

New foreign investments control regime in Poland as of July 24, 2020

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Similar to numerous initiatives in Western Europe, as part of the so-called “Anti-Crisis Shield 4.0”, the Polish Parliament adopted legislation amending the Act of July 24, 2015, on the Control of Certain Investments, thus introducing full-fledged foreign direct investment control in Poland. **The new law entered into force on July 24, 2020.**

What types of investments will be subject to control?

Entities from outside the EEA and/or the OECD have to notify the Polish Competition Authority (“UOKiK”) of the intention to make an investment resulting in acquisition, achievement or – respectively – obtaining, directly, indirectly, or subsequently of:

1. “significant participation” (defined briefly as 20% or 40% of share in the total number of votes, capital, or profits or purchasing or leasing of an enterprise or an organized part thereof) or
2. the status of a dominant entity within the meaning of the Act of July 24, 2015, on the Control of Certain Investments in an entity subject to protection.

Under the new legislation, subsidiaries of entities from outside the EEA and/or the OECD, even if they have their seat in the EEA or the OECD, are considered to be entities from outside the EEA and/or-respectively - the OECD.

Apart from direct acquisitions, the legislation lists several examples of “indirect” acquisitions, including e.g., acquisition on the basis of foreign law, acquisition by a subsidiary or acquisition on one’s own behalf, but at the request of another entity, including as part of the performance of a portfolio management contract. The new legislation covers also so-called subsequent acquisitions, i.e., as a result of, e.g., redemption of shares of the protected entity or amendments to the agreement or statutes of the protected entity with respect to the preference of shares.

The legislation also contains a circumvention clause. As stated in the explanatory memorandum which accompanied the law, this is supposed to thwart attempts at avoiding the obligation to clear the transaction in case an entity from outside the EEA and/or the OECD wanted to merely pretend to be an entity from the EEA or the OECD.

What entities will be subject to protection?

Entities subject to protection are undertakings within the meaning of the new legislation, having their seat in Poland on the day of the transaction subject to control and belonging to one of the following categories of entities:

1. a public company within the meaning of the Act on Public Offering;

2. an undertaking which:

- has property that has been disclosed in a separate consolidated list of structures, installations, devices, and services included in the critical infrastructure,
- develops or modifies certain types of software indicated in the law or
- conducts business activity in one of 21 industries listed in the law (both those traditionally considered strategic, such as the energy, gas, telecommunications, fuel, and chemical industries, and novelties such as, e.g., manufacture of medicines or processing of meat, milk, fruit, and vegetables)

if their revenue from sales and services in Poland exceeded €10 million in either of the two financial years preceding the notification.

The control procedure

The main principle is the prior notification of the transaction to UOKiK. In the case of a tender offer to subscribe for the sale or exchange of shares in a public company the notification needs to happen before the tender offer is published. The entity submitting the notification must refrain from carrying out the activities covered by the notification until the date on which the decision should be issued.

The legislation provides for exceptions from the prior notification obligation in case of an indirect acquisition as a result of an act carried out on the basis of foreign law. In this case, the notification can be submitted after the acquisition within one of a deadlines specified in the law.

UOKiK's proceedings are divided into two phases. In phase one, UOKiK has 30 days to issue a decision or to move the case to phase two. According to the explanatory memorandum of the legislation and the guidelines, UOKiK would clear "non-controversial" transactions within this period. In phase two UOKiK has 120 days to issue a decision. The procedure provides for various events that suspend both of the above deadlines, including a request for information from UOKiK which suspends the deadline until the applicant's response.

Grounds for opposition to the transaction

UOKiK will oppose the acquisition if:

1. there is at least a potential threat to public policy or public security of Poland, or public health in Poland or
2. it may have a negative impact on projects and programs of European Union interest.

Additionally, it will oppose the acquisition if it is not able to determine if the buyer is from the EEA or the OECD or if the notifying entity does not supplement formal shortcomings of the notification or does not provide additional explanations.

However, if these premises are met, but the acquisition was indirect and took place as a result of an act carried out on the basis of foreign law, instead of expressing an objection, UOKiK will declare inadmissibility to exercise the rights attached to the shares of the protected entity.

UOKiK's decision is subject to appeal to administrative courts.

Consequences of non-compliance with the new

rules

Investments carried out without notification or despite an objection decision are invalid. However, in the case of an indirect acquisition as a result of an act carried out on the basis of foreign law, the sanction is the inadmissibility to exercise the rights attached to the shares of the protected entity.

Resolutions adopted in violation of the new provisions are void, unless they meet the quorum and majority of votes requirements without taking into account invalid votes. UOKiK is entitled to bring an action for annulment of the respective resolutions.

The legislation also provides for criminal liability for closing an acquisition without the required notification (in such a situation a fine of up to PLN 50 million or imprisonment of between six months and five years would apply). For failure to submit a notification in certain circumstances as well as for exercise of the rights attached to shares on behalf of the entity which, despite the obligation, has not notified that it has achieved a significant participation in the protected entity, if the entity exercising those rights was aware of this circumstance or could find out about it, the sanction is a fine of up to PLN 5 million or imprisonment of between six months and five years.

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