

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

**FREEDOM OF INVESTMENT PROCESS:
Additional information on Poland's national security related investment review mechanism**

Submission by Poland

In 2015, Poland introduced legislation that establishes a mechanism to monitor certain investment operations with a view to address national security concerns arising from such operations. Poland had notified this measure to the Organisation in late 2015 [DAF/INV/RD(2016)1/REV1] and presented it to Participants in Freedom of Investment Roundtable 24 held in March 2016 [DAF/INV/A(2016)1/REV1]. Participants in the Roundtable asked questions at this occasion. This document contains Poland's responses to the questions; Poland submitted these responses to the OECD on 29 September 2016.

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**ADDITIONAL INFORMATION ON POLAND'S NATIONAL SECURITY RELATED
INVESTMENT REVIEW MECHANISM**

(SUBMISSION BY POLAND OF 29 SEPTEMBER 2016)

1.) How does Poland plan to update or review the list of industries or sectors that are covered by this law? Will it be on a regular schedule? Will it involve stakeholder input?

The Act of 24 July 2015 on Control over Certain Investments (Journal of Laws of 2015, item 1272, as amended) was adopted as an MP-proposed bill by the Sejm of the 7th term, which expired on 11 November 2015.

As indicated in the justification for the draft legislation, in its assumptions it includes the regulations of the European Union law. It should be pointed out that, as a rule, any limitations of the freedom to conduct a business activity (Article 49 and following of the Treaty on the Functioning of the European Union, hereinafter referred to as "TFEU") or of the free movement of capital (Article 63 and following of the TFEU) are prohibited. According to the Articles 52 section 1 and 65 section 1 of the TFEU and the decisions of the European Court of Justice, a Member State can introduce certain measures justified by reasons related to public order or security, provided that the measure is proportional to the objective, adequate, non-discriminatory and it is not possible to introduce a less restrictive measure.

For the above reasons, the Act assumes solely a temporary and strictly interventional nature of the control measure which will come into force only after the Council of Ministers have adopted an executive regulation determining the list of entities subjected to control, for a specified period of time. It should be emphasized, that the control measures will not apply to all legal entities conducting an activity within the scope listed in Article 2 section 1 of the Act on the Control over Certain Investments, but only to entities specifically indicated in the aforementioned regulation issued on the basis of Article 4 section 2 of that Act. Moreover, it should be stressed that the issue of the said regulation is not obligatory and depends on the decision of the Council of Ministers which may decide that there is a threat to the public security and order.

Such a solution means that the Act meets the requirements concerning the proportionality of the applied measure, resulting from the European Union law. The public authorities will only act in individual cases and such a solution is not overly onerous for entrepreneurs, from the perspective of the freedom to conduct a business activity in Poland. Moreover, such a solution minimizes the intervention of the public authorities, as it focuses their attention on the aspects of utmost importance for the protection of public security and order. The applied control measure should be the least burdensome for the investors and entrepreneurs in Poland. For this reason, it would be unacceptable to preventively introduce under this Act a control measure towards a group of entities which is broader than necessary.

Consequently, under the existing legislation, it is impossible to apply any protection system other than the one provided for in the Act on the Control over Certain Investments.

Moreover, it should be stressed that at present no works are carried out in the Ministry of Treasury on the expansion of the catalogue of sectors indicated in Article 4 section 1 of the Act on Control over Certain

Investments. If it is decided that due to the need to protect the public security and order it is necessary to expand the above mentioned catalogue, that may happen only through the amendment of Article 4 section 1 of the Act on the Control over Certain Investments, in accordance with the applicable legislative procedures, in which the leading role is played by the Polish Parliament (with the cooperation of the Council of Ministers) and the President of the Republic of Poland. The said provisions grant the possibility of participation in the parliamentary works for the parties affected by the planned regulation.

2) The review process is mandatory; some perceive this as more burdensome on investors and regulators than a voluntary review. Why did Poland decide to opt for a mandatory approach?

