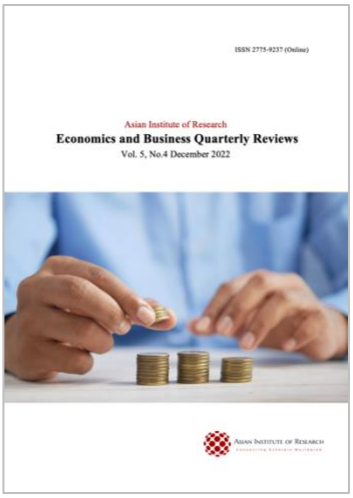

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"Killing the Golden Goose?": FDI in Poland 2022

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Abstract
This article is a follow up on recent events that relate to participation in foreign direct investment (FDI) activities in Poland in light of the *Law on Freedom of Economic Activity* (LFEA), the *Act on Control of Certain Investments* and the Amendments thereto, which provide for the rules on foreign participation in the Polish market and later restrictions on the purchase of Polish assets by discrete categories of investors. The article builds on research published in 2021 relating to the existence and importance of FDI in the Polish economy that had been negatively affected by a series of challenges and paradoxes in Polish society.

Keywords: Foreign Direct Investment, Polish Tech Bridges, Investment Factors, Investment Sectors

1. Introduction

Foreign direct investment, more commonly known as FDI, occurs with the purchase of "the physical assets or a significant amount of the ownership (stock) of a company in another country to gain a measure of management control" (Hunter & Ryan, 2012, p. 594). Ordinarily, FDI inflows are counted from a *10 percent stock ownership* in a company abroad.

As an active form of investment, FDI may take the form of a merger-and-acquisition activity with an existing company or entity (often referred to as a "brownfield" investment), where the purchaser acquires an ongoing business operation. In addition, FDI may take the form of creating an entirely new investment—literally from the "ground up" (often referred to as a "greenfield" investment) (adapted from Hunter & Ryan, 2012).

Poland has remained one of the most attractive destinations for foreign direct investment in Europe. This is no accident! The Polish government has made it a top policy priority to expand the domestic economy by "supporting high-tech investments, increasing productivity and foreign trade, and supporting entrepreneurship, scientific research, and innovation through the use of domestic and EU funding" (U.S. Department of State, 2019). According to a study conducted by the Polish Investment and Trade Agency (PAIH) in 2019, because of the positive investment climate fostered in Poland, as many as 94 per cent of foreign investors would re-invest in Poland (reported by Rodl & Partner, 2020).

Gorynia, Nowak, and Wolniak (2007, p. 132) noted that "Foreign direct investment (FDI) has played a pivotal role in the transformation of post-communist economies of Central and Eastern Europe (CEE) for more than a decade now. This is especially true for Poland which experienced a phenomenal growth of inward FDI." Hunter and Ryan (2013, p. 14) commented that "From the start of the process of economic transformation in Poland in the fall of 1989, attracting FDI has been considered as a main policy objective of nearly all political parties and parliamentary configurations that have governed Poland and of all the individuals who have held the critical position of Minister of Finance in the Polish government"—at least until now.

The Polish Investment and Trade Agency (PAIH) is charged with supporting both the foreign expansion of Polish business and the inflow of FDI into Poland (see Przezdziecka, 2021). In addition, PAIH assists in boosting Polish exports and supporting the new generation of entrepreneurs who have grown up in post-1989 Poland. Specifically, PAIH assists in overcoming administrative and legal roadblocks related to implementing specific projects, in finding a suitable location in Poland for an investment, and in assuring reliable partners and suppliers to assure the sustained success of an investment.

The Agency implements pro-export projects such as "the Polish Tech Bridges" dedicated to the expansion of innovative Small and Medium-Sized enterprises (SMEs) (Wozniak, Duda, Gasior, & Bernat, 2019).

1.1. SME's and Investment: "Building Bridges"

SMEs create more than a half of the Polish GDP in the sale of products and services abroad. Since Poland has entered the European Union, exports have tripled from almost 60 billion euro (2004) to 185 billion euro in 2016. A record of 200 billion euros in foreign sales of the product or services of Polish companies is expected in the period 2017 to 2020. The increase of investment activity has led PAIH to implement a six-year project of tailored support for Polish SMEs which is termed "**Polish Tech Bridges**."

The Polish Tech Bridges project provides SMEs with professional tools that prepare them to compete outside traditional European markets so that they can effectively operate in as many as 20 world-wide markets. The beneficiaries of this ambitious project are entrepreneurs whose activity is part of the so-called "National Smart Specializations."

