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The Minister of the State Treasury will control mergers and acquisitