

On July 24, 2020 the amendment to the Act on Control of Certain Investments of 2015 (the “Amendment”) enters into force, which will materially extend control over mergers and acquisitions in Poland for 24 months. The Amendment cites Articles 52(1) and 65(1) TFEU, invoking protection of public order, safety and health, as the main grounds justifying implementing the limitations provided for in the Amendment.

- Said Amendment extends the category of “protected entities.” Any public company as well as company or partnership with its registered office in Poland which owns certain critical infrastructure or operates in particular industry sectors (e.g. oil and gas, telecommunications, pharmaceuticals and medical devices, energy, developers of certain software, as well as food processing) may be treated as a “protected entity,” the takeover of which is subject to limitations, unless the Polish revenue of such entity had not exceeded €10 million in any of the two preceding years.
- The Amendment applies to public and private transactions (intragroup transactions have not been explicitly exempted).
- Any acquisition, whether direct or indirect, of dominance over a protected entity or a material stake in such entity is subject to control by the President of the Office for Competition and Consumers’ Protection (UOKiK), regardless of the form of such acquisition. Dominance is understood as holding the majority of votes or capital, the right to appoint the majority of directors, but also as the right to decide, on a contractual basis, on the entity’s course of action. Material stake is defined as holding more than 20% of votes, income or capital of the protected entity.
- The Amendment also applies to indirect acquisitions, such as through subsidiaries, entities acting on behalf of another or by entities acting in concert, as well as other situations in which dominance over, or a material stake in, a protected entity is acquired (e.g. merger of companies outside Poland resulting in indirect acquisition of dominance over a Polish company).
- Any potential acquirer that is not an EU citizen or does not have its registered office within an EU/EEA/OECD member state (“Member State”) or did not have registered office within two years before notification, will need to file a notification with UOKiK before taking any steps toward the transaction. Any branches or subsidiaries of a non-Member State entity will be treated as non-Member State entities themselves. The Amendment also provides for a concept of circumventing the law, reading that if the acquisition is contemplated by an EU entity, such entity may be treated as a non-Member State entity if it does not carry out real business other than the contemplated acquisition or does not have substance (enterprise, office, employees) within a member state.
- UOKiK will, within 30 business days, decide to either discontinue the proceedings, meaning that the acquisition may proceed (and ones already completed are approved), or launch a full investigation. In the latter case, UOKiK must issue the decision on the application within 120 days, either approving the notified transaction or objecting to it (this term may be longer – the clock stops anytime UOKiK requests additional documents or information). The parties may not proceed with the contemplated transaction or need to withhold exercising their voting rights (for follow-up acquisition) until the decision has been issued.
- UOKiK may reject the application, inter alia, if the proposed transaction may potentially jeopardize public order, safety or health (taking into account the provisions of TFEU).
- Any acquisition completed without notification or with the application being rejected is null and void and, if shares have been acquired as a result of follow-up acquisitions, the acquirer may not exercise the voting rights vested in such shares. Any breach of this limitation may render the resolution null and void. UOKiK may also issue a decision requesting divestment of acquired shares. The Amendment also provides for financial penalties of up to PLN 50 million and/or criminal sanctions for acting without notification or for a failure to file one.

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