The reasons why the Polish legislature applied the protection model presented in the Act on the Control over Certain Investments have been presented in point 1 above. The introduction to the Polish system of public law of a mechanism for the control of investments in entities subject to protection and seated in the Republic of Poland, consisting of the obligation to submit a notification of the intent to acquire or achieve a significant participation or acquire a dominant position in an entity subject to protection, as well as an investor's acquisition of a company or its organised part from such an entity in the strategic sectors of the economy of the Republic of Poland, is intended to ensure the protection of public safety and public order.

On the basis of the Polish Act on the Control over Certain Investments, an obligatory procedure consisting in the submission of a notification to a control authority, applies only to those entities that have been included in the list of entities subject to protection, which must be determined by way of a regulation of the Council of Ministers. It should be noted that the regulation of the Council of Ministers of 21 June 2016 on the list of entities subject to protection (Journal of Laws of 2016, item 977) has been in force since 6 July 2016, and has been subsequently amended by the regulation of the Council of Ministers of 23 August 2016 (Journal of Laws of 2016, item 1316). On the basis of the regulation in its current wording, the following companies have been included in the list of entities subject to protection:

1. EDF Polska S.A. with its seat in Warsaw;
2. ENGIE Energia Polska S.A. with its seat in Zawada;
3. Grupa Azoty S.A. with its seat in Tarnów;
4. KGHM Polska Miedź S.A. with its seat in Lubin;
5. Polski Koncern Naftowy ORLEN S.A. with its seat in Płock;
6. PKP Energetyka S.A. with its seat in Warsaw;
7. TAURON Polska Energia S.A. with its seat in Katowice.

The investment control mechanism provided for in the Act on the Control over Certain Investments currently applies only to the seven entities listed above, which had to meet very stringent conditions such as:

1. a significant participation of the given entity in the market,
2. the scale of the conducted business activity,
3. a real and sufficiently serious threat to the fundamental interests of the society related to the conduct of a business activity by the entity that is to be protected,
4. the lack of possibility of introducing a less restrictive measure, and the necessity of applying investment control on the principles set out in the Act in relation to the entity operating in the given sector, in order to ensure the protection of public order or public security, referred to in

Article 52 section 1 and Article 65 section 1 of the Treaty on the Functioning of the European Union

Furthermore, it was necessary to specify the time justifying the application of the protection measures provided for in the Act on the Control Over Certain Investments.

In light of the above, the applied control mechanism is not excessively onerous, especially given the fact that the above regulation of the Council of Ministers of 21 June 2016 on the list of entities subject to protection shall remain valid until 31 December 2016.

3.) What action can the Consultation Committee take if it objects to a transaction? For example, how does it block a transaction? Can it impose mitigation measures? Can companies agree to mitigation terms in order to get the acquisition approved?

Pursuant to the Act, the Consultation Committee is solely an advisory body of the control authority (Article 13 section 1 of the Act). The Committee's competencies include providing opinions on matters stipulated by the control body and presenting recommendations, including factual and legal grounds for the legitimacy of the control body's objections to the transaction or declaring the unacceptability or limiting the exercise of the share-related rights or forcing the sale of shares. The Consultation Committee is not entitled to block any transaction and this competence is restricted to the control body.

The function of the control body is exercised by the minister competent for energy - to the extent specified in Article 4 section 1 points 1-5, 8-10 and 12 - and the minister competent for State Treasury to the extent specified in Article 4 section 1 points 6, 7, 11, 13, and 14. The control body may issue three kinds of decisions:

1. submit an objection to the acquisition of shares or stocks, or share-related or stock-related rights, or the taking up of shares or stocks of a company, which is an entity subject to protection, resulting in the acquisition or achievement of a significant participation or acquisition of a dominant position over the company, which is an entity subject to protection, or the acquisition of an enterprise or an organised part of an enterprise from a company which is an entity subject to protection, including also in the case of an indirect acquisition;
2. declare impermissible the exercise of share-related or stock-related rights in a company which is subject to protection, if the indirect acquisition occurred as a result of activities made pursuant to the provisions of the law of a state other than the Republic of Poland;
3. declare permissible the exercise of share-related or stock-related rights in a company which is subject to protection, in a manner which does not exceed significant participation in the company, in the event a significant participation is achieved in a company subject to protection, in the case of proceedings initiated ex officio, if in the course of the proceedings it was not possible to determine the basis on which the entity achieved significant participation.

