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SHIELD 4.0 – legal changes (restructuring, support of investment projects, compliance, criminal law)

After its promulgation on 23 June 2020 in the Journal of Laws (item 1086), the Act on subsidies to interest on bank loans provided to COVID-19-affected entrepreneurs and on simplified procedure for approval of a composition in connection with COVID-19, commonly referred to as “Shield 4.0”, entered into force (hereinafter “**the Act**”).

The Act enables the Bank of National Economy (BGK) to subsidize interest accruing on loans granted by commercial banks to entrepreneurs affected by COVID-19 and implements (on a one-off basis until mid-2021) a new type of restructuring procedure; additionally, it extends the mechanisms of protection of the Polish companies against their acquisition by entities from outside the EEC and OECD and acquisition of majority shareholdings. The Act also introduces other changes to the so-called Anti-Crisis Shield (changes regarding the labour law and tax law, and to the public-law burdens are discussed separately).

Presented below are selected changes to legal regulations:

INSTRUMENTS OF AID AND SUPPORT OF INVESTMENT PROJECTS

I. Possibility for entrepreneurs to apply for a subsidized loan (revolving or non-revolving working-capital loan denominated in PLN) from a bank cooperating with BGK:

- agreements for a subsidized loan may be concluded until 31 December 2020 with entrepreneurs adversely affected by COVID-19 (exposed to the risk of financial liquidity loss) who, as at 31 December 2019, were not in difficulty and who continue their business activity (or those who suspended their business activity after 1 February 2020 in connection with COVID-19):
- the subsidies will constitute maximum 2 percentage points (for micro-, small- and medium-sized entrepreneurs) or 1 percentage point (for other entrepreneurs) of the interest payable to the bank;
- the subsidies will be paid for a period of up to 12 months from conclusion of the subsidized loan agreement;
- the subsidies are classified as public aid and are summed up with other forms of aid according to specific rules (increased limit) established in connection with COVID-19 by the European Commission.

II. Changes to the act on support of new investment projects:

- a change to the definition of a “new investment project” – investments consisting of acquisition of assets which belong to an establishment that was closed down or would have been closed down if not for the acquisition, can benefit from the public aid;
- the way of determining the period for which the subsidy-related decision is issued was made more precise in a situation where the investment is partly located on the premises classified as a special economic zone (the subsidy-related decision can be issued for the period of 15 years if at least 51% of the investment site is located within a special economic zone);
- the expenditure incurred for 2-year labour costs, lease, tenancy and financial leasing can be recognized as eligible costs of a new investment.

FINANCIAL RESTRUCTURING AND PAYMENT LAGS

III. The new simplified restructuring procedure (SRP) is to enable the debtor to negotiate with the creditors **without engaging the court in opening the procedure**, with simultaneous **protection against enforcement by creditors and termination of the crucial contract**, individually. Essential information about the SRP:

- The Simplified Restructuring Procedure is a modified form of procedure for approval of a composition, available only until 30 June 2021 – on a one-off basis;

The SRP is initiated by the entrepreneur through **publication of an announcement** in the Court and Business Monitor [*Monitor Sądowy i Gospodarczy*]; publication of the announcement does not involve the court, but **must be preceded** by conclusion of an agreement with a restructuring adviser who will act as the supervisor of the composition, and secondly – by preparation by the debtor of the composition proposals, a list of creditors and a list of disputable debts, and their submission to the supervisor of the composition.

in the SRP, **the composition** may apply to debts secured by a security in rem, even **without the creditor's consent** if the proposed composition provides for full repayment of the debt or ensures that the debt will be repaid to an amount not lower than expected in case it is enforced from the security in rem (such creditors are treated as a separate category of interest);

the debtor gets **4 months** from initiation of the SRP for conclusion of composition with creditors and submission of an application to the court for approval thereof (after this time limit the SRP is cancelled);

for 4 months from the announcement in the Monitor, the **enforcement procedures regarding debts covered** by composition by operation of law (or by proposed composition – see above) **are suspended**, no new proceedings may be opened for enforcement or for establishing a security, and also **the debtor may not have tenancy, rental or leasing contracts** or a previously granted loan **terminated**;

to prevent abuse, the creditor, supervisor of the composition and the debtor himself may apply to the court for annulment of the effects of initiation of the procedure.

