

# International Comparative Legal Guides



## Foreign Direct Investment Regimes 2021

A practical cross-border insight into FDI screening regimes

**Second Edition**

Featuring contributions from:

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Anderson, Mōri & Tomotsune  
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Barun Law LLC  
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Baker Botts L.L.P.: Matthew T. West, Paul Luther & Jason Wilcox

# Poland

Wolf Theiss



Jakub Pietrasik



Jacek Michalski

## 1 Foreign Investment Policy

### 1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

In Poland, national policy with regard to the review of foreign direct investments (“**FDI**”) on national security and public order grounds is covered by the Act of 24 July 2015 on the Control of Certain Investments (“**Act on the Control of Certain Investments**” or “**Act**”).

The Act provides the rules and procedures for the control of certain investments resulting in the acquisition or achievement of significant participation or the acquisition of a dominant position over Polish entities operating in strategic sectors. The Act obliges investors to notify the relevant Minister or the President of the Office of Competition and Consumer Protection of their intention to buy shares or achieve a significant participation in the strategic companies. The screening procedure is aimed at protecting public order, public security and/or public health in Poland.

The Act and the implementing regulation of the Council of Ministers dated 23 December 2019 (“**Regulation**”) provide a specific list of strategic companies directly covered by the notification procedure, i.e. nine Polish private and public companies in the energy, oil, gas, fuel, telecommunication and chemicals sectors. Additionally, after the amendment to the Act introduced on 24 July 2020 (as specified in question 1.3 below), the Act substantially extends the sectors of strategic companies covered by the approval requirements (however, the amendment does not provide a specific list of companies – it only presents types of companies and strategic sectors).

### 1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

The screening procedure under the Act is aimed at protecting public order, public security and/or public health in Poland. Additionally, the Act (in particular, its amendment – as specified in question 1.3 below) has been introduced to protect Polish strategic companies against “hostile” takeovers by entities from non-EU/EEA/OECD countries.

### 1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

Due to the COVID-19 pandemic, the Polish Act on the Control

of Certain Investments has been recently substantially amended and extended (“**Amendment**”). The Amendment came into force on 24 July 2020 and is now fully binding.

The Amendment substantially extends the sectors of strategic companies covered by the approval requirements. However, it is important to note that the specific screening requirements imposed under the Amendment will apply only to the transactions taking place after the Amendment came into force, i.e. after 24 July 2020 (it will not apply to the transactions concluded before this date). Additionally, the Act in the scope changed/extended by the Amendment will be valid only for 24 months.

## 2 Law and Scope of Application

### 2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

In Poland, FDIs are covered by the Act on the Control of Certain Investments, which has been amended by the Amendment that came into force on 24 July 2020. The Amendment has substantially extended the sectors of strategic companies covered by the approval requirements.

### 2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

According to the companies listed in the Regulation, there is no concept of a foreign or domestic buyer – transactions regarding any target company covered by the Regulation fall under the screening procedure.

As to the new types of companies covered by the Amendment, the Act provides that the approval requirements apply only to the buyers who are:

- natural persons not having a residential address within the EU, EEA or OECD; and
- companies not having a registered seat within the EU, EEA or OECD for at least two years before the date of filing.

Additionally, the Amendment states that subsidiaries or affiliates of foreign entities (i.e. entities not having a residential address or registered seat within the EU, EEA or OECD), even if seated within EU/EEA/OECD, will be qualified as foreign entities.

According to the companies directly listed in the Regulation, relevant authority approval is required in the case of acquiring

dominance, i.e. reaching or exceeding 50% of the total number of votes in the target company's shareholder meeting or in a target's share capital, and in the case of acquiring or achieving a significant participation – i.e. when the entity acquires shares or rights which reaches or exceeds 20%, 25%, 33% of the total number of votes at the shareholders' meeting or in the share capital respectively, or when the buyer purchases the target's enterprise or the organised part thereof.