The Act does not provide the possibility for the control authority to indicate specific conditions the fulfillment of which would enable the "approval of the transaction".

The above activities take the form of an administrative decision which must correspond to the requirements stipulated in the Act on Control over Certain Investments and in the Act of 14 June 1960 - Code of Administrative Procedure (it must include i.a. the legal grounds, the indication of the parties, the decision as well as the factual and legal justification).

Consequently, it should be explained that the submission of objections to the transactions does not take place by way of a government vote, but through an administrative decision issued by the control body after obtaining the opinion of the Consultation Committee (which, however, is not binding). A dissatisfied

party may challenge the decision of the control body by filing a motion for the case to be examined again. As a result, another administrative decision is issued. If it is not in line with the party's intentions, it can be contested at the Voivodeship Administrative Court, whose decision in turn is subject to a cassation appeal to the Supreme Administrative Court. During the court and administrative procedure, the decision is verified with respect to its compliance with the provisions of the Act on Control over Certain Investments and the correctness of the administrative procedure prior to the decision.

The introduced control mechanism does not exclude the freedom of contract and the freedom of economic activity. The interested parties enjoy the freedom of contract, but they must fulfill their information obligations towards the public authorities. The freedom of contract is excluded only when specific actions are carried out without the required notification or when the control body objects to a transaction (Article 12 section 1 point 1 and Article 12 section 2 point 2 of the Act). Entities subject to the legislative regulations will therefore have the freedom to shape their contractual relations freely, provided they fulfill their information obligations towards the state and the effects of their legal activities do not threaten public security and order

4.) Do the obligations apply to any acquirer, foreign and domestic alike?

The mechanism covered by the Act includes the principles of non-discrimination of foreign entities in relation to domestic entities. This means the control of investments relating to entities subject to protection is required for all entities, both domestic and foreign.

5.) How does the Polish government plan to ensure the integrity and security of information provided to their government in the course of this process, in a manner that provides investors comfort that their proposed acquisitions will not be negatively affected?

Cases considered on the basis of the Act on Control over Certain Investments are administrative procedures regulated by the provisions of the Act of 14 June 1960 - Code of Administrative Procedure (Journal of Laws of 2016, item 23 and 868). According to Article 73 § 1 of the Code of Administrative Procedure, parties are entitled to "view the file and to make notes or copies thereof. This right also applies after termination of the proceedings". However, we should be aware of Article 74 of the Code of Administrative Procedure, which stipulates that access does not apply to case files that are classified as "secret" or "top secret" and other files which the public administration body excludes for reasons of public interest.

Moreover, it should be indicated, that Article 11 of the Act of 16 April 1993 on Combating Unfair Competition provides for the protection of entrepreneurs against the act of unfair competition, consisting in the transfer, disclosure or use of third party information, which constitutes business secret, or its acquisition from an unauthorized person, if that threatens or violates the interests of the entrepreneur. Business secret is understood as technical, technological, organisational or other information of the company, which has a commercial value, which has not been disclosed to the public and in relation to which the entrepreneur has taken necessary steps to maintain its confidentiality. It should also be emphasized that the members of the Consultation Committee can only be people who obtained the security clearance entitling them to access information classed as "secret".

6.) Could Poland clarify the reasons the clock can be stopped. What happens if there is an issue related to investigating the impacts of the transaction and the decision goes beyond 90 days? Is there a further time-bound cut-off for a decision? How would the law affect companies who are in the process of conducting a transaction and may have made an agreement before or during the review process? Is there provision for unwinding a transaction?