IV. The broadly commented-on rights granted to the borrower whereby the borrower can suspend repayment of loans upon a unilateral decision (which will automatically extend the loan period and related deadlines) is vested in consumers only.

V. A change to **Art. 5 of the Act on counteracting excessive delays in commercial transactions** – only a creditor **who is not a large entrepreneur** may impose interest on a debtor if the payment term exceeds 30 days (so far interest could be imposed by each creditor; thus the protection of large entrepreneurs was limited). The changed rule also applies to commercial transactions dated before the effective date of the of the Act, with respect to which the 30-day period ends after the effective date of the Act.

CONTROL OVER INVESTMENTS FROM OUTSIDE THE EEC AND OECD

VI. Implementation of **protection measures against acquisitions by entities from outside the EU/EEC/OECD – by introduction of a comprehensive auditing framework for a period of 24 months** with respect to activities which might pose a threat to public safety, order and health by such entities in connection with deteriorating economic situation resulting from COVID-19 epidemic. The regulations amend the act on control of certain investment projects, and come into force 30 days after promulgation.

Important information:

The act requires that the **Chairman of the Office for Protection of Consumers and Competition** be notified in advance about an intended investment by an entity from outside the EU/EEC/OECD which would lead to acquisition, achieving or obtaining, as appropriate, either directly, indirectly or *a posteriori*, with respect to a protected entity:

- **a significant shareholding** (achieving or exceeding 20% or 40% share in voting, capital or profit or acquisition or lease of an enterprise or an organised part of an enterprise) or
- **dominance** in a company (achieving or exceeding 50% share in voting, capital or profit)

Entities to be covered by the protection will include **entrepreneurs having their registered office in Poland on the day of the transaction subject to control, who fall under one of the below categories:**

- a public-law company,
- an entrepreneur who:
 - has assets disclosed in the list of facilities, systems, equipment and services making up the critical infrastructure;
 - develops or modifies the types of software indicated in the project (e.g. for power plant control, for management, control or automation of drinking water supply installations, etc.);
 - provides data collection or processing services in a cloud, or
 - operates the business activity in one of the 21 sectors listed in the Act (from traditionally recognised as strategic, such as the power, gas, telecommunications, fuel and chemical industries, to new sectors which appear in such regulations, for example production of medicinal products or meat, milk, fruit and vegetable processing);

if their income from sales and services in Poland during any of the two financial years preceding the notification exceeded the equivalent of EUR 10 million;

- audits will be initiated *ex officio* or as a result of a notification;
- the proceedings will be of strictly defined duration
- preliminary verification procedure – maximum 30 days
- actual audit – maximum 120 days
- the audit will apply to investments which lead to acquisition of significant shareholding or dominance in an entity subject to protection;
- investments made without the notification or in breach of an objection issued by the Chairman of the Office for Protection of Consumers and Competition (UOKiK) will be invalid, and the breach may be penalized with a fine of up to PLN 50,000,000 or imprisonment from 6 months to 5 years.

CORPORATE SYSTEM

I. Changes to the act amending the Commercial Companies Code **by suspending the application of the share dematerialization regulations** with respect to companies under bankruptcy which did not make the first call to submit shares to the company, for the duration of the bankruptcy procedure, i.e. until the end, termination, dismissal or cancellation of the bankruptcy procedures. The dematerialization transactions made to date remain in force, and the company gets additional time to complete them. Only 1 year after completion/termination/dismissal/cancellation of the bankruptcy procedures the effectiveness of the share documents issued by a company in bankruptcy will expire, and the paper shares will be valid in the company's internal relations for 5 years from the end of this date.

II. Extended terms of office for governing bodies in foundations and associations if they end during the state of epidemic threat or epidemics (a change to the Act on Foundations and the Law on Associations).

REAL PROPERTY AND BUILDING INVESTMENTS

III. The **flow of documents** resulting from **geodetic works** can be made entirely electronically; geodetic documents can be certified true.