PAIH (2022) notes that the national smart specializations are targeted priorities in the field of research, development, and innovation, "which concentrate investments in areas ensuring the added value of the economy and its competitiveness." Smart specializations were created as the result of extensive cooperation between public administration and representatives of business and science. The intent of this initiative is to identify "bottom-up areas" in which Polish enterprises would develop market potential in the belief that the concentration of efforts will lead a strong "return on investment" and to development of innovation (Dworak, 2020). "Smart specializations are designed to contribute to the further transformation of the national economy through modernization, structural transformation, diversification of products and services and the creation of innovative socio-economic solutions, also supporting the transformation towards a resource-efficient economy, including natural resources" (Polish Investment and Trade Agency (PAIH), 2018).

The list of current national smart specializations is as follows (KIS, 2022):

"HEALTHY SOCIETY
NSS 1. HEALTHY SOCIETY
AGRICULTURE AND FOOD BIOECONOMY, FOREST BASED AND ENVIRONMENTAL BIOECONOMY
NSS 2. INNOVATIVE TECHNOLOGIES, PROCESSES AND PRODUCTS OF THE AGRICULTURE AND FOOD AND FOREST BASED SECTOR

NSS 3. BIOTECHNOLOGICAL AND CHEMICAL PROCESSES, BIOPRODUCTS AND PRODUCTS OF DEDICATED CHEMISTRY AND ENVIRONMENTAL ENGINEERING SUSTAINABLE ENERGY INDUSTRY
NSS 4. HIGHLY EFFICIENT, LOW-CARBON AND INTEGRATED SYSTEMS OF GENERATION, STORAGE, TRANSMISSION AND DISTRIBUTION OF ENERGY
NSS 5. SMART AND ENERGY-EFFICIENT CONSTRUCTION
NSS 6. ENVIRONMENT FRIENDLY TRANSPORT SOLUTIONS
CIRCULAR ECONOMY – WATER, FOSSIL RAW MATERIALS, WASTE
NSS 7. CIRCULAR ECONOMY – WATER, FOSSIL RAW MATERIALS, WASTE
INNOVATIVE TECHNOLOGIES AND INDUSTRIAL PROCESSES (HORIZONTAL APPROACH)
NSS 8. MULTIFUNCTIONAL MATERIALS AND COMPOSITES WITH ADVANCED PROPERTIES, INCLUDING NANOPROCESSES AND NANOPRODUCTS
NSS 9. SENSORS (INCLUDING BIOSENSORS) AND SMART SENSOR NETWORKS
NSS 10. SMART NETWORKS, INFORMATION AND COMMUNICATION TECHNOLOGIES AND GEOINFORMATION TECHNOLOGIES
NSS 11. PRINTED, ORGANIC AND FLEXIBLE ELECTRONICS
NSS 12. AUTOMATION AND ROBOTICS OF TECHNOLOGICAL PROCESSES
NSS 13. PHOTONICS
NSS 14. INTELLIGENT CREATION TECHNOLOGIES
NSS 15. INNOVATIVE MARITIME TECHNOLOGIES FOR SPECIALIZED VESSELS, MARITIME AND OFFSHORE STRUCTURES AND LOGISTICS BASED ON THE SEA AND INLAND WATERWAY TRANSPORT”

The program will also benefit small *entrepreneurs* who plan to increase the volume of exports or consider investments in foreign markets. The program also focuses on *innovators* who are seeking foreign partners to conduct research and development projects (R&D) as well as seeking external financing sources for these activities. The maximum grant for one SME could reach PLN 200,000 (about $45,500), while the total value of governmental support amounts to over PLN 176.5 million ($37.5 million). [For informational purposes, the current exchange rate, as of September 5, 2022, of the Polish zloty to the U.S. dollar is 1 Polish zloty is equal to .21 U.S. dollar. The current exchange rate of the Polish zloty to the euro (€) is .21 euro.]

Target countries include the United States, Canada, Mexico, Vietnam, China (including the Hong Kong SAR), Japan, the United Arab Emirates, Iran, Kenya, Turkey, Republic of Korea, Saudi Arabia, Egypt, India, Norway, Switzerland, Ukraine, Russia, Republic of South Africa – all of which were identified as “*fast growth markets”* (see Reynolds, 2021).

The Polish Tech Bridges project is primarily financed from the European Regional Development Fund under the Smart Growth Operational Programme and will be carried out in years 2018 – 2023.