According to the companies covered by the Amendment, there is no specific threshold provided for acquiring a dominant position – the dominant position is acquired when the buyer has a right to decide the target's business. As to acquiring or achieving a significant participation, a notification to the relevant authority will be required when the buyer has a significant influence on the target by having at least 20% of its shares or in its share capital or profit share, as well as when the buyer achieves or exceeds 20% and 40% of the total number of votes at the shareholders' meeting or of the profit share or of the target's share capital, or when the buyer purchases or leases the target's enterprise or the organised part thereof.

### 2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

The approval regime applies to the Polish strategic companies specifically listed in the Regulation (currently there are nine such companies), operating in the following core sectors:

- production of energy;
- production of oil and gas;
- oil and gas pipe transmission;
- storage of oil, gas and natural gas;
- underground storage of oil and gas;
- manufacturing of chemicals, fertiliser and chemical products;
- manufacturing and trade in explosives, arms and ammunition and products or technology with military or police use;
- regasification or liquefaction of natural gas;
- transshipment of crude oil and its products in seaports;
- distribution of natural gas and energy;
- transshipment in ports of major importance for the national economy;
- telecommunications;
- transmission of gaseous fuels;
- manufacturing of rhenium; and
- mining and processing of metal ores used for the manufacturing of explosives, arms and ammunition and products or technology with military or police use.

Additionally, the Amendment has substantially extended the approval regime. Under the Act changed by the Amendment, the following new types of entities shall be also covered by the approval regime:

- all public-listed companies;
- entities owning assets in strategic infrastructure;
- IT industry entities that develop or modify software to:
  - manage power plants, networks or services or systems relating to the supply of energy, natural gas, fuels or heat;
  - manage, control or automate drinking water supply or wastewater treatment installations;
  - operate equipment or systems used for voice or data transmission or for storage and data processing;
  - operate or manage equipment or systems used for cash supply, card payments, cash transactions, settlement of securities and derivative transactions or to provide insurance services;

- operate hospital information systems, operate equipment and systems used in the sale of prescription drugs or operate laboratory information systems or laboratory tests;
- operate facilities or systems used for the transportation of passengers or goods by air, rail, sea or inland waterway, road, public transport or in logistics;
- operate equipment or systems used in the supply of food;
- entities providing cloud computing data storage or processing services;
- entities operating in the following core sectors:
  - production of energy;
  - production of oil and gas;
  - oil and gas pipe transmission;
  - storage of oil, gas and natural gas;
  - underground storage of oil and gas;
  - manufacturing of chemicals, fertiliser and chemical products;
  - manufacturing and trade in explosives, arms and ammunition and products or technology with military or police use;
  - regasification or liquefaction of natural gas;
  - transshipment of crude oil and its products in seaports;
  - distribution of natural gas and energy;
  - transshipment in ports of major importance for the national economy;
  - telecommunications;
  - transmission of gaseous fuels;
  - manufacturing of rhenium;
  - mining and processing of metal ores used for the manufacturing of explosives, arms and ammunition and products or technology with military or police use;
  - manufacturing of medical devices and products;
  - manufacturing of medicinal and other pharmaceutical products;
  - cross-border trade in gaseous fuels and gas;
  - production, transmission or distribution of heat;
  - transshipment in inland ports; and/or
  - processing of meat, milk, cereals, fruits or vegetables.

Under the Amendment there is no specific regulation providing the list of protected companies – as specified above, the Amendment only provides the types of entities covered by the Act. There is also no sector-specific review mechanism in place.

### 2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

According to the companies listed in the Regulation, there is no concept of a foreign or domestic buyer – transactions regarding any company covered by the Regulation fall under the screening procedure.

As to the new types of companies covered by the Amendment, the Act provides that the approval requirements apply only to the buyers who are:

- natural persons not having a residential address within the EU, EEA or OECD; and/or
- companies not having a registered seat within the EU, EEA or OECD for at least two years before the date of filing.

### 2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

No, there are no specific rules for certain foreign investors such as state-owned enterprises ("SOEs").

**2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?**

The approval regime under the Act on the Control of Certain Investments applies only to companies with a registered seat in Poland.

**2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?**

Yes. If the foreign company is the object of the transaction and such foreign company has a subsidiary in Poland, the category of indirect acquisition may come into force and such transaction shall be verified under the Act on this level.

In general, an indirect acquisition takes place when the transaction is concluded via the subsidiary or when the transaction applies to the entity having significant participation or dominant position over the Polish company protected under the Act.