IV. **Changes to the law governing the management of agricultural real property of the State Treasury** whereby the managers of special economic zones gain the preemptive right to real property located within the boundaries of the special economic zone they manage as well as real property located outside SEZ and designated for industrial use,

services, or industrial use and services in the local spatial development plan.

V. **Repealing a provision of the construction law** which stipulates that **lodgment of an objection** by a body of architectural and construction administration imposes an obligation on the project owner to **suspend construction works** or to demolish the building.

VI. **Planning procedures** (governed by the Act on spatial planning and management) are possible by **means of remote communication**.

VII. **A change of the amount of stamp duty** (from the current PLN 107 to PLN 598) **for a land development decision**, with simultaneous exemption from the duty of owners and perpetual users of real property to whom the land development decision will be issued regardless of the purpose of its issuance.

VIII. **Change to the act on preparation and implementation of strategic investments in transmission networks – the project owners get the right to dispose of the real property required** to prepare and implement a strategic investment project in a transmission network and the possibility to start construction work as of the date of issuance of the decision determining the location of the project (before the decision becomes final).

IX. **Postponement of the deadline for payment of the annual fee for perpetual use** for 2020 until 31 December 2021. Additionally, if the entrepreneur notifies of timely payment of the fee, and he had no outstanding debt under the public law at the end of Quarter 3 of 2019, the amount of the fee may be reduced in proportion to the number of days of the COVID-19 epidemic threat or epidemics in the year.

X. **Exemption of entrepreneurs, non-government organisations and state-owned corporations from fees** payable to the State Treasury under contracts of lease, tenancy or use of real property which belongs to the State Treasury, and granting the same right to the Local Government Unit with respect to real property owned by the LGU:

- for the period of 3 months,
- provided that the turnover decreases as a result of COVID and that there are no outstanding public-law liabilities at the end of Quarter 3 of 2019.

COMPLIANCE AND CRIMINAL LAW

XI. **Exemption from the obligation** resulting from the Act on anti-money laundering and counteracting the financing of terrorism to provide Inspector General of Financial Information with information **about completed transfer of funds** in an amount exceeding EUR 15,000 if such funds were provided as part of the central or local government program intended to **counteract COVID-19**.

XII. Implementation of a possibility to carry out an audit or any of the audit procedures **remotely** through the postal service operator or means of electronic communication, if this will facilitate the audit and the nature of the business activity operated by an entrepreneur supports this choice (**a change to the regulations of the Law on Entrepreneurs**).

XIII. Changes to the Criminal Code:

reinstatement of joint penalties, which is to lead to a reduced number of joint judgments and thus a reduced number of cases in courts referred to be examined during court hearings.

introduction of the crime of “particularly audacious theft” [the perpetrator stealing movable property worn by a person displays a dismissive or defiant attitude or resorts to violence (other than towards a person) in order to take possession of property], for which **a higher penalty is provided for (from 6 months to 8 years)** than for ordinary theft.

XIV. Expansion of the possibility to carry out certain criminal-law procedures remotely, including:

the possibility for a suspect to attend the sitting at which temporary arrest is to be contemplated using technical equipment for direct and simultaneous transmission of image and sound (Art. 250 of the Criminal Procedure Code);

an arrested person must be released within 24 hours of his/her being put at the court’s disposal, if s/he was not served with or notified of the decision during a sitting held with the use of technical equipment (Art. 248 §2 of the Criminal Procedure Code);

introduction of the obligation to serve the defendant with a decision on temporary arrest (Art. 100 of the Criminal Procedure Code).

increase of the group of persons to participate in the process of witness interrogation in order to ensure due course of this procedure, when it is conducted remotely with direct transmission of image and sound (Art. 177 of the Criminal Procedure Code).

XV. Consuls are vested with the right to perform an act at the request of a court, prosecutor or a public administration authority, i.e. **being present in the place of residence of a witness interrogated in the manner specified in Art. 177 §1a of the Criminal Procedure Code**(i.e. using the technical equipment which enables remote interrogation with image and sound transmission), by a change of the consular law).

The above presentation and additional materials describe selected changes resulting from Shield 4.0. Should you have any questions regarding the above or other changes, you are welcome to contact us.



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