Article 9 section 5 of the Act on Control over Certain Investments provides, that the decision in a case initiated pursuant to a notification or ex officio, shall be issued within 90 days from the receipt of the notification or initiation of the procedure ex officio, whereby it shall be delivered no later than within 2 working days from its issue. This deadline is suspended from the date of submission of a request for the removal of any formal defects of the notification or the request for the submission of additional information or documents within the set deadline, until the time when all the required information and documents are submitted. In the event of proceedings initiated ex officio or in the case of an indirect acquisition, the control authority calls on the appropriate entity to provide additional written explanations with regard to the information or documents which should be attached to the notification. This deadline indicated above is suspended until all the required information and documents are submitted.

In addition, the control authority may ask the entity submitting the notification, to provide additional written explanations with regard to the information or documents which should be attached to the notification. In such a case the 90-day period for the issue of a decision is suspended until the day the control authority receives all the required clarifications.

The Act on the Control over Certain Investments does not provide for any alternative options to extend the deadline for the issue of a decision other than indicated above.

In addition, it should be emphasized, that, in accordance with Article 9 section 8 of the Act on the Control over Certain Investments, the entity submitting the notification is obliged to refrain from any activities covered by the notification until the expiry of the period in which a decision should be issued. Therefore, after the expiry of the above period the investor may perform activities covered by the Act without any legal obstacles.

The control activity stipulated by the Act on Control is antecedent control, which means that it takes place before the transaction. The entity wishing to purchase or obtain significant shareholding or a dominant position is obliged to notify of that fact before closing the transaction.

If the transaction is closed without the notification or despite an objection, it shall be invalid (Article 12 section 1 of the Act) and the entitlement to exercise share-related rights and stock-related rights, as well as other entitlements may be limited, with the exception of the right to sell the stocks or shares (Article 12 section 2 of the Act).

7.) Could Poland provide additional detail on the scope of considerations subject to review, notably clarify whether the Act will cover asset purchases that do not constitute an operating business. Could Poland explain the meaning of “enterprises or organised parts thereof”, notably whether this means legal organisation or whether the act could cover a business unit/branch office/group, etc. even if not organised as a separate legal entity?

Objection to a transaction may be filed only in cases specified in Article 11 section 1 and 2 of the Act on the Control over Certain Investments. The two premises are formal in nature and are associated with the failure to complete the documents and explanations requested by the control body or a failure to provide additional written clarifications within the deadline set by the control body. Moreover, an objection can be issued if justified by the goal of:

- ensuring the performance of the obligations of the Republic of Poland related to the protection of independence and integrity of the territory of Poland, ensuring the freedom and rights of human beings and citizens, the security of citizens and environmental protection;
- preventing any social or political actions or phenomena, hindering or hampering the Republic of Poland in the fulfillment of obligations resulting from the North Atlantic Treaty, drafted in Washington on 4 April 1949, as well as from Poland's participation in the North Atlantic Treaty Organisation;
- preventing social or political actions or phenomena which could disturb the foreign relations of the Republic of Poland;
- ensuring the public order or security in the Republic of Poland, as well as covering the nation's needs related to the protection of life and health of the citizens;

In the above cases, Article 52 section 1 and Article 65 section 1 of the Treaty on the Functioning of the European Union and Article 4 section 2 of the Treaty on European Union should be taken into account each time.

When issuing the above decision, the control authority shall take into account the assumptions of the state policy in the areas of social or economic life which have significant implications for the implementation of the above objectives. Moreover, the Act on Control Over Certain Investments states, that the economic interest of the state cannot constitute the grounds for objection to a transaction. The above catalogue of premises should be seen as exhaustive and should not be construed broadly.

The Act on Control Over Certain Investments covers the control of transactions consisting in the acquisition of:

1. shares or stocks,
2. general rights and obligations of a shareholder entitled to run the company's business or to represent the partnership;
3. an enterprise or its organised part;
4. which leads to the acquisition or achievement of significant shareholding or acquisition of a dominant position over a company which is an entity subject to protection.

The situations which are construed, under the Act, as the acquisition or achievement of significant shareholding or acquisition of a dominant position are described in Article 3 sections 3, 4, 5, 6, 7 and 8 of the discussed Act.