### 3 Jurisdiction and Procedure

**3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?**

There are four conditions that must be met for the law to apply (including monetary threshold):

1. the target company must be a company with a registered seat in Poland (and – in the case of companies covered by the Regulation – it must be listed in the Regulation);
2. the target company must be covered by the Regulation or it must operate in strategic sectors, as specified in question 2.3 above;
3. in the case of companies covered by the Amendment, the target company must have revenue from sales and services which exceeded in Poland in any of the two financial years preceding the notification, the equivalent of EUR 10,000,000.00; and
4. in the case of companies covered by the Amendment, the transaction must be conducted by the investor qualified as a foreign investor, i.e.:
  - a natural person not having a residential address within the EU, EEA or OECD; and/or
  - a company not having a registered seat within the EU, EEA or OECD for at least two years before the date of filing.

**3.2 Is the filing voluntary or mandatory? Are there any filing fees?**

If the conditions specified in the Act are fulfilled, the filing is mandatory.

There are no fees for the filing.

**3.3 In the case of transactions, who is responsible for obtaining the necessary approval?**

The general rule is that the buyer is obliged to notify the relevant authority on acquiring or achieving significant participation or about acquiring dominance in a strategic (protected) company.

There are two main exceptions from the rule presented above. Firstly, in the case of indirect acquisition or achieving a significant position, the notification obligation is imposed on the subsidiary or affiliated entity.

Secondly, the target company is a party obliged to notify the relevant authority in the case of a follow-up acquisition, i.e. when the buyer acquires or achieves significant participation of the target, or acquires dominance over the target, or reaches or exceeds participation in the target in a number reaching or exceeding, respectively, 20% or 40% of the total number of votes at the shareholders' meeting, in the profit share or in the share capital – by way of: a) redemption of target's shares or the acquisition of target's own shares; b) division of the target company; c) change of articles of association of the target company resulting in the change of personal rights (in the case of companies listed directly in the Regulation, the thresholds specified above are as follows: 20%; 25%; 33%; 50%; and additionally, the follow-up acquisition applies also to a situation of the cancellation of target's share documents).

**3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?**

The Act on the Control of Certain Investments does not provide any guidance procedure. It is possible to apply for informal interpretations but the authority has no obligation to respond to such informal enquiries and the interpretations will not have a binding effect.

**3.5 What type of information do investors have to provide as part of their filing?**

Investors must provide the authority with detailed information regarding all the entities involved in the transaction, including the target company and the investor itself.

In particular, the investor shall provide the authority with the following information:

1. the investor's shareholding in the target company (direct or indirect) and in target's subsidiaries or affiliated entities;
2. the structure of the transaction covered by the filing;
3. the scope of the investor's business activity;
4. the investor's capital group, its structure and internal relations;
5. the investor's economic and financial standing;
6. any criminal convictions regarding the investor, as well as any criminal proceedings in progress;
7. any pre-transaction activities conducted before the filing;
8. financial resources dedicated for the transaction; and
9. the investor's intentions towards the target company (long and short term).

**3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?**

Under the Act on the Control of Certain Investments, the acquisition or achievement of significant participation or the acquisition of the dominant position without notification or despite the relevant authority's opposition is null and void by virtue of law.

In case of some types of indirect acquisition (e.g. acquisition that took place on the basis of foreign law or outside the territory of Poland), the buyer must not execute his voting rights or any other rights resulting from the shares acquired in this way, excluding the right to sell the shares.

Additionally, resolutions of the shareholders' meetings of the target company adopted in violation of the Act are null and void, except when they fulfil quorum requirements and they would have been adopted even without the invalid votes. The relevant authority also has a right to appeal the resolution. Moreover, in some cases, the relevant Minister may impose an obligation to sell the shares within a specified deadline.

Regardless of the above sanctions, a person or entity that purchases or achieves significant participation or acquires dominant position without the notification is subject to a financial penalty of up to:

- PLN 100,000,000.00 (approx. EUR 22,000,000.00) – in case of companies listed in the Regulation; or
- PLN 50,000,000.00 (approx. EUR 11,000,000.00) – in case of entities covered by the Amendment.

