

Polish protection of strategic companies and new rules of administering state assets

For some time there has been an apparent reinforcement of legal instruments of protectionist or interventionist nature. Some new restrictions of this type were also adopted in Poland. The best evidence are regulations already in force, concerning in particular:

- 1) Acquisition of a dominant position or significant stake in companies operating in sectors deemed by the state to be vital to the economy
- 2) Alienation of shares (and other significant assets) belonging to companies in which the State Treasury holds a stake.

The limitations under point 1) were introduced in October 2015 but were applied in practice for the first time in late 2016. The limitations under point 2) entered into force at the beginning of 2017.

1. Acquiring or obtaining a significant stake or dominant position in key companies

Scope

The entities subject to protection are companies operating in strategic sectors of the economy which are first entered in a list of protected entities. The sectors regarded as particularly vital to the state include *inter alia* such areas as energy, telecommunications, chemicals, refineries, and defence. For the purpose of these restrictions, the capital structure of the company is irrelevant. **Not only state-owned companies are protected; any company can be protected, even one that is entirely privately owned.** So far the following companies have been entered in the list of protected companies: EDF Polska S.A., ENGIE Energia Polska S.A. (Polish subsidiaries of French electric utility companies), Grupa Azoty S.A. (a leading chemicals company in Europe), KGHM Polska Miedź S.A. (a world leader in copper and silver production), PKP Energetyka S.A. (a cross-country electricity distributor to the Polish railway network), Polski Koncern Naftowy Orlen S.A. (a major Polish oil refiner and petrol retailer) and Tauron Polska Energia S.A. (an energy holding company, one of the largest companies in Poland).

This system of controls **applies only to transactions in which the acquirer acquires or achieves a significant stake or control of the protected company.** The limitations apply to acquisition or taking up of shares in a limited-liability company or joint-stock company resulting in obtaining or exceeding 20%, 25%, 33% or 50% of the votes or shares in the protected company, or acquisition of the enterprise or an organised part of the enterprise of a protected company.

These thresholds may also be achieved as a result of acquisition of shares **indirectly** (e.g. via a subsidiary or the other party to an agreement) or **consequentially** (e.g. through redemption of shares in a protected company, acquisition of the company's own shares, or merger or division of the company). **These controls also apply to acquisition or achievement of a significant stake or dominant position as a result of transactions under foreign law** (e.g. as a result of a merger of companies registered outside of Poland).

Consequences for the buyer

Crossing the foregoing thresholds gives rise to a notification obligation. The entity intending to carry out the transaction in question (i.e. the prospective buyer) is required in each instance to submit a notice to the competent oversight authority. As a rule, the notification must be made before the transaction is carried out.

Following notification, the authority has 90 days to decide the matter. During that time the authority may issue a decision objecting to the transaction. If no objection is raised during that time, then the transaction may be carried out when the period expires.

However, if the transaction is conducted under foreign law, the notification is made after the transaction is carried out. Then the oversight authority has no ability to assert an objection in advance and “block” the transaction, but it may issue a decision prohibiting exercise of rights to the shares thus acquired in the protected company.

The grounds for issuing either type of decision are the same. The authority will issue the decision if justified by such considerations as ensuring the independence and integrity of Polish territory, security of Polish citizens or protection of life, health or the environment, or preventing interference in Poland’s foreign relations, as well as when there are formal defects in the notification. In its decision, the authority must also reflect the provisions of European Union law and the aims of state policy. However, such decisions cannot be based on the economic interests of the state.

Decisions may be challenged by applying for reconsideration and subsequently by filing suit in the administrative court. However, litigation over such decisions carries the risk of seriously delaying the planned transaction, with no guarantee of obtaining a favourable outcome.

Severe sanctions

Failure to follow the procedure outlined above carries serious consequences.

Acquiring or achieving a significant stake or dominant position without submitting the required notification or despite an objection is **void**. Failure to provide notification of such acquisition under foreign law or violation of a decision prohibiting exercise of the rights to vote the shares in a protected company carries with it the sanction of the invalidity of the votes cast at the meeting of the company’s shareholders.

In addition, criminal sanctions are provided in the form of a fine (in a maximum amount of up to about EUR 24 million) or imprisonment (of 6 months to 5 years), which may be imposed on the acquirer, the acquirer’s representative, or the person exercising voting rights in the protected company.

2. Alienation of shares belonging to companies in which the State Treasury holds a stake

Scope

Apart from the limitations on key companies discussed above, from the beginning of 2017 new regulations have also been in force concerning disposal of assets belonging to companies in which the State Treasury holds an ownership interest. In particular, limitations have been introduced on trading in shares belonging to state companies. Unlike the limitations on key companies, these apply only to state companies and do not apply to private companies.

Mandatory restriction on disposal of shares

Control of transactions involving the assets of state companies is to be realised primarily by including in the company’s articles of association an obligation to obtain the approval of the relevant corporate authority. Consequently, the entities entitled to exercise rights to the relevant shares are required to “take actions with the aim of” establishing by resolution of the shareholders of the company or in the company’s articles of association that consent of the meeting of shareholders shall be required for *inter alia* sale, acquisition or usufruct of significant assets of the company, as well as alienation or acquisition of shares.

It is not clear in this respect what the “actions” referred to above would consist of (particularly in companies in which the State Treasury is a minority shareholder), or how (if at all) supervision would be exercised over the assets of companies in which such “actions” were not effectively taken. Nonetheless, violation of restrictions on alienation of shares held by state companies included in the company’s articles of association will expose the persons involved in the transaction to liability in damages

Summary

The restrictions described above may impact prospective transactions involving shares or assets of Polish companies. The limitations affecting key companies have already been applied at least once. In December 2016 the oversight authority objected to a planned transaction involving power company EDF Polska S.A. The company was to be split into a portion containing the heating assets and a portion containing the Rybnik power plant, so that these assets could then be sold to two separate buyers, i.e. IFM Investors and EPH (Energetický a průmyslový holding, the largest supplier of heat in the Czech Republic). The objection effectively blocked the entire transaction.

Meanwhile, the regulations concerning mandatory amendments to the articles of association of companies in which the State Treasury holds a stake only entered into force at the beginning of the year, and no practice has developed yet for how these regulations will be applied. In the near future, however, undoubtedly these rules as well will have a major impact on transactions involving shares and other assets held by state-owned companies.

It should also be stressed that the application of the two acts may overlap, so that both types of limitations affect the same transaction at different stages (e.g. if the transaction involves shares of a controlled company, at least part of which is owned by the State Treasury). These regulations also appear to have been prepared in haste, and the wording of the regulations presents numerous difficulties of interpretation. Because of these doubts, a thorough analysis of the potential impact of these restrictions on any planned transaction is recommended. But Poland is not the only country to introduce restrictions on disposal of shares and assets with the aim of protecting state companies of strategic importance. To the contrary, the Polish regulations allude to similar restrictions already functioning in some other countries, both members and non-members of the European Union.