The notion of an "enterprise" within the understanding of the Act on Control Over Certain Investments is used within the meaning defined in Article 55⁽¹⁾ of the Act of 23 April 1964 - Civil Code (Journal of Laws of 2016, item 380 and 585), which states that an enterprise is an organised set of non-material and material factors intended for the conduct of a business activity. It covers in particular (but not limited to):

- individual designation of the enterprise or its separated parts (company name);
- ownership of real property or movables, including equipment, materials, goods and products, as well as any other rights in rem to real properties or movables;
- rights resulting from rental and lease agreements in respect of real properties or movables as well as the rights to use real properties or movables under other legal relationships;
- claims, rights resulting from securities and cash;

- concessions, licenses and permits;
- patents and other industrial property rights;
- proprietary copyright and related rights;
- trade secrets;
- books and documents related to the business activity.

It should be mentioned that an enterprise in itself is not an individual legal entity, and has no legal personality.

The concept of an organised part of an enterprise has not been defined in any Act in the Polish legal system. In jurisprudence it is accepted that it is possible to distinguish the following characteristics of an organised part of an enterprise. Firstly, an organised part of an enterprise is a part of a company as its internal component. Secondly, it constitutes an organisationally separated grouping of material and non-material components. Thirdly, these components are functionally related to each other, i.e. they have the ability to accomplish specific economic tasks.

8.) After a transaction has been reviewed, will the parties to the transaction gain “safe harbor”? How does Poland plan to address timing and penalties, especially early on, when companies may not be aware of the fact that their transaction would be considered to be a “covered” transaction?

It should be recalled that, in accordance with Article 9 section 8 of the Act on the Control over Certain Investments, the entity submitting the notification is obliged to refrain from any activities covered by the notification until the expiry of the period in which a decision should be issued. Therefore, after the expiry of the above period the investor may perform activities covered by the Act without any legal obstacles.

Referring to the issue of transaction security, it should be stressed that if the body accepted the transaction (i.e. did not object to it within 90 days after the notification was submitted), the Act on Control over Certain Investments does not provide for the possibility of repeated examination of the notified transaction by the control body.

Referring to the doubts concerning the lack of Companies' awareness of the obligation to report a given transaction to the control body, it should be pointed out that entities operating in Poland are obliged to comply with the applicable legal provisions and follow their amendments. Both the Act of 24 July 2015 on Control over Certain Investments, and the executive regulations complementing it, have been published in the Journal of Laws which is a widely available document, including by means of electronic communication.

The Act entered into force after the expiration of 30 days from the date of its announcement, which took place on 31 August 2015, that is on 1 October 2015. In addition, it should be noted that the investment control mechanism established by the above Act actually came into force on the effective date of the regulation of the Council of Ministers of 21 June 2016 on the list of entities subject to protection, that is, on 6 July 2016. Moreover, the above regulation will remain valid until 31 December 2016, and was amended by the regulation of the Council of Ministers of 23 August 2016 (Journal of Laws of 2016, item 1316). This regulation determined that the following companies have been included in the list of entities subject to protection:

1. EDF Polska S.A. with its seat in Warsaw;
2. ENGIE Energia Polska S.A. with its seat in Zawada;

3. Grupa Azoty S.A. with its seat in Tarnów;
4. KGHM Polska Miedź S.A. with its seat in Lubin;
5. Polski Koncern Naftowy ORLEN S.A. with its seat in Płock;
6. PKP Energetyka S.A. with its seat in Warsaw;
7. TAURON Polska Energia S.A. with its seat in Katowice.

So the investment control mechanism specified in the Act actually entered into force more than 9 months after the date of entry into force of the Act on Control over Certain Investments. This period is long enough for investors to prepare for the application of the new investment control mechanism. At this point, it should be noted, that Article 12 section 1 of the Act on Control over Certain Investments clearly states, that the acquisition or achievement of a significant participation or the acquisition of a dominant position which is made without the submission of a notification or in spite of objection, is invalid.

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