

AmCham.Pl QUARTERLY

The official magazine of the American Chamber of Commerce
in Poland



3/2020

VOL III, No. 3 • ISSN 2545-322X

EXPERT:

Marcin Wnukowski and Karolina Łasowska from Squire Patton Boggs write about the new law for scanning investors buying control stakes in companies in Poland.

EVER SINCE ITS INCEPTION 30 YEARS AGO, ONE OF THE MOST FUNDAMENTAL FUNCTIONS OF AMCHAM HAS BEEN TO MAINTAIN PLATFORMS FOR SHARING PROFESSIONAL KNOWLEDGE AND EXPERIENCE BETWEEN ITS MEMBERS. THERE ARE SEVERAL SUCH PLATFORMS, INCLUDING AMCHAM MONTHLY MEETINGS, THE AMCHAM COMMITTEES, AND THE EXPERT SECTION OF THE CHAMBER'S MAGAZINE. IN THIS DISPATCH **MARCIN WNUKOWSKI, PARTNER AT SQUIRE PATTON BOGGS, AND KAROLINA ŁASOWSKA, ASSOCIATE AT SQUIRE PATTON BOGGS,** WRITE ABOUT THE NEW PROVISIONS OF A LAW WHICH CONTROLS INVESTMENTS IN COMPANIES IN POLAND AND HOW THEY MAY AFFECT THE MARKET OF MERGERS AND ACQUISITIONS.

EXPERT Foreign Direct Investment

REINFORCING THE NET

New rules for scanning FDI coming to Poland

Poland has adopted a new act intended to screen foreign direct investments in Polish companies. The new law (the “Amendment”) amends the Act on Control of Certain Investments of 2015 (the “Act”) and extends control over mergers and acquisitions. The new provisions entered into force on July 23, 2020 and will expire in 24 months.

In justifying the Amendment, the government referred to Articles 52.1 and 65.1 of the Treaty on the Functioning of the European Union, invoking the protection of public order, safety, and health as the main grounds justifying imposing the new limitations. Noteworthy is that many member states and the European Commission have emphasized the need for regulations protecting valuable core European assets from takeover at lower prices in the wake of the COVID-19 epidemic.

WHAT'S NEW?

The Amendment extends the catalog of so-called “protected entities” by stating that all companies with registered offices in Poland that are public companies listed on the stock exchange, own critical infrastructure, or conduct commercial activity in a specific sector of industry are “protected entities” subject to control under the Act unless the Polish revenues of such entity did not exceed EUR 10 million in any of the two preceding years. These specific industry sectors include oil and gas, telecommunications, pharmaceuticals, medical devices, energy, developers of specific software, and food processing. Intra-group transactions are not explicitly exempt

under the Amendment.

Any acquisition of dominance, whether direct or indirect, of a protected entity or a material stake in such entity is subject to control by the UOKiK, the Polish Office of Competition and Consumer Protection. 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 receive more than 50 percent of revenue or the right to decide, on the entity’s course of action on a contractual basis. A material stake is defined as holding more than 20 percent of the votes, income, or capital of a protected entity.

The Amendment not only covers direct acquisitions, but also includes many cases of indirect acquisition, such as through subsidiaries, entities acting on behalf of other entities, or by entities acting in concert. Further, the Amendment also applies to the so-called secondary acquisitions (*nabycie następcze*), which occur when dominance or a material stake is acquired through redemption of a protected entity’s shares, by way of demerger or merger of a protected entity with other entities, or through actions not aiming at such acquisition—for instance, a merger of companies outside Poland resulting in the indirect acquisition of dominance.

NO TRANSACTION WITHOUT NOTIFICATION

Acquisition of dominance or a material stake in a protected entity must be preceded by notification to the UOKiK if the direct or indirect potential acquirer is not a national of the EU, a member state of the European Eco-



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nomie Area, or the Organisation for Economic Co-operation and Development. Companies must notify the UOKiK if they have not been based in the above mentioned states for two years. Investors from the US are exempted from the Amendment, though. Any branches or subsidiaries of a non-exempted entity will be treated as non-exempted entities themselves. The Amendment also attempts to close a potential loophole to avoid the Act by stating that if an exempted entity contemplates the acquisition, such entity may be treated as a non-exempted entity if it does not do real business other than the contemplated acquisition, or if it does not have substance (enterprise, office, employees) within the EU/EEA/OECD.

Subject to several exemptions, the notification needs to be filed before executing any agreement resulting in the obligation to acquire a stake in the protected entity. Within 30 days, the UOKiK will be obliged to decide either that there are no objections in respect of the acquisition or to launch a full investigation. In the latter case, the UOKiK must issue a decision within 120 days either approving the notified transaction or objecting to it (this deadline may be longer because the clock stops any time the UOKiK requests additional documents or information). The parties involved may not proceed with the contemplated transaction until the UOKiK’s decision has been issued.

The UOKiK may object to the acquisition if it determines that the proposed transaction may cause potential danger to public order, safety, or health, based on the Treaty on the Functioning of the European Union. An acquisition completed with-

out notification or that has been objected to becomes null and void. If shares have been indirectly acquired as a result of secondary acquisitions, the voting rights vested in such shares may not be exercised. The Amendment also provides for financial penalties of up to PLN 50 million, criminal sanctions for acting without notification or failing to file a notification, or both financial penalties and criminal sanctions.

EFFECTS

The Amendment will materially change the market of mergers and acquisitions as well as private equity for Polish companies.

First, it adds another hurdle to the acquisition process. The parties involved must file the required documents and wait for the outcome of these proceedings before the UOKiK. Furthermore, the notified transaction will now be analyzed from the point of view of public order, safety, and health. Since there are not many existing case laws regarding these issues in Poland, the parties to the transaction may be uncertain as to the outcome of a UOKiK review, adding another layer of complexity. Finally, there may also be anxiety concerning too much discretionary power vested in the UOKiK in potentially blocking transactions concerning private companies.

The Amendment also sets forth the rules of exchanging information and cooperation between Poland, the European Commission, and EU member states with respect to foreign investments. The new provisions may require investors to provide information about the contemplated investment or the investment which has already been put in place after April 10, 2019.