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Legal Alert

Poland introduces protection against the hostile takeover in connection with the crisis caused by COVID-19

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A draft is now publicly available to introduce solutions under Shield 4.0. The proposed regulations contain solutions aimed at protecting Polish companies against hostile takeovers in connection with the crisis caused by COVID-19. It covers some branches of traditional industry (including entities processing meat, milk, cereals and fruit and vegetables), and also IT, medical and pharmaceutical emerged as part of critical industries. In addition, all public companies are to be protected, while smaller private companies will not be safeguarded.

Why do we need protection?

The purpose of the proposed rules is to protect Polish companies against investors from outside the EU. Similar solutions have already been introduced in Germany, Spain and Italy. At EU level, the European Commission published guidelines for Member States in March this year on foreign direct investment and the free movement of capital from third countries as well as on protecting Europe's strategic assets.

For two years, the new regulations are to protect against hostile takeovers, among others, Polish companies from the IT industry (e.g. fintechs, software producers for the transport and logistics industry or data processing in the cloud), as well as medical and pharmaceutical businesses. In addition, all public companies are to be protected, while private companies generating less than EUR 10 million of turnover in the last two years will not be safeguarded. There is also a chance that other companies will be excluded in the future by a regulation of the Council of Ministers.

The sectors traditionally covered by the rules on the control of certain investments, i.e. telecommunications, energy, chemical or defence industries, are also listed in the amendment, while entities currently protected (e.g. Grupa Azoty, KGHM, PKN ORLEN, PKP Energetyka, Tauron or TK Telekom) will be excluded from the scope of the amendment and will remain under the control of the competent ministers.

How will it look like?

Investors (from outside the EU) will be required to notify the Polish Office of Competition and Consumer Protection (the "**OCCP**") before the transaction and in the case of listed companies - before the public tender offer for shares is

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announced. In the case of entities other than natural persons, these will be entities that do not have or have not had within the prior two years from the day preceding the notification of the transaction, its registered office in the territory of a Member State. The President of OCCP will decide whether an attempt to take over a Polish company at least potentially harms the protection of order, security or public health.
The notification obligation applies first of all to transactions that will result in:

- acquisition of rights to hold 20% of votes or profits as well as the acquisition of an enterprise of a protected entity or an organized part thereof,
- acquisition of dominance, i.e. reaching 50% of votes in the governing body of a given entity or in its share capital as well as a share in profits amounting to at least 50%.

The proposed provisions also apply to indirect acquisitions (e.g. made by a subsidiary) and subsequent acquisitions, which may occur e.g. as a result of the division or merger of a protected company or redemption of its shares or stocks - in such cases, the notification obligation arises when the threshold of 20% or 40% of votes / shares in profits is exceeded.

The conclusion of an enterprise lease agreement, conclusion of an agreement within the meaning of the provisions on listed companies (and becoming "concert parties") or joint venture agreements will also be subject to notification.

The OCCP will have up to 120 days to issue the decision allowing the transaction, with preliminary proceedings lasting no more than 30 business days, similarly to concentration control notifications carried out by the OCCP. As part of the procedure, the applicant will have to present, among others, its shareholding structure and investment plans in relation to the entity being acquired, regarding its activities, anticipated organizational changes, financing, dividend policy and related to employment.

The sanctions provided for are the invalidity of the transaction agreement, restriction of the right to vote and a fine of up to PLN 50 million and/or imprisonment from 6 months to 5 years.

When will it take effect?

The new regulations are to come into force within 30 days of their publication in the Journal of Laws, therefore it is worth following the legislative process, as they may also affect ongoing acquisition processes. It cannot be ruled out that the act will be adopted very soon.