In July 2020, Polish Parliament passed an amendment to the Act on Control of Certain Investments of 24 July 2015, which entered into force on 24 July 2020 (the Amendment). That Amendment has extended the scope of government’s control over the acquisition of stakes in Polish entities. Investors from outside of the EEA, EU, or OECD would need to obtain clearance for the acquisition of a stake in Polish companies (or partnerships) carrying out business in sectors that the government has identified as being of strategic importance.

The concept behind the Amendment was not originally domestic – the Polish government responded to the EU call to protect the “European crown jewels” from buyouts by non-EU investors at lowered prices while the lowered valuations were caused by the COVID-19 pandemic. EU law (regulation 2019/452), however, does not provide for a centralised system of control over the foreign investments, but rather the information exchange network between member states. Member states are
allowed to implement the measures of screening the foreign direct investments in their territory on the grounds of security or public order. Many EU countries have provisions regarding some form of control over foreign investments, allowing the national governments to monitor and, in certain cases, object investments if these are considered undesired for various reasons.

The Amendment indeed broadened the scope of control – any investor seated in a country not being EEA/EU or OECD member state, willing to acquire (directly or indirectly) more than a 20% stake in a Polish entity carrying out business deemed to be of strategic importance, needs to obtain a permit from the President of the Office for Competition and Consumers Protection (UOKiK). The definition of so-called “protected entities” is very broad, including all public companies and holders of strategic infrastructure, as well as companies carrying out business in 21 sectors of industry, provided that such company’s turnover exceeded €10 million in either of the two years preceding the year of filing for clearance. The Amendment is to expire on 25 July 2022; it remains to be seen whether the term will be extended.

While the rules are very broad, the recent publication of case statistics by the UOKiK makes one pause to think. According to the information published by UOKiK, until December 2020, there have been four applications for clearance under the Amendment. In two cases, UOKiK ruled out that the Amendment does not apply, while in the remaining two cases, the clearance was granted. The statistics for 2021 do not show an increase in the number of cases either.

One of the reasons may well be the exception for OECD countries that does not exist in most other EU countries. This exempts investments from the US (and now the UK) and many other countries. It is also apparent that Poland, more than many other countries, chose to align its foreign direct investments (FDI) control laws to its merger control laws. The review is carried out by the same body authority (UOKiK) and transactions are only covered above a threshold, which is the same as in merger control law, where acquisitions are exempt if the Target’s turnover is less than €10 million in both of the last two years, i.e. exactly the same threshold as in FDI. Given the structure of Polish merger control thresholds, there will be very few transactions that fall under the FDI control rules but not also under the merger control rules. The gap would essentially be limited to acquisitions by companies from non-OECD countries of non-controlling minority interests above 20%. Moreover, when having to deal with the regulator in any event, companies are less inclined to make a precautionary FDI filing.

Still, looking at this from an investor’s perspective, the Amendment added another hurdle in the M&A process in Poland since the clearance from UOKiK needs to be obtained on top of merger control clearance (and other sectoral type permits). Investors need to analyse whether they are exempted and, if not, whether their Polish target is a protected entity. At first glance, it may look like an obstacle. On the one hand, it looks like the Amendment did not cause the slowdown on the M&A market – four applications within one year does not seem to be a significant number. The language of the Amendment may require some polishing and clarification (e.g. in defining the covered entities) but as said before, this regulation does not seem to be a major obstacle in the investment process. One needs to note that the Amendment applies only to the acquisition of a stake in existing companies and not to any
greenfield investments, which fall beyond the scope of application of the Amendment.

The Amendment is to expire on 25 July 2022, so there is still some time to evaluate the feasibility of this type of regulation. Introduction of FDI regulations by Poland does not seem to be an exceptional action going beyond similar regulations introduced by certain other EU member states. The practice of application of the Amendment seems to suggest it is not a real obstacle in investing in Poland. This kind of regulation may always pose a question – would the government introduce rules that are more stringent? This remains to be seen.

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