

The Polish Parliament has just passed a new law restricting investment in certain strategic Polish companies. The law, when it comes into effect, raises the risk of potential Bilateral Investment Treaty claims against Poland for violation of the principle of non-impairment.

The new law provides that companies (regardless of whether state owned or privately owned) may be placed on a restrictive list by decision of the Council of Ministers (Polish Cabinet). This list would not be subject to any appeal (inclusion of companies would be entirely up to the government). The acquisition and disposal (whether direct or indirect) of more than 20% of the shares in companies on the list will be subject to the Minister of State Treasury not objecting to the transaction. No compensation is contemplated – the law is presented as an ordinary regulatory measure designed to protect the national economy (a number of other countries' regulations, including the United States, Germany and France, are used as references in the justification). The law applies to purchases/acquisitions by both foreign and Polish buyers/transferees – in order to avoid claims of discrimination.

Poland has signed 60 bilateral investment treaties. Generally such treaties include the basic principle of non-impairment, meaning that unreasonable or unjustified means may not be introduced that lead to the impairment of the management, maintenance, use, enjoyment or disposal of the investment. The treaties also prohibit expropriation or equivalent measures unless such measures are justified by public policy, are non-discriminatory and fair compensation is offered. The new Act raises the issue of whether certain investors will be impaired, for instance, by not being able to or by having significant difficulties in selling their shares due to the fact that the number of potential purchasers is limited by a potential objection of the government. The market valuation of companies placed on the list could drop significantly, impairing further the protection of investments. Impairment must be decided on a case-by-case basis, so it will first be necessary to see which companies are included on the restricted list, who are the foreign investors in such companies, and the consequences of the restriction, including as it applies to potential buyers. Existing companies with foreign ownership could be put on the restricted list, meaning that the law would affect existing investors.

Controversy exists as to whether the new piece of legislation violates EU law (namely Articles 52 and 65 of the Treaty on Functioning of the European Union, providing for measures taken on the grounds of public policy or public security) as excessive, non-proportional and vesting too broad and discretionary powers to the Polish authorities. The new law invokes, in a very broad manner, the protection of public order and public security and justifies objection by the State Treasury by, inter alia, the protection of independence and integrity of Poland (other grounds for objection being defined in the same very broad manner). Judicial protections available to an investor will likely be impaired by the wide scope of discretion vested to the authorities.

These objections were raised during the legislative process where it was pointed out that the post-acquisition regulatory measures should be more proportionate and compliant with EU law. These objections were countered by the justification that the geopolitical situation of Poland and of Europe as a whole makes the case law of the European Court of Justice "outdated". Arguments such as this make it likely that the new piece of legislation could be subjected to judicial scrutiny after it takes effect.

Before it can take effect, the law (designated as the Act of 24 July 2015 on the control of certain investments) must be signed by the President. The President has the option of requesting the Constitutional Tribunal to rule on its constitutionality – besides the issues as to compliance with EU law, it is also questionable whether the new legislation is compliant with the Polish Constitution with respect to civil liberties. Any such request for a ruling by the Constitutional Tribunal would delay effectiveness for a substantial period of at least 18 months.

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