Additionally, such person may be imprisoned for a period ranging from six months up to five years.

The same penalties may be imposed on a person representing the buyer.

Additionally, a person obliged to represent the subsidiary, who knows about the transaction (indirect acquisition) that already took place and does not notify the relevant authority about the transaction, may be subject to a financial penalty of up to:

- PLN 10,000,000.00 (approx. EUR 2,200,000.00) – in case of companies listed in the Regulation; or
- PLN 5,000,000.00 (approx. EUR 1,100,000.00) – in case of entities covered by the Amendment.

Such person may also be imprisoned for a period ranging from six months up to five years.

The same penalties may be imposed on a person who represents the buyer on a shareholders' meeting of the target (protected company) and executes share rights on behalf of an entity that has not notified the transaction to the relevant authority, provided that such person knew or might have known about such circumstances.

### 3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

Under the Act on the Control of Certain Investments, there is no "deemed approval" procedure.

According to the companies listed in the Regulation, approval is granted by the relevant Minister specified for each protected company in the Regulation. Securing the approval for such companies shall take no longer than 90 days – within this deadline, the Minister shall issue a decision granting or denying the approval.

As to the entities covered by the Amendment, approval is granted by the President of the Office of Competition and Consumer Protection. The approval procedure is divided into a preliminary stage and a controlling stage. The preliminary stage shall be closed within 30 business days, by issuing a decision denying the procedure (i.e. stating that the transaction is not covered by the Act) or a decision on commencing the controlling stage. In the case of the controlling stage, the decision shall be issued within 120 calendar days as of the beginning of the controlling stage.

### 3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

The general rule is that the notification shall be made before

taking any legal action that leads to acquiring or achieving significant participation or acquiring dominance in a strategic company. This is provided that the review needs to be obtained prior to the closing, and even prior to the signing. In practice this means that the review shall be made, for example, on the basis of a letter of intent, which normally is non-binding (however, there is still no unified practice in this regard). At the same time, the Act states that the agreement (or other legal action) covered by the notification can be conditional upon the authority's approval.

In the case of indirect acquisition or follow-up acquisition, the notification shall be made after the acquisition, within seven or 30 days (depending on the situation).

If the parties implement the transaction before the approval is obtained, general sanctions specified in question 3.6 above shall apply, in particular, the transaction completed without notification or despite the relevant authority's opposition will be null and void by virtue of law.

### 3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

The Act on the Control of Certain Investments does not grant any specific rights to third parties or governmental agencies. Such parties are not involved in the review process.

### 3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

The Act on the Control of Certain Investments does not specify whether the proceedings are confidential and how the authority should protect parties' business secrets from disclosure. There is also no practice on this matter.

However, as the proceedings under the Amendment are held by the President of the Office of Competition and Consumer Protection, it can be assumed that there will be certain restrictions imposed on the authority, regarding the publicity of material evidence enclosed in the case records. Additionally, we recommend filing a notification as highly confidential and requesting the authority to protect a parties' business secrets.

### 3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

Regardless of the screening procedure specified by the Act on the Control of Certain Investments, under the Polish law there are also other administrative approvals required for foreign investments regarding (i) general corporate filing requirements, (ii) merger/competition control laws, (iii) requirements regarding the acquisition of real estate by foreigners, or (iv) other specific laws and requirements that may be applicable in specific types of transactions (e.g. regarding banks, insurers, etc.).

## 4 Substantive Assessment

### 4.1 Which authorities are responsible for conducting the review?

According to the companies listed in the Regulation, approval is granted by the relevant Minister specified for each protected company in the Regulation.

As to the entities covered by the Amendment, approval is granted by the President of the Office of Competition and Consumer Protection.

#### 4.2 What is the applicable test and who bears the burden of proof?

The screening procedure under the Act on the Control of Certain Investments is aimed at protecting public order, public security and/or public health in Poland.