2. Foreign direct investment (FDI) in Poland: An Overview

Poland has been one of the most attractive countries in Europe in terms of FDI. According to *UNCTAD's 2021 World Investment Report* (2021), FDI inflows to Poland remained stable in 2020, reaching USD 10 billion, in line with the USD 10.8 billion recorded a year earlier, despite the outbreak of the Covid-19 pandemic which caused a contraction of 42% of global FDI (Hayakawa, Lee, & Park, 2022).

Total investment stocks in Poland [inward FDI] stood at USD 236.5 billion in 2020. Poland ranked fifth globally in terms of the value of “greenfield” projects announced in 2020, with a total of USD 24.3 billion. [Greenfield Investments are a form of foreign direct investment where a parent company starts a new venture in a foreign country by constructing new operational facilities, literally from the ground up.] The U.S. Chamber of Commerce

(2021) reported that "Foreign companies have created over 6,300 jobs in their greenfield investment ventures run by PAIH and devoted to these projects over $2.8 billion in 2020. 46% of capital expenditures and 38% of new jobs in all greenfield projects were created by US-owned companies which started or expanded their business in Poland in 2020 and were organized with the cooperation of PAIH."
Interestingly, major projects include the construction of a "cloud region" in Poland by Google for USD 1.8 billion. [A "cloud region" describes the actual, real-life geographic location where public cloud resources are located (Hargrove, 2022).]
Poland is the largest recipient of FDI inflows in Central Europe. The majority of investment stocks are held by the Netherlands, Germany, Luxembourg, and France. Investments are concentrated in manufacturing, financial services, insurance, wholesale and retail trade, and the real estate sectors. In addition, a high percentage of investors coming from China and South Korea.

According to the latest figures from OECD, in the first half of 2021 FDI inflows to Poland totaled USD 12.3 billion, greater by 27.4% compared to the same period one year earlier, when FDI inflows stood at USD 9.6 billion.

2.1. Investment Factors

In successfully attracting FDI, Poland's main assets have been its strategic position, literally "in the heart of Europe" (Davies, 2001; Wozniak, 2021), a large population of nearly 38 million, its membership in the European Union (see Rapacki & Prochniak, 2021), economic stability, relatively "cheap" but skilled labour reflected in the cost of labor (Euronews, 2018), and a fiscal system attractive to businesses.

Wozniak (2020) commented;

> "Poland is located in the heart of Europe which makes it the perfect investment location for companies needing to export products both in eastern and western directions. On the one hand, companies located in Poland can benefit from a strong economic relationship with Eurozone, having free trade access to the EU market and standardized regulations. On the other hand, the Polish economy is stable and resistant to any economic crisis thanks to having its own currency (Polish zloty). "

PAIH (2022) has assembled information on a number of factors which point to the attractiveness of Poland as a destination for foreign investment. These include:

- **Human capital:**

"Poland's greatest asset are its citizens, especially their ambitious nature, eagerness to learn, great work ethic, loyalty and entrepreneurial spirit. Companies starting their operations in Poland can also count on consumers with open minds to modern solutions."
Nurczyk (2017) cited the following "skill sets" of Poland's work force:

- Data management skills: analysis, credibility assessment, researching and logical thinking;
- Technology literacy;
- Social intelligence; and
- Flexibility.

- **Modern consumers:**

"Companies in Poland have access to a market of modern consumers - often online shoppers, open to technological innovations and fond of modern banking solutions." This observation is confirmed by Poland's second place ranking in "The Top 10 Cashless Countries in Europe," a study which assessed the percentage of the population using credit or debit payment cards and the frequency of using "contactless payments" through internet services. This is no doubt in a large part thanks to over a million payment terminals in Poland with the contactless payment function." Drapinska (2020) notes: "Polish consumers are still trying to catch up and meet their needs at a level similar to that in highly developed countries. Nevertheless, one can observe some symptoms of consumerist behaviour, e.g., spending on pleasure and entertainment prevails over saving, buying unnecessary things, or pleasure shopping."

- **Education:**

Wes and Bodewig (2016) noted that "International research has identified three dimensions of skills that matter for good employment outcomes and economic growth: cognitive skills, such as literacy, numeracy, and creative and critical thinking or problem-solving; socio-emotional skills and behavioral traits, such as ability to finish a task and work well in teams; and job- or occupation-specific technical skills, such as in engineering." Tracking these dimensions, Poland ranks third in the prestigious PISA [Programme for International Student Assessment] ranking, an international assessment of students' skills, behind Estonia and Finland, but before Ireland, Slovenia, and Great Britain.

