.) on the territory of a EU member).
- » The draft law also allows the target to seek confirmation from the President of UOKiK whether it is covered by the regulation or not.
- » Approval of a transaction that does not raise issues, or confirmation that the transaction is not subject to control, will be given within 30 business days. Cases requiring review from the public order perspective will be completed within 90 calendar days.
- » Any acquisition made without notification shall be invalid. Moreover, the draft assumes both financial (up to PLN 100 000 000) and penal (up to 5 years imprisonment) responsibility for non-compliance with the above-mentioned regulations (the penalties may be imposed both on the entity acquiring the interest without notification as well as natural persons acting on its behalf).