Authorities may oppose the transaction, in particular, in the following situations:

- if the investor does not provide the authority with required documents or explanations;
- if the transaction results in the acquisition or achievement of significant participation or the acquisition of dominant position over the Polish entity subject to the protection which may at least potentially constitute a threat to public order, public security and/or public health in Poland;
- if it is impossible to define who the investor is (i.e. if the investor being a natural person has a residential address within the EU, EEA or OECD, or if the investor being a company has a registered seat within the EU, EEA or OECD for at least two years before the date of filing); and
- if the transaction may have a negative impact on EU projects and programmes.

The investor (applicant) bears the burden of proof, i.e. the investor is obligated to prove that the transaction will not be detrimental to public order, public security and/or public health in Poland.

#### 4.3 What are the main evaluation criteria and are there any guidelines available?

There are no specific evaluation criteria – a general test of public order, public security and/or public health in Poland shall apply.

The President of the Office of Competition and Consumer Protection has published guidelines on the screening procedure, but currently they are rather general and they do not clarify concerns and ambiguities of the Act.

#### 4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Yes. During the review, authorities analyse the investor's capital group and its structure, entities belonging to it, legal and actual capital, financial and personal links with other entities, etc. The authority also verifies the consolidated financial statements of the parent company and the capital group itself, including all subsidiaries, even if they are not operating in Poland.

#### 4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

Under the Act on the Control of Certain Investments, authorities apply a general test of public order, public security and/or public health in Poland. Therefore, they have a lot of discretion in approving or opposing the transaction.

#### 4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

Yes, under the Act on the Control of Certain Investments it is possible to appeal the decision of the competent authority to the administrative court – within 30 days as of a delivery of the decision. The appeal procedure has a judicial character. Only parties of the screening proceedings can appeal the decision.

#### 4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

If the authority has objections during the review, it may request the entity submitting the notification to provide further documents or explanations.

After the decision is made by the authority, it can only be appealed to the administrative court. There are no conditional decisions, i.e. decisions allowing the transaction and imposing specific remedies or other arrangements on the investor.

#### 4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

There is no clear data available with regard to the Polish authorities' approach on FDI under the Act on the Control of Certain Investments, especially after the Amendment (as this is a brand new legislation). Therefore, it is not possible to predict the authorities' general position in this matter. However, due to the Polish government policy and historical conditions, we can assume that the Polish authorities will protect at least the most strategic companies from oil and gas sector and may execute their rights to oppose some of the transactions.



**Jakub Pietrasik** is a member of the Corporate/M&A team at Wolf Theiss. With over 11 years of experience working in Polish and international law firms, Jakub specialises in new technology law, commercial litigation and construction law. He provides legal advice to production and industrial companies, technological companies and start-ups, including advising on M&A transactions, technology transfer and commercialisation of IP rights. Furthermore, Jakub is experienced in providing complex legal advice to construction companies, in particular to general contractors and sub-contractors, at all stages of investment. Jakub is the author of several publications on corporate disputes, appealing resolutions of shareholders in companies and problems of proceedings on securing claims. He is a member of the Warsaw Bar of Legal Advisors. He studied law at the University of Warsaw, and has also completed his studies at the British Centre for English and European Legal Studies organised in cooperation with the University of Cambridge.

**Wolf Theiss**  
49 Mokotowska Street  
00-542 Warsaw  
Poland

Tel: +48 22 3788 969  
Email: [jakub.pietrasik@wolftheiss.com](mailto:jakub.pietrasik@wolftheiss.com)  
URL: [www.wolftheiss.com](http://www.wolftheiss.com)



**Jacek Michalski** is a member of the Corporate/M&A team and heads the local practice in Warsaw. With over 28 years of experience, Jacek has led many ground-breaking transactions in Poland, the CEE region and Africa. He focuses on counselling and representing clients in M&A, capital markets, corporate governance, and financial sector regulatory matters. Jacek also advises on the creation of new banks, acquisitions of existing banks, and mergers between large local banks and international banks. He has been listed by major legal directories as one of the leading corporate lawyers in Poland for many years.

**Wolf Theiss**  
49 Mokotowska Street  
00-542 Warsaw  
Poland

Tel: +48 22 3788 958  
Email: [jacek.michalski@wolftheiss.com](mailto:jacek.michalski@wolftheiss.com)  
URL: [www.wolftheiss.com](http://www.wolftheiss.com)

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