> "From the EU perspective, the results of the PISA survey are particularly important as they form part of the strategic framework for European cooperation in education and training. As one of the few countries, thanks to educational reforms, Poland has kept its share of underperformers below 15% in all assessed areas in PISA 2018. This wouldn't be possible without a highly developed education system that makes every effort to ensure that students receive the highest quality education" (see European Commission, 2022).

Approximately 92% of Polish citizens aged 25-64 have attained at least a secondary education. This achievement places Poland in 5th place among all the OECD countries and significantly above the OECD average of 78%. Almost 1.3 million Polish students are enrolled at institutions of higher education, which places Poland 4th in Europe**.** The Polish higher education system is characterized by the large number of students in STEM (exact sciences, technology, engineering and mathematics) programs (see Piotrowski, 2019).

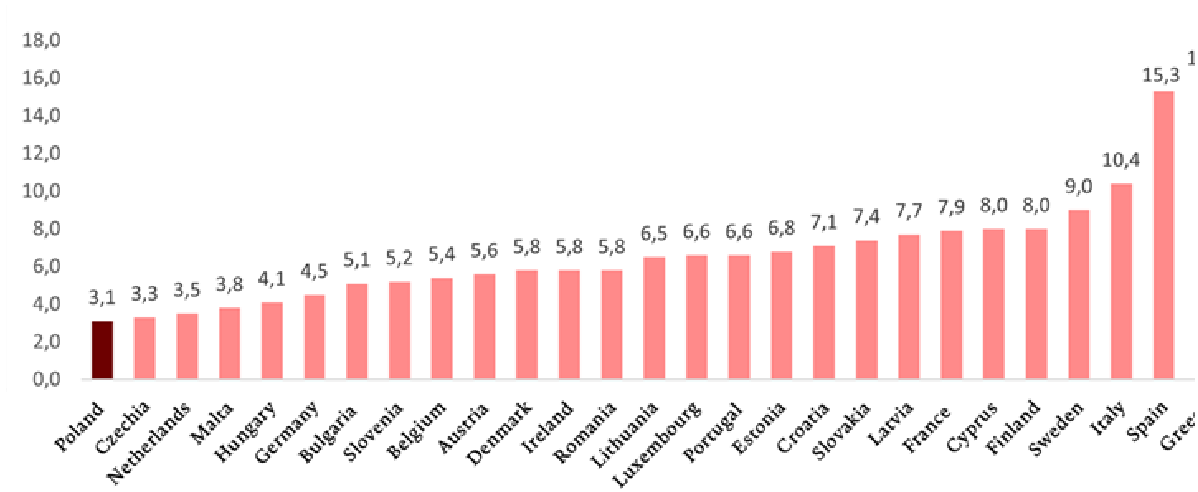
- **Knowledge of foreign languages:**

Poland places 16th (out of the top 100 countries) in 2020 in the "EF Proficiency Index," which ranks countries based on the knowledge of the English language among non-native English speakers.

- **Employment and Salary considerations:**

The average salary for workers in Poland in the first quarter of 2021 was PLN 5,681.56 (€ 1,260). This is a 6.6% increase on a year-to-year basis, 4.1% more than in the fourth quarter of 2020. The labor market is gradually recovering to the levels before the Coronavirus pandemic.

- **Unemployment in the EU as of March 2021 in %:**



At the end of 2021, *Trading Economics* (2022) reports that Poland's unemployment rate increased but has stabilized at 4.9% in July of 2022, coming in slightly above market projections The number of registered unemployed people steadied at 810,200.
2.2. Structural Reforms

Poland has established priorities assuring "structural reforms" relating to:
- Education and skills: Promote participation in lifelong learning;
- Labour market: Increase the labour force participation rate of older workers and women;
- Environmental policy: Reduce air pollution levels and carbon emissions;
- Healthcare: Improve efficiency in health and long-term care;
- Competition and regulation; and
- Ease business regulations and improve bankruptcy proceedings (see OECD 2021).

However, as the OECD (2022) offers a somewhat cautionary notes and states: "After strong GDP growth in the second half of 2021, the war in Ukraine will take a toll. Real **GDP** is projected to expand by **4.4% in 2022 and by 1.8% in 2023.** Consumption and, to a lesser extent, investment growth is expected to slow considerably, partly offset by fiscal policy. Inflation is expected to peak by the end of the year as the rise in energy prices slows and monetary policy tightens. Core inflation is projected to decrease but is likely to remain elevated at the end of 2023."

