

Summary

Mergers and Acquisitions Law

Selected issues, with particular emphasis on foreign investment control

The main focus of the monograph, entitled *M&A Law. Selected issues, with particular emphasis on foreign investment control*, are the basic assumptions that underpin the amendment to the Polish Act on the Control of Certain Investments of 24/07/2015 made by the Act on Subsidies on Interest on Bank Loans Granted to Entrepreneurs Affected by COVID-19 and the streamlined procedure of composition approval in connection with COVID-19 (Amendment). The Amendment introduced an extraordinary procedure applicable to the control of foreign investments. Legislative work started as early as in March 2020, shortly after the outbreak of the pandemic. It is worth recalling that the health crisis led to short-term panic and sell-offs in the financial markets all over the world, causing stock prices to plummet. Still perceived as a developing market and thus involving additional risks, Poland experienced both a sharp decline in the value of its currency, the zloty, and a crash on the Warsaw Stock Exchange. The combination of both events resulted in the value of Polish businesses, including state-owned ones, dropping in a matter of days.

The discussion opens with an overview of the subject matter of the Act and the entities it applies to.

This section provides a detailed account of the types of protected business activity, outlining the historical background for the development of the current legislation. These issues are fundamental for the description of entities subject to protection. Subsequently, the chapter on activities and events triggering the notification obligation offers an analysis of the conceptual matrix used in the Act (which includes such terms as 'indirect acquisition' or 'secondary acquisition'). This conceptual matrix is, in fact, subject to a painstaking critique in the summary of this section. Following that, the analysis moves on to the criteria for raising an objection and the issue of sanctions. This part also elaborates on the key aspects of the Polish Act on the Control of Certain Investments from the perspective of conflict of laws. The fourth chapter offers an analysis of the procedural issues inherent to the control of foreign investments. The reasoning in this section focuses on the structure of the procedure before the authority tasked with investment control, modelled upon the

European and Polish procedure applicable to the control of concentrations. On top of that, the author distinguishes between *ex ante* and *ex post* notifications and provides a detailed description of premises for the applicability of each of the two procedures. The summary contains an analysis of the court reviews of the authority's decisions. What merits special attention is the comprehensive assessment of the compliance of Polish law on the control of foreign investments with EU law, presented in Chapter Five. Relying on his unique access to sources, in particular the documentation of the infringement procedure that the European Commission instituted against Poland, the author separately examines the compliance of the law in its original wording of 2015 and the one introduced within the Covid-related legislative package in 2020. A separate subsection addresses the so-called screening regulation, instrumental to the interpretation and application of the Polish act as well. The discussion ends with a summary of *de lege ferenda* postulates.

The second and third parts of the volume deal with tender offers in takeovers of public companies and the administrative law aspects of takeovers of companies having properties in maritime ports and harbours, respectively. The second part contains an overview of the comprehensive recast of the Act on Public Offering. The obligations of the buyers of significant holdings in companies are a separate research area. As a result, the juxtaposition of these two topics may initially be viewed as a surprise. Nevertheless, a detailed reading of the text reveals uncanny similarities in terms of the scope of sanctions introduced by the Act on the Control of Certain Investments and the Act on Public Offering. Both pieces of legislation rely on a similar conceptual matrix. The author makes a *de lege ferenda* suggestion that the two be harmonised. They share the aspect of sanctions – in particular the voting ban, touched upon in the part on foreign investments and developed in the context of the Act on public offering.

The same conclusions, by analogy, apply to the third part. The monograph ends with a chapter on the Act of 20 December 1996 on Ports and Maritime Harbours, with a special focus on its amendment from 2019. The selection of the Act on Ports and Maritime Harbours as the piece of law to be analysed in the context of a study on M&A processes requires some explanation. The key reason for discussing selected issues relative to its applicability is that they are a perfect paragon of mutual dependencies between the interference of the state authorities by way of public law and the processes in question. This is a showcase of nearly all of the problems related to the legislative process, followed by the interpretation of the application of law, which I have tried to discuss in the part on the control of foreign investments and the obligations of buyers of significant holdings in companies. These boil down to a relatively simple objective on the part of the legislator, namely extending state control (here: oversight of properties located within the boundaries of maritime ports and harbours) to all possible transactions and conversion forms of the relevant companies. As is the case with the previously discussed legislation, the basic regulatory tool constitutes the sanctions invalidating legal activities or resolutions of corporate authorities, as well as bans on voting. Unfortunately, the vagueness of the wording used in the Act on Ports and Maritime Harbours, as well as manifest lacunae when combined with the extreme severity of the sanctions and the lack of any feasible consultation mechanisms with the authority applying the law, result in major interpretative dilemmas that entrepreneurs are confronted with and that deserve to be discussed.

I hope to draw readers' attention to the following research conclusions. The study is the first one in the Polish legal literature to review Polish legislation on the control of foreign investments as mandatory rules. It identifies the mechanism triggering the applicability of the sanctions provided for by the law, whenever the transaction involves applying foreign law. What is more, it is the first publication on Polish law to discuss the acceptability of a conditional approval being issued by the control authority in the area of the control of foreign investments. It further analyses the so-called 'preventive measures', relying on the analogy with the control of concentrations in Poland, and in the EU in particular. Finally, it is the first study to put forward the problem of the scope of competence of administrative courts in the area of control of foreign investments. The author's proposal is built upon an analogy to the case-law on the liability for tort of members of corporate authorities (the 'business judgement rule'). Additionally, the volume contains a comprehensive assessment of the compliance of Polish law with EU law, and a summary of the existing case-law in the context of the Act on the Control of Certain Investments (both in terms of decisions issued by the President of the Office of Competition and Consumer Protection and the Minister of State Assets).