



New law expanding foreign investment controls

Poland adopted a new law on foreign direct investment controls as part of the so-called “Anti-Crisis Shield 4.0”. The law expands the State’s control over M&A transactions in some strategic sectors of the economy.

These provisions came into force on 24 July 2020 and they seem to apply to ongoing transactions (those not closed before that date).

On 21 July 2020 President of the Office of Competition and Consumer Protection (UOKiK, the authority responsible for application of the new measures) published guidelines concerning new rules on foreign direct investment. Even though the guidelines are not a binding source of law they show how the new measures will be interpreted and adopted.

THE IMPACT ON M&A TRANSACTIONS

- » The new provisions have been prepared in order to protect the Polish industry against “hostile takeovers” performed by investors from outside of (1) the European Union, (2) European Economic Area (EEA), (3) Organisation for Economic Cooperation and Development (OECD). The carve-out for investors from OECD was added at the very last stage of the parliamentary works, and it significantly softens the impact of the new law, as not only investors from the EU, but also those from the US, Canada, Australia, Israel, as well as Japan or South Korea, will benefit from the carve-out.
- » The new Act has a significant impact on M&A transactions, as it:
 - > concerns enterprises active in numerous sectors of the economy;
 - > establishes a low materiality threshold for transactions (transactions regarding enterprises with an annual Polish turnover exceeding EUR 10,000,000 are subject to notification);
 - > grants the competent authority – that being UOKiK – far-reaching powers (one of the conditions triggering their objection is a mere potential threat to the public order or public security of the Republic of Poland or public health in the Republic of Poland);
 - > provides for strict financial penalties, as well as imprisonment for natural persons, in the event of a violation of duties resulting from the Act.

ECONOMIC SECTORS SUBJECT TO PROTECTION

- » The list of entities covered by the new regulations (so-called protected entities) is relatively broad and includes, among others:
 - > public companies;
 - > entities which hold assets listed as “critical infrastructure”; and
 - > entities doing business in certain sectors of the economy: IT (software developers dedicated to certain specified sectors), entities involved in electricity generation (both conventional and renewables), entities involved in the transmission and storage of fuel and gas, telecommunication companies, entities in the medical and pharmaceutical industry (the manufacture of medical devices and instruments, as well as medicines and other pharmaceutical products, etc.), as well as entities involved in the generation, transmission and distribution of heat, and also the processing of meat, dairy, grain and fruits and vegetables.

WKB’s experts are at your disposal.

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TYPES OF TRANSACTIONS SUBJECT TO CONTROL

- » Only those transactions undertaken by entities (dominant undertakings with the buyer's capital group) **from outside of the European Union, EEA and OECD** are subject to control.
- » The Act concerns actions which may lead to **the acquisition of dominant control or "significant participation"** (meaning acquiring or crossing the 20% or 40% shareholding thresholds). The law covers not only the direct acquisition of shares, but also indirect acquisitions through subsidiaries, asset deals, and all types of indirect means of taking control or gaining influence over another entity (e.g. mergers, demergers, amendments to articles of association, redemptions of shares, as well as all other transactions or acts resulting in the indirect acquisition of significant participation or control, including those performed on the basis of foreign transactions under foreign law).
- » The new law applies to cases where the target enterprise has achieved a turnover in excess of EUR 10 million in the Republic of Poland in at least one of the two preceding financing years.

COMPETENCES OF THE PRESIDENT OF THE OFFICE OF COMPETITION AND CONSUMER PROTECTION

- » UOKiK is intended to undertake the control of foreign investments.
- » It is worth noting that this authority also oversees concentrations on the basis of the current Act on competition and consumer protection.
- » Therefore, it is possible that certain transactions may, in practice, require two approvals from the same government body, issued on the basis of different conditions.

ASSESSMENT CRITERIA FOR NOTIFIED TRANSACTIONS

- » UOKiK may object to a transaction if "at least a potential threat to the public order or public security of the Republic of Poland or public health in the Republic of Poland" exists.
- » Additionally, an objection may be issued if the applicant fails to provide all of the required information, as well as where it is impossible to determine if an EU-based entity acquiring control or significant participation has fulfilled these conditions within the previous 2 years at least.
- » The assessment will therefore be performed on the basis of very broad conditions. Thus, this gives UOKiK broad powers.

SUBMISSION OF A NOTIFICATION

- » In principle, a transaction must be notified prior to its consummation.
- » Unfortunately, the Act is also imprecise in this regard, since in other sections it imposes an obligation to notify prior to the conclusion of "any agreement creating an obligation to acquire", and, in relation to public companies, requires notification prior to the announcement of a public tender offer (which may indicate that it is impermissible to announce a public tender offer conditional on approval – in practice, this may create certain difficulties, including for example, the leak of the intention to announce a tender offer prior to it being announced). The Guidelines do not – in detail – address and resolve this issue.
- » The transaction should not be completed prior to clearance being granted or the lapse of the statutory time period for the issuance of the clearance decision.

DURATION OF THE PROCEEDINGS

- »» Approval of a transaction which does not raise any issues, or confirmation that the transaction is not subject to control, will be given within 30 business days.
- »» Cases requiring review from a public security or public order perspective will be completed within 120 calendar days (where the clock stops any time the President of the UOKiK seeks additional information).

PENALTIES FOR FAILING TO FULFILL THE NOTIFICATION OBLIGATION

- »» Any acquisition made without the required notification shall be invalid.
- »» Moreover, the Act provides for both very strict financial fines (up to the maximum amount of PLN 50 000 000) and penal responsibility (up to 5 years imprisonment) for non-compliance with the new regulations (these penalties may be imposed both on the entity acquiring an interest without notification, as well as natural persons acting on its behalf).