Under the 2021-2027 EU budget, Poland will receive USD 78.4 billion in *cohesion funds* (European Commission, 2022), as well as approximately USD 27 billion in grants and USD 40 billion in loan access from the EU Recovery and Resilience Facility.

"Cohesion Policy funds will promote economic, social and territorial cohesion in the Polish regions and help implementing key EU priorities such as the green and digital transition" in the following areas (European Commission, 2022):

- **Reducing energy dependence and protecting the environment;**
- **Digital transformation of the economy and society;**
- **Building socially inclusive and resilient communities;**
- **Encouraging local partnerships; and**
- **Sustainable fisheries and aquaculture sector."**

3. Positive and Negative Attributes of the Polish Economy

While there are strong positive indicators present in the Polish economy, there are also several negative indicators or factors present as well. This section of the study will describe some of the most important positive and negative factors.

3.1. Positive Success Indicators

Successes abound in the Polish economy in several areas—most especially in the growth of employment—which are important in assuring that there will not be an "innovation gap" between the Polish economy and countries in the European Union (Dworak, 2020). Theses examples are provided by the Polish Investment and Trade Agency (PAIH, 2022).

Business Support Services: A thriving BSS industry, valued at USD 19.8 billion recorded strong growth over the last decade, resulting in an increase from 50,000 employees in 2008 to over 338,000 in 2020. This growth is expected to continue throughout the decade (Leonski, 2022).

Electronics and electrical engineering: The value of electrotechnical equipment sold exceeds PLN 64.6 billion and accounts for 5% of Polish industry's total production. The industry employs a total of 115,000 workers—4.8% of the total number of people working in the manufacturing sector in Poland.

Renewable Energy: Poland ranks 5th in Europe in terms of growth of renewable energy capacity (see Jankowska, Stalinski, & Trapczynski, 2021; Pietrzak, Iglinski, & Kujawski, 2021).

Pharmaceuticals and biotechnology: The pharmaceutical industry accounted for 26,000 jobs in 2020 (Sas, 2022a) and generated about € 213 billion in market value in 2019 in the EU (see Pierigud, Piotrowicz, & Cuthbertson, 2018). Approximately 200 companies, employing over 4,000 people, work in the field of biotechnology in Poland (see Kuzmierkiewicz, Rachon, & Grynkiewicz, 2019).

Gaming: The value of the gaming segment in Poland is estimated at EUR 8.1 billion (Wanat, 2022), which includes PC gaming, console gaming, mobile gaming, game developers, and E-sports gaming (Dordevic, 2021).

IT: The size of the IT sector in Poland is estimated at PLN 70-85 billion. Fourteen Polish IT companies appeared in the 2020 ranking of the 1000 fastest growing companies in Europe (Kulig, 2019). Polish IT companies have established unique *branding* in providing export services, which are "characterised by high quality and meticulousness of the services provided, both as a supplier of comprehensive solutions as well as "tailor made" solutions or highly qualified outsourcing teams."

Cosmetics: Poland is ranked 14th in the world in terms of cosmetics export, with a 2.6% share, with over 85% of Polish cosmetics exports destined for European markets. Sas (2022b) reports:

> "The cosmetic industry in Poland has strengthened its position both on the domestic market, through sales growth, and abroad through exports. International companies compete with numerous small Polish manufacturers. The value of the Polish cosmetics market amounted to over 18 billion zloty in 2020. This was reached due to constant development in recent years. Since 2017, the value of the market has been growing on average by more than three percent a year. Past years have seen a positive balance of Poland in the cosmetics trade. The most exported cosmetic items in 2020 were make-up and skincare products, which accounted for 46 percent of all exported cosmetic goods. Poland's leading cosmetics export markets are Germany, Kazakhstan, and Russia."

Aeronautics: 17,100 Poles are employed in aeronautical production, with the value of the Polish aviation industry's sales reaching euro 1,93 billion in 2018, an increase of 16,8% on a year-to-year basis. The industry has achieved great prominence since at least 2010 (Klimas, 2016).

The five largest manufacturers of aircraft engines [Lufthansa, GE Aviation, Sikorsky, UTC Aerospace Systems and AugustaWestland] have all begun production in Poland. There are 140 aviation companies working in Poland.

Ships and yachts: KPMG (2019) reports that there are approximately 1000 companies in Poland involved in building or producing yachts, boats, and accessories, plus a network of Polish sub-suppliers.

