CELIS Country Note

on

Poland, 2023

by

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Date of Publication 14.08.2023

CELIS

Abstract

The Note contains basic information on the political background of FDI screening in Poland, the Polish FDI screening mechanism and framework, including protected entities, grounds for issuing objection against a planned investment, and the procedure. A noteworthy feature of the mechanism is that during the COVID-19 pandemic a parallel extraordinary mechanism has been established, besides the ordinary one. The new mechanism has a much wider scope of application and is supposed to be of temporary nature. Nevertheless, the period of its application has already been extended to 60 months (in place of originally intended 24 months) and the reasons for its preservation have been supplemented to include (besides the COVID-19 pandemic) also "the international situation distorting the market or the competition". In both models, planned transactions can be carried out if the responsible authority does not issue an objection, the reasons for which are specified by law.

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To cite this report: Maria Kalinowska and Marek Jaśkowski, CELIS Country Note on Poland, 2023, 14.08.2023

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1. Political Background

Poland, as a country that has been developing so rapidly in recent years, has even been an ideal place for investment, including foreign investment. After Brexit, Poland has become the sixth largest economy in the European Union. Over the decade before the pandemic (2009-2019), its GDP grew by 3.6% per year on average.[1] Foreign investors have been both beneficiaries of Poland's success story and key contributors to it. Today, there are nearly 25,000 foreign-owned companies operating in Poland, which come from 107 countries, and create 15% of workplaces in the private sector.[2]

The outbreak of the COVID-19 pandemic has interrupted nearly 30 years of economic expansion in Poland. In 2020, Poland experienced a recession, albeit one of the less severe in the European Union, as data shows. In 2020, as a result of the COVID-19 pandemic, Poland recorded a recession of 2.5%, according to the GUS (Central Statistical Office in Poland) data. This is the fifth best result in the whole of the European Union, while the eurozone and the overall EU economy shrank by 6.4% and 5.9% respectively in 2020.[3] Policy actions including a wide range of fiscal measures and unprecedented monetary support mitigated the socio-economic impact of the pandemic. Despite the challenges posed by the pandemic and the deterioration of some aspects of the investment climate, Poland remained an attractive destination for foreign investment. In the year of 2021 alone – foreign direct investment inflows to Poland were worth more than $24.8 billion. According to data from the United Nations

[1] Investment in Poland. The rough guide to successful investing in Poland, KPMG November 2021, page 6, available at: https://assets.kpmg.com/content/dam/kpmg/pl/pdf/2021/11/pl-Investment-in-Poland-The-rough-guide-to-succesful-investing-in-Poland-1121.pdf.

[2] Report of the American Chamber of Commerce in Poland, "Foreign Direct Investment in Poland." December 2020, page 4, available at: https://amcham.pl/sites/default/files/content-files/AmCham_IGCC%20Foreign%20Direct%20Investment%20in%20Poland_F.pdf.

[3] Investment in Poland. The rough guide to successful investing in Poland, KPMG November 2021, page 6, available at: https://assets.kpmg.com/content/dam/kpmg/pl/pdf/2021/11/pl-Investment-in-Poland-The-rough-guide-to-succesful-investing-in-Poland-1121.pdf.

Conference on Trade and Development ('UNCTAD') report,[4] this is almost twice as much as the year before. Noteworthy, according to the UNCTAD report, the above-mentioned result placed Poland in the top 20 countries in the world in terms of foreign direct investment inflows.

Foreign investors in Poland appreciate the country's openness, geographic location in the middle of Europe and stability of its diversified economy. Businesses that have decided to locate their capital here can benefit from a number of incentives and grants from national programmes and EU funds, of which Poland is the biggest beneficiary.[5] Programs proposed by the Polish government include: (i) the Polish Investment Zone (*Polska Strefa Inwestycji*), which is the benefit of tax exemptions throughout Poland for companies making new investments on both public and private land; (ii) government grants which are awarded on the basis of the Program to Support Investments of Significant Importance to the Polish Economy 2011-2030; (iii) Research and Science Centers (*Centra Badawczo-Naukowe*), as well as (iv) Industrial and Technology Parks (*Parki Przemysłowe i Technologiczne*).[6]

Moreover, companies located in Poland enjoy having access to a well-educated workforce, a large internal market, and an increasingly better transportation infrastructure. On the other hand, investors look with similar interest at disturbing data on rising inflation, the frequently changing rules of administrative, regulatory or tax burdens. Nevertheless, Poland is one of the biggest recipients of greenfield investments in the continent, as well as a target country for numerous M&A transactions made by foreign entities. Poland has consistently topped the Visegrad Group ranking in terms of private equity investment value since 2015.[7]

Whereas the above-mentioned openness of Poland to foreign direct investment (as illustrated by many legislative incentives), assessing the current political situation and investment control regulations, it is also important to point out the numerous actions of the Polish legislature to

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[4] United Nations Conference on Trade and Development. Investment Report 2022. International tax reforms and sustainable investment. United Nations. Geneva, 2022, pages 9 and 210, available at: https://unctad.org/system/files/official-document/wir2022_en.pdf.

[5] The U.S. Department of State, "2021 Investment Climate Statements", available at: www.state.gov/reports/2021-investment-climate-statements/poland/.

[6] The full list of investment incentives with descriptions can be found on the PAIH website at: www.paih.gov.pl/why_poland/investment_incentives.

[7] Investment in Poland. The rough guide to successful investing in Poland, KPMG November 2021, page 27, available at: https://assets.kpmg.com/content/dam/kpmg/pl/pdf/2021/11/pl-Investment-in-Poland-The-rough-guide-to-succesful-investing-in-Poland-1121.pdf.

put the state in the position of an entity that controls strategic industries of the economy (banks, insurance, oil and gas extraction and processing, electricity production and transmission, ports, precious metal mining). The Polish government's actions in this spirit began in 2005 enacting the Law of June 3, 2005 on Special Powers of the State Treasury and their Exercise in Capital Companies of Significant Importance for Public Order and Security (Journal of Laws No. 132, item 1108). However, as a result of the procedure initiated by the European Commission against Poland under Article 258 of the Treaty on the Functioning of the European Union (TFEU) for violation of treaty obligations, and the subsequent European Commission's recognition of the introduced regulations as an unreasonable restriction of the free movement of capital within the meaning of Article 63 TFEU, the above Law was repealed in its entirety. The coverage of critical infrastructure was to be regulated by another Law of March 18, 2010 on the Special Powers of the Minister Responsible for State Assets and their Exercise in Certain Capital Companies or Groups Operating in the Electricity, Oil and Gas Fuels Sectors (consolidated text: Journal of Laws 2020 item 2173), which is still in force. The legal state formed by the enactment of the Law of March 18, 2010, and the simultaneous repeal of the Law of June 3, 2005, as well as the Polish regulations, i.e. Article 411(3) of the Code of Commercial Companies (*Kodeks Spółek Handlowych*), the Polish government considered as not satisfactorily ensuring the State Treasury's control over strategic companies. It was the Law on Control of Certain Investments of 24 July 2015[8] (hereinafter 'LCCI') that was the most significant initiative of the Polish legislator aimed at ensuring control over companies considered strategic.[9] The foreign investment control regulations currently in force, described below in detail, were prompted by the need to protect Polish entrepreneurs from takeovers by entities from outside the EU, EEA and OECD member states as a consequence of the decline in revenues resulting from the negative economic situation caused by the COVID-19 pandemic. The specific objective, however, was stated explicitly as the protection of public

[8] Law of July 24, 2015 on the Control of Certain Investments (Ustawa z dnia 24 lipca 2015 r. o kontroli niektórych inwestycji), Journal of Laws 2023, item 415, as amended.

[9] Maciej Mataczynski, Ewelina Kochowska, Adam Krzywoń, Maksymilian Saczywko, Robert Zawlowcki, ”Ustawa o kontroli niektórych inwestycji. Komentarz” (Law on control of certain investments. Commentary), Wolters Kluwer. 2016, pages: 1-3.

order, public security or public health, as referred to in Articles 52(1) and 65(1) of the TFEU, taking into account Article 4(2) of the Treaty on the European Union (TEU).[10]

2. Overview of Domestic Screening Mechanisms and Relevant Framework

The Polish screening mechanism is based on the Law on Control of Certain Investments of 24 July 2015 **("LCCI")**. Currently, the LCCI provides for two screening mechanisms: the ordinary mechanism ("OM"), in force since 2015, and the extraordinary one ("EM"), established in 2020 because of the COVID-19 pandemic. The latter was conceived as a temporary solution and currently it is scheduled to expire 60 months counting from the date of entry into force, i.e., on 25 July 2025.[11] The deadline was initially set at 24 months but in 2022 it has been extended to 60 months. At the same time, the reasons for the preservation of the extraordinary mechanism have been extended to include (besides the COVID-19 pandemic) also "the international situation distorting the market or the competition".[12] Following the establishment of the EM, the President of the Office of Competition and Consumer Protection (the authority responsible for the control of investments within the EM) published an explanatory note to the EM.[13] The note is not legally binding but the President of OCCP declares to obey it.[14]

Both mechanisms function parallelly and are based on a similar model. There are, however, important differences between them, including (but not limited to) (1) targeted investors, (2) protected companies, and (3) reasons for issuing an objection to the transaction.

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[10] Joanna Róg-Dyrda, Marek Wierzbowski, Nowe uregulowania w zakresie kontroli niektórych inwestycji (New regulations for the control of certain investments), MOP year 2021 issue 6 page 296.

[11] Law on interest subsidies for bank loans granted to entrepreneurs affected by the effects of COVID-19 and on simplified proceedings for approval of composition in connection with the occurrence of COVID-19 (ustawa o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorcom dotkniętym skutkami COVID-19 oraz o uproszczonym postępowaniu o zatwierdzenie układu w związku z wystąpieniem COVID-19), Polish OJ 2022, items 171 and 1137), Article 89(2).

[12] Law on the amendment of the law on VAT and certain other laws (ustawa o zmianie ustawy o podatku od towarów i usług oraz niektórych innych ustaw), Journal of Laws 2022 r. item 1137, Article 4.

[13] „Wyjaśnienia proceduralne w sprawie składania Prezesowi UOKiK zawiadomień oraz prowadzenia postępowań objętych zakresem ustawy o kontroli inwestycji", available at https://www.uokik.gov.pl/download.php?plik=24681.

[14] Explanatory note, p. 6.

2.1. Targeted investors

Concerning targeted investors (i.e., transactions performed by whom are subject to control) the OM does not single out any particular category – the responsible authority has to be notified about any investment leading to significant participation or domination in a protected entity. On the other hand, the EM targets only transactions intended or accomplished by natural persons who are not citizens of a member state or entities which do not have or have not had their seat in a member state for the preceding two years (Article 12a(1)(1) LCCI). The category of Member States includes not only the EU but also other EEA and OECD member states (Article 12c(1)(5) LCCI). Companies controlled by companies from outside the territory of the Member States shall be deemed to be from outside of the Member States territory as well, even if they have their seat in a Member State (Article 12e(4) LCCI) protected entities.

The scope of protected entities is determined according to a different model in the OM and the EM. Within the OM the catalogue of individually listed protected companies is enacted by the government (the Council of Ministers, Article 4(2) LCCI). Only companies active in the following sectors can be placed on the list:

1. generating electricity or
2. production of motor gasoline or diesel oil, or
3. pipeline transport of crude oil, motor gasoline or diesel oil, or
4. warehousing and storage of motor gasoline, diesel oil, natural gas, or
5. underground storage of crude oil or natural gas, or
6. production of chemicals, fertilizers and chemical products, or
7. manufacturing and trading in explosives, weapons and ammunition as well as products and technology for military or police purposes, or
8. regasification or liquefaction of natural gas, or
9. reloading of crude oil and its products in seaports, or
10. distribution of natural gas or electricity, or
11. reloading in ports of fundamental importance to the national economy, or
12. telecommunications activity, or
13. transmission of gaseous fuels, or
14. rhenium production, or
15. mining and processing of metal ores used for the production of explosives, weapons and ammunition as well as products and technologies for military or police purposes (Article 4(1) LCCI).

The list of individual companies is prepared by the Council of Ministers, taking into account (1) the significant share of a given company in the market, (2) the scale of the conducted activity, (3) genuine and sufficiently serious threats to the fundamental interests of society related to the business activity of the company to be protected, (4) proportionality ("the inability to introduce a less restrictive measure and the necessity (…) of the application of investment control to ensure the protection of public order or public security referred to in Articles 52(1) and 65(1) TFEU"). At the same time, the Council of Ministers indicates the authority responsible for screening investments in each protected company. Moreover, the timespan of protection has to be indicated (Article 4(2) LCCI; the practice is that the lists are issued on a yearly basis, with a validity of one year). As for 2023, the list consists of 17 companies. The responsible authority is the Minister for National Defence (one company) and the Minister for State Assets (the remaining 16 companies).[15]

The scope of the EM is determined according to a different model and is radically wider. The scope of protected companies includes:

1) "public companies" within the meaning of the law on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Public Companies (i.e. a company at least one share of which is admitted to trading on a regulated market or introduced to trading in an alternative trading system on the territory of Poland) (Article 12d(1) LCCI);
2) companies that possess the property that has been disclosed in the uniform list of objects, installations, devices and services included in the critical infrastructure, as referred to in Article 5b paragraph 7 point 1 of the law on crisis management[16] or (b) develops or modifies the software used for certain purposes (of which the LCCI contains an extensive list) or (c) provides cloud computing data collection or processing services (Article 12d(2) LCCI);

[15] Regulation of the Council of Ministers on the list of entities subject to protection and the authorities responsible for exercising the control (rozporządzenie Rady Ministrów w sprawie wykazu podmiotów podlegających ochronie oraz właściwych dla nich organów kontroli), Journal of Laws 2022, item 2838, as amended.

[16] The list is issued by the Head of the Governmental Security Center, and it also includes the European critical infrastructure located in Poland and the European critical infrastructure located on the territory of other member states of the European Union, which may have a significant impact on Poland. Interestingly, the list is classified.

3) companies that conduct economic activity in enumerated sectors. These sectors include all the areas encompassed by the OM (see above) and more:
   (a) production of devices, instruments, and medical devices, or
   (b) production of drugs and other pharmaceutical products, or
   (c) foreign trade in gaseous fuels and gas, or
   (d) production or transmission or distribution of heat, or
   (e) reloading in inland ports, or
   (f) processing of meat, milk, cereals as well as fruit and vegetables (Article 12d(3) LCCI).

The entity is encompassed by the EM if the revenue from sales and services exceeded, in the territory of Poland, in any of the two financial years preceding the notification the equivalent of EUR 10,000,000. The EM does not apply to companies subject to the OM (Article 12a(2) LCCI).

2.2. Procedure

In principle, the control procedure is initiated on notification of the investment. However, in certain cases, it can be launched ex officio. In the framework of the OM, the decision should be issued within 90 days, while the EM procedure is divided into two stages. The initial investigation (stage I) should end within 30 days and the control procedure (stage II, if initiated) – within 120 days. The investment may not be implemented until the deadline, and it can be implemented unless the responsible authority issues an objection within prescribed time limits.

The contact point (as required by Article 11 of Regulation 2019/452) has been established in accordance with Article 14a LCCI and it is run by the minister responsible for the economy (currently this role is fulfilled by the Minister for Development and Technology). Specific rules concerning the mode of operation of the contact point are enacted in the ministerial regulation.[17]

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[17] Regulation of the Minister for Development, Labour and Technology on the contact point for implementation and application of the regulation establishing a framework for the screening of foreign direct investments into the Union (rozporządzenie Ministra Rozwoju, Pracy i Technologii w sprawie punktu kontaktowego do spraw wdrażania i stosowania rozporządzenia ustanawiającego ramy monitorowania bezpośrednich inwestycji zagranicznych w Unii), Journal of Laws 2020, item 1762,

2.3. Reasons for issuing an objection

The transaction can be carried out if the responsible authority does not issue an objection.

Within the OM, the objection is issued if the investor has not supplied the required information or if this is justified due to (1) ensuring the independence and inviolability of the territory of Poland, ensuring the freedoms and rights of a human and a citizen, the security of citizens and environmental protection, (2) avoid the phenomena preventing or hindering Poland from performing its obligations under the North Atlantic Treaty, or the participation of Poland in NATO, (3) prevent social or political activities or phenomena that may disturb the foreign relations of Poland, (4) ensure public order or security of Poland, as well as to cover the needs to protect the health and life of the population (Article 11(1) LCCI). The economic interests of Poland cannot be grounds for the objection.

In the EM the objection is issued if the investor has not supplied the required information or if (1) due to the transaction there is at least a potential threat to public order, public security or public health, (2) it is not possible to determine whether the acquirer has the citizenship of a Member State or has or has had, for at least two years, from the day preceding the notification its seat in the territory of a member state or (3) the transaction may have a negative impact on projects and programs in the interest of the European Union (Article 12j(1) LCCI).

3. Developments to follow

Poland currently has no ongoing initiatives that may result in amendments to its existing screening mechanism.

Annex 1: Relevant laws, ordinances, regulatory guidelines

(1) Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79I , 21.3.2019).

(2) Law of July 24, 2015 on the Control of Certain Investments (consolidated text: Journal of Laws of 2023, item 415).

(3) Law of December 16, 2016 on the Principles of State Property Management (consolidated text: Journal of Laws of 2023, item 973).

(4) Law of March 18, 2010 on the Special Powers of the Minister Responsible for State Assets and their Exercise in Certain Capital Companies or Groups Operating in the Electricity, Oil and Gas Fuels Sectors (consolidated text: Journal of Laws of 2020 item 2173).

(5) Principles of Participation of Foreign Entrepreneurs and Other Foreign Persons in Business in the Territory of the Republic of Poland, March 6, 2018 (consolidated text: Journal of Laws of 2022, item 470).

(6) Promotion of New Investments, May 10, 2018 (Journal of Laws of 2023 item 74).

(7) Interest Rate Subsidies for Bank Loans Granted to Entrepreneurs Affected by COVID-19 and on Simplified Proceedings for Approval of an Arrangement in Connection with the Occurrence of COVID-19, June 19, 2020 (Journal of Laws of 2022 item 2141 ("Anti-Crisis Shield 4.0").

(8) Amending the Act on Goods and Services Tax and certain other acts May 12, 2022 (Journal of Laws of 2022 item 1137, as amended).

(9) Regulation of the Council of Ministers on the list of entities subject to protection and the authorities responsible for exercising the control, Journal of Laws 2022, item 2838, as amended).

(10) Regulation of the Minister for Development, Labour and Technology on the contact point for implementation and application of the regulation establishing a framework for the screening of foreign direct investments into the Union (Journal of Laws 2020, item 1762).

Annex 2: Relevant administrative and court cases

(1) Decision of the President of the Office of Competition and Consumer Protection dated October 8, 2020, No. DKK- 179/2020.

(2) Judgment of Regional Administrative Court in Warsaw of 17 October 2017, case no: VI SA/Wa 727/17.

(3) Judgment of Regional Administrative Court in Warsaw of 17 October 2017, case no: VI SA/Wa 728/17.

(4) Judgment of Regional Administrative Court in Warsaw of 17 October 2017, case no: VI SA/Wa 776/17.

(5) Judgment of the Supreme Administrative Court in Warsaw of 27 January 2022, case no. II GSK 594/18.

(6) Judgment of the Supreme Administrative Court in Warsaw of 27 January 2022, case no. II GSK 596/18.

Annex 3: Relevant literature

(1) „Wyjaśnienia proceduralne w sprawie składania Prezesowi UOKiK zawiadomień oraz prowadzenia postępowań objętych zakresem ustawy o kontroli inwestycji", (Procedural Clarification on Filing Notices to the President of the the President of the Office of Competition and Consumer Protection and Conducting Proceedings Covered by the Law on Investment Control.), available at https://www.uokik.gov.pl/download.php?plik=24681 (in Polish).

(2) Michał Bałdowski, Ustawa o kontroli niektórych inwestycji jako mechanizm zapewniający bezpieczeństwo energetyczne (Law on the control of certain investments as a mechanism of ensuring energy security), IKAR year 2019, issue 5 (in Polish).

(3) Marek Jaśkowski, Implikacje art. 3 rozporządzenia UE 2019/452 dla prawa polskiego (Consequences of Article 3 of EU Regulation 2019/452 for Polish Law), Przegląd Ustawodawstwa Gospodarczego 2021, issue 1 (in Polish).

(4) Marek Jaśkowski and Szymon Pawłowski, "Foreign Investment Screening in Poland, Lithuania and Latvia" in Steffen Hindelang and Andreas Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020, Springer 2020.

(5) Maciej Mataczynski, Ewelina Kochowska, Adam Krzywoń, Maksymilian Saczywko, Robert Zawlowcki, „Ustawa o kontroli niektórych inwestycji. Komentarz” (Law on control of certain investments. Commentary), Wolters Kluwer. 2016. (in Polish).

(6) Maciej Mataczyński, Podstawowe założenia „COVID-owej” nowelizacji reżimu kontroli inwestycji zagranicznych w Polsce (Foundations of the "COVID" amendment to the foreign investment control regime in Poland) [in:] J. Haberko, J. Grykiel, K. Mularski (eds.), Ius civile vigilantibus scriptum est. Księga jubileuszowa Profesora Adama Olejniczaka, Warszawa 2022 (in Polish).

(7) Joanna Róg-Dyrda, Marek Wierzbowski, Nowe uregulowania w zakresie kontroli niektórych inwestycji (New regulations for the control of certain investments), MOP year 2021 issue 6 page 296. (in Polish).

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