



## SHIELD 4.0 – The Polish antitrust authority gains new powers to block investments

The Sejm, the lower chamber of Polish parliament, has just adopted and passed on to the Senate the latest package of legislation touted as the Anti-Crisis Shield intended to counter the effects of the coronavirus epidemic. The numerous legislative proposals advanced by the government in this context include amendments to the legislative Act of 24 July 2015 regarding control of certain investments (“**the Act**”) which, if adopted, will have the effect of significantly expanding the powers of the Polish state – represented by the **President of the Office of Competition and Consumer Protection (“UOKiK”)** – to interdict investments as a result of which control or dominance over a protected entity would pass to an **Investor** who:

- **Is not a citizen of a member state of the European Union or the European Economic Area** (for natural persons) or
- **Does not have, or did not have for at least 2 years prior to the filing of the proposed investment, a corporate seat within a member state of the European Union or the European Economic Area** (for other persons).

Apart from that, the legislation expressly stipulates that **subsidiaries, branches, and representative offices of such an Investor shall be regarded as entities which do not have their seats within the European Union.**

### Who are the protected entities ?

Protection from take-overs under the proposed legislation extends to business enterprises **with their registered seats in Poland** whose revenues from sale of goods and services within Poland in either of the **2 financial years preceding the filing exceeded the equivalent of EUR 10 mln.** Protection shall extend over:

- **Publicly listed companies** within the meaning of the legislative Act of 29 July 2005 regarding public offering and conditions for introduction of financial instruments to the organised trading system and public companies;

- **Entities holding critical infrastructure** in accordance with the legislative Act of 26 April 2007 regarding crisis management (comprising power supply systems, energy commodities and fuels, communications, ICT networks, financial infrastructure, food and water supply, healthcare, transport infrastructure, rescue and emergency resources, systems ensuring continued and uninterrupted operation of the public administration, production, stockpiling, and storage and use of chemical and radioactive substances, including pipelines transporting hazardous chemicals);
- **IT companies** providing software for use in the energy industry, in water supply and sewage treatment, in telecoms (communications), in mass transport and logistics, in cashless payments, in data processing, at hospitals and laboratories, in medical devices, and for sale of prescription-only drugs;
- Companies **operating in the power, natural gas, petroleum, and (other) fuels sectors (e.g. production, storage, transport, and trading operations)**;
- Companies which produce rhenium, chemicals, fertilisers, and chemical products;
- Producers and traders of explosives, weapons, ammunition and other supplies **for the military and police forces**, and also companies which extract and process metal ores for this purpose;
- Companies in the **telecommunications sector**;
- Companies engaging in **unloading and loading** of goods at the Polish seaports of Gdynia, Gdansk, Szczecin, and Świnoujście and at river ports;
- Producers of medical equipment, medicines, and other pharmaceutical products;
- Food sector enterprises **processing** meat, milk, grains, fruits, and vegetables.

### The filing duty

Under the pending legislation, an Investor who intends to purchase / acquire dominance / a significant stake in a protected entity is obligated to file notice of such intent to UOKiK, presenting the specific information called for in the Act. Then, until the deadline for action by UOKiK has elapsed, the Investor must refrain from proceeding with the actions covered by the notice. **If the intended actions described in the notice do not fall within the ambit of the Act**, UOKiK shall refuse to initiate preliminary verification proceedings by way of a decision (which will not be subject to appeal).

### Dominance, significant stake

The proposed legislation will empower UOKiK **to block only such investments as result in acquisition / achievement by the Investor of a significant stake or of dominance in the entities subject to control**. In this aspect, the Act adopts a rather broad approach, defining

**dominance** as a situation in which the Investor secures the status of a dominant entity vis a vis a protected entity by:

1. Holding, whether directly or indirectly (through other entities), a majority of the votes in the governing bodies of another entity (also pursuant to agreement with other entities) or
2. Being entitled to appoint and/or remove a majority of the composition of the management and/or supervisory bodies of another entity or
3. Benefiting from a situation in which more than half the membership of the management board of another entity simultaneously sits on the management board of the former entity (or of its subsidiary), are its proxies, or performs management roles at the former entity or
4. Holding a capital stake in a partnership corresponding to at least 50% of all the contributions to such company or
5. Otherwise being able to decide on and define the general operating policies of another entity (in particular on the basis of a management contract or a contract for partaking in its profits).

Such dominance may be secured either through outright purchase / acquisition of shares (or rights from shares) or through execution of a contract for management of the entity or for partaking in such entity's profits.

**A significant stake**, meanwhile, is defined in terms of the ability to influence the operations of an entity by virtue of holding:

1. Shares / stakes representing at least **20% of the total votes**;
2. **A share in the profits** of another entity at a level of at least 20%;
3. A **capital stake in a partnership** corresponding to at least 20% of all the contributions to such partnership.

**Acquisition / achievement of a significant stake**, finally, is defined as:

- Achievement of a significant stake in a protected entity in accordance with the above by purchasing / acquiring shares or rights from shares or
- Achieving or exceeding the **thresholds of 20% and 40% of, respectively, the total votes** within the main governing body of the protected entity, **the profits** of a protected entity, or **the capital of a partnership** which is a protected entity in juxtaposition with the aggregate value of contributions made to by way of acquisition of share or rights from shares or
- **Purchase / lease** from a protected entity **of a business enterprise or an organised part thereof**.

The duty of prior notification shall also apply to scenarios resulting in **indirect acquisition** of dominance / achievement of a significant stake (e.g. through a subsidiary), and likewise to instances of **acquisition via succession** (e.g. consequent to redemption of the shares in a protected entity, its demerger, or its merger with another entity).

## Penalties

The legislative proposal calls for a catalogue of penalties for transgression against the Act. These include:

- **Invalidity of the act in law** in instances where acquisition / achievement of a significant stake / dominance occurred without due filing to UOKiK, or in contravention of a decision objecting to acquisition / achievement issued consequent to such filing;
- **Criminal liability:**
- A fine of up to **PLN 50 mln**, or a prison sentence from **6 months to 5 years**, or both these penalties jointly, may be applied to individuals who:

- **Acquire / achieve a significant stake / dominance without making a filing,**

- Perform such an act **in the name, or to the benefit of, a legal entity or an organisational entity without legal personality;**

- A fine of up to **PLN 5 mln**, or a prison sentence from **6 months to 5 years**, or both these penalties jointly, may be applied to individuals who:

- Are obligated – under applicable laws, or pursuant to contract – to attend to the affairs of a subsidiary and **who knew of the planned acquisition but did not file notice with UOKiK,**

- Were participating in the session of a principal governing body of a protected entity / in the adoption of resolutions by shareholders of a protected entity and proceed to exercise rights from shares on behalf of an entity which, in spite of the applicable duty, failed to file notice of achieving a significant stake in a protected entity, even though such individual **was aware of this circumstance, or could have apprised herself accordingly on the basis of information** made available in accordance with the law.

## The procedure at UOKiK

**The filing of notice to the Polish antitrust authority, as described above, will result in commencement of preliminary verification proceedings.** Apart from that, UOKiK may commence preliminary verification proceedings **on an ex officio basis within 5 years** from acquisition / achievement of a significant stake / dominance.

In particular, UOKiK may commence proceedings ex officio where it discerns indications of abuse or circumvention of the law, first and foremost some stratagem to evade a filing duty (**the circumvention clause**). Such indications would include situations where the entity concerned:

- **Does not actually pursue business operations in its own name within a range other than** actions related to acquisition / achievement of a significant stake / dominance or
- **Does not maintain a permanent establishment, office or personnel in any member state.**

To go by the reasoning proffered along with the draft Act, such solutions are to enable oversight of entities from beyond the European Union which, as the legislature poetically put it, “drape themselves in the robes” of EU / EEA companies as a ruse, so as to evade the controls put in place by the Act.

The assessment by UOKiK is to proceed in two stages – preliminary verification proceedings and the control proceedings proper.

During the first stage, UOKiK will have **30 business days** for issue of:

- **A decision refusing initiation of control proceedings and expressing lack of objections** to the proposed acquisition / achievement of a significant stake / dominance or
- **A decision on initiation of control proceedings**, this in instances where:
- The filing entity failed, within the set deadline, to rectify formal defects and/or present additional information in its original filing, or
- There obtain circumstances (public security and public interest considerations) militating in favour of further scrutiny of the notified intent to acquire / achieve a significant stake / dominance.

**Such a decision cannot be appealed.**

Within 7 days following commencement of control proceedings, UOKiK shall notify the European Commission and the remaining member states in accordance with art. 6.1 of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

**UOKiK then has 120 days from initiation of control proceedings to issue its decision.**

### **Objection by UOKiK**

In its decision, UOKiK may **object** to acquisition / achievement of a significant stake / dominance in a protected entity if:

- The filing entity failed, within the deadline set by UOKiK, **to rectify formal defects** and/or to present additional information, documents and/or clarifications;
- The proposed acquisition / achievement of a significant stake / dominance gives rise to, at least, **potential threat to public security, public health, and/or the general public order in Poland;**
- **It is impossible to establish whether or not the potential purchaser has its corporate seat in, or is a citizen of, a member state.**

The decision issued by UOKiK **may be appealed before the administrative courts.**

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