Furniture: Poland was the world's second largest furniture exporter in 2019 and first in the European market. Sas (20222c) notes that "In 2021, in terms of value, Poland exported the most furniture to Germany, reaching five billion euros. Total exports value amounted to 14.9 billion euros in this period." Germany, Czechia, the Netherlands, France, Great Britain, and Ukraine (at least before the 2022) remain the main export destinations. The furniture industry in Poland is responsible for over 2% of Polish GDP. It is the fourth largest industry in the country in terms of employment. Poland ranks 6th in the world in terms of the value of manufactured furniture. Polish furniture is shipped mainly to Western Europe – with 90% of furniture products exported.

Automotive: 327,400 workers are employed in the automotive industry, ranking Poland 3rd in the EU. The value of the Polish automotive industry's exports in 2019 amounted to euro 36 billion, which accounts for 15.3% of the total exports of goods. The United States International Trade Commission (2022) commented that:

> "Poland's automotive industry is an important manufacturing sectors that has become Central and Eastern Europe's manufacturing hub for cars, car parts and components. Poland's automotive industry is one of the most important manufacturing sectors in Poland, accounting for 11.1 % the total value of the country's production and is second only to the food industry. In recent years Poland has attracted a substantial amount of foreign direct investment in the automotive manufacturing sector and, consequently, has become one of Central and Eastern Europe's major manufacturing hubs for cars, car parts and components. Automotive manufacturing has evolved into one of Poland's key industries in terms of production value, employment, capital expenditures and exports. Poland is the region's largest automotive market in terms of sales and services."

Polish exports of lithium-ion batteries in 2021 amounted to approximately PLN 165.9 billion. Poland is the 6th largest producer of commercial vehicles in Europe, with 208,000 units produced in 2018 alone. The largest vehicle producers in Poland are Volkswagen, Daimler, and Toyota.

Textiles, clothing and fashion: About 300,000 people are employed in the fashion industry in Poland, largely in small family businesses (approximately 73%). At the same time, a significant part of sales is carried by large companies in the fashion industry, including nationwide chains (see Sadowski, Dobrowolski, Skowron-Grabowska, & Bujak, 2021).

Paper production: The value of the Polish paper sector is approximately PLN 45 billion, ranking this sector as the second most profitable industry in Poland, after the pharmaceutical industry. Poland's share in the European Union's paper production is growing - from 4% in 2010 to over 6% in 2021 (see Cetera, 2022).

Medical equipment: There are more than 300 companies operating in the medical products and medical devices industry, offering approximately 500,000 medical products, which have been approved for sale under strict EU regulations (see Rutkowski, 2021).

3.2 Potential Negatives

Despite the strengths in the economy exhibited in these sectors of the Polish economy, however, there is one major potential negative: Polish law limits foreign ownership of companies in selected strategic sectors and restricts acquisition of real estate, especially agricultural and forest land. In addition, a new law [discussed below] was enacted which gives President of the Office for Competition and Consumer Protection the authority to review investments by non-EEA and non-OECD investors on the grounds of public security, public order, and public health. [The EEA includes EU countries and also Iceland, Liechtenstein and Norway, allowing them to be part of the EU's single market. Switzerland is not an EU or EEA member but is part of the single market as well.]

According to Trading Economics (2022), the business climate in Poland is strong. The World Bank ranks Poland 40th out of 190 countries in its latest *Doing Business* ranking; however, Poland fell seven positions compared to the previous edition.

Polish law limits non-EU citizens to 49 percent ownership of a company's capital shares in the air transport, radio and television broadcasting, and airport and seaport operations sectors, effectively creating a "golden share" relating to ownership (see, e.g., Gaydarska, 2009; Szabados, 2019). The *Law on Freedom of Economic Activity* (LFEA) of July 2, 2004, requires companies to obtain *licenses, permits, and concessions* to conduct businesses in certain sectors such as broadcasting, aviation, energy, weaponry, military equipment, mining and private security services. Licenses and concessions for defense production and management of seaports are generally granted on the basis of "national treatment" for investors from OECD countries.

In July of 2015, Poland enacted an *Act on the Control of Certain Investments* [Act] for companies operating in strategic sectors. In May of 2020, the Polish government approved a series of regulations (Pawlak, Weiss, & Kulak, 2020) aimed at making it difficult for investors from outside the European Union to acquire companies that Poland considers "strategic" to its economy at low or below market values. The regulations were part of a government rescue package worth more than PLN 300 billion to help Poland survive the coronavirus pandemic and the resulting economic crisis (Sabatino, 2021).

4. A Discussion of the Act and Regulations

Pietrasik and Michalski (2022) lay out the parameters and details of the regulations in responses to a series of questions relating to the effect of the regulations on FDI in Poland. We have adapted this format in discussing both the Act and the Regulations adopted pursuant to it.

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

The Act obliges potential 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 strategic companies.

The Act and the implementing regulation of the Council of Ministers dated 11 December 2020 provide a specific list of strategic companies directly covered by the notification procedures, including 13 Polish private and public companies in the energy, oil, gas, fuel, telecommunication, and chemicals sectors. Additionally, as a result of the Amendment to the Act which came into effect on 24 July 2020, at least partially in response to the Covid-19 pandemic, the Act substantially expands the sectors of strategic companies covered by the approval requirements.

Wnukowski and Geiss (2022) state:

> "The Amendment has extended the scope of government's control over the acquisition of stakes in Polish entities. Investors from outside of the EEA, EU, or OECD would need to obtain clearance for the acquisition of a stake in Polish companies (or partnerships) carrying out business in sectors that the government has identified as being of strategic importance. The concept behind the Amendment was not originally domestic – the Polish government responded to the EU call to protect the "European crown jewels" from buyouts by non-EU investors at lowered prices while the lowered valuations were caused by the COVID-19 pandemic."

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

The Act (in particular, its Amendment) has been introduced to protect Polish strategic companies against "hostile" takeovers by entities from non-EU/EEA/OECD countries.

What kinds of foreign investments, foreign investors and transactions are subject to the Act? Is the acquisition of minority interests subject to the Act?

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

- natural persons who do not have EU, EEA or OECD citizenship; 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 located within EU/EEA/OECD, will be qualified as foreign entities.

There is no specific threshold provided for acquiring a *dominant position* in a Polish company – a dominant position is reached when the buyer has a "right to control" the target company's business. However, notification to the relevant authority will in fact be required when the buyer exerts a "significant influence" on the target by owning at least 20% of its shares or in its share capital or share of its profits, as well as when the buyer achieves or exceeds 20% of the total number of votes at the shareholders' meeting or 40% of the profit derived from the target's share capital, or when the buyer purchases or leases the target's enterprise or the organized part thereof.

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 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, fertilizer 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.

The Amendment has substantially extended the approval regime. Under 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, fertilizer 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;
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- 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 list of protected companies; the Amendment only provides a generic *types of entities* covered by the Act.

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 definition of a foreign or domestic buyer – transactions regarding any company covered by the Regulation fall under the screening procedure.

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

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

Are there specific rules for certain foreign investors (e.g., non-EU / non-WTO), including state-owned enterprises (SOEs)?

If the investor is qualified as a foreign investor under the Act, then the *screening regime* applies. There are no specific rules for foreign investors such as state-owned enterprises.

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.

What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

There are four conditions that must be met jointly for the law to apply (including a 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;
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; and
4. In the case of companies covered by the Amendment, the transaction must be conducted by the investor qualified as a foreign investor.

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 upon acquiring or achieving significant participation or acquiring dominance in a strategic (protected) company.

There are two main **exceptions** form the rule presented above:

- In the case of indirect acquisition or achieving a significant position, the notification obligation is imposed on the subsidiary or affiliated entity.

- The target company is a party obliged to notify the relevant authority in the case of follow-up acquisitions, i.e., when the buyer acquires or achieves significant participation of the target, or acquires dominance over the target by way of a redemption of target's shares or the acquisition of target's own shares; division of the target company; and/or a change of articles of association of the target company resulting in the change of personal rights.

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

It is possible to apply for ***informal interpretations or guidance,*** but the authority has no obligation to respond to such informal enquiries and the interpretations will not have a binding effect.

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

This is perhaps the most important aspect of the regulations. 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 the 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).

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, 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 the case of certain types of indirect acquisition (e.g., an 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, any resolutions adopted at a shareholders' meetings of the target company in violation of the Act are null and void, except when such resolutions fulfil quorum requirements and the resolutions would have been adopted even without the invalid votes. The relevant authority also has a right to repeal any resolution that is deemed null and void. Moreover, in some cases, the relevant authority may impose an obligation to sell the shares within a specified deadline.

In addition to the above provisions, a person or entity that purchases or achieves significant participation or acquires dominant position without the required notification is subject to a financial penalties of up to:

- PLN 100,000,000 (approx. EUR 22,000,000) – in the case of companies listed in the Regulation; or
- PLN 50,000,000 (approx. EUR 11,000,000) – in the 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 representing the subsidiary, who knows about a 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 (approx. EUR 2,200,000) – in the case of companies listed in the Regulation; or
- PLN 5,000,000 (approx. EUR 1,100,000) – in the 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 at a shareholders' meeting of the target company and *executes* share rights on behalf of an entity that has not notified the relevant authority of the transaction, provided that such person knew or should have known about such circumstances.

Is there a filing deadline and what is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

Under the Act there is no "deemed approval" procedure. According to the designation of 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. The Minister is required to issue a decision granting or denying the approval within this 90-day period.

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 to commence 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.

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?

The general rule is that notification shall be made before taking any positive steps or legal actions that lead to acquiring or achieving significant participation or acquiring dominance in a strategic company. Thus, the review needs to be carried out prior to the closing, and in some cases. even prior to the execution of a binding agreement. In practice, this means that the review may be made on the basis of a *letter of intent,* which normally is non-binding, but in this case is an important part of the process of approval. At the same time, the Act states that the agreement (or other legal actions) covered by the notification can be conditional upon the authority's approval.

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

If the parties conclude a transaction before approval is obtained, the general sanctions detailed above shall apply; in particular, the transaction completed without notification or despite the opposition of the relevant authority will be null and void by virtue of law.

Which authorities are responsible for conducting the review?

According to the listing of companies 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.

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

Under the Act, it is possible to appeal the decision of the competent authority to the Administrative Court (see Wiaczek, 2021) – within 30 days after a decision has been rendered. The appeal procedure has a judicial character. Only parties to the screening proceedings have standing to appeal the decision to the Administrative Court.

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

If the relevant decision-making authority has raised 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 on a conditional basis.

5. Some conclusions and Observations

In addition to "muddying the waters" in the area of FDI, another "potential" negative for Poland today is an unstable political landscape (Hunter & Domanska, 2016) caused by certain government policies relating to the judiciary (Hunter; 2020; Zoll & Wortham, 2018; Bojarski, 2021); restrictions on the Polish press (Chapman, 2017); threats to freedom of speech (Moran, 2018); issues relating to the "rule of law" (Rech, 2018; Bogdanowicz, 2020), human rights (Fleming & Foy, 2021) and gender equality (Rappy, 2022); and other controversial social issues such as the ongoing and perhaps deepening European refugee crisis, now exacerbated by events in Ukraine (see Klaus, 2017; Zanfrini, 2021); LGBT rights (Roache, 2019; Reid, 2021); and abortion (see Hussein, Cottingham, Nowicka, & Kismodi, 2018; Picheta, Osinski, & Mahmood, 2020; Plock, 2020; Amnesty International, 2022) and reproductive rights (Krajewska, 2021).

Many of these actions have pitted Poland against the policies and norms of the European Union (Hunter, 2017; Hunter, 2019; Erlanger & Pronczuk, 2021; Cienski, 2022). These have been chronicled and dissected by Hunter and Lozada (2021).

For some, the situation has reached a critical "tipping point." Ciobanu (2021) recently wrote:

> "The hollowness of the Polish state has been exposed by the coronavirus pandemic: almost half a million people died in the country last year, the highest figure since World War II, and 20 per cent above the annual average in recent years, according to data compiled by *Gazeta Wyborcza*.
>
> Throughout the year, Poles have been reminded again and again of the decrepit state of the national healthcare system, which has been severely underfunded for decades in a similar fashion to other post-communist countries. The pandemic follows years of protests (including hunger strikes) by Polish doctors and nurses demanding better pay and working conditions."

As a result, the "Poland of 2022" may once again be seen to be at a crossroads. For approximately 30 years, Poland was seen as welcoming, supporting, and sustaining FDI to an extent unparalleled in post-transition countries. Because the changes in the structure of FDI activities, and certain impulses gripping the nation described above that reflect skepticism or even hostility to further integration with the European Union on issues relating to culture, politics, and religion, the economic progress that Poland has experienced in the past thirty-three years may be in jeopardy, "muddled in mass of social paradoxes brought on by internal political machinations and interference by certain internal forces (Hunter & Lozada, 2021).

The next few years will certainly determine whether Poland will continue on a "glide-path to success" as demonstrated by its ability to continue to attract significant inflows of FDI or whether these counter-indications ultimately will result in a loss of investor confidence brought about by a perceived unwelcoming attitude to foreign investment on the part of the current regime. Only time will tell how these and other issues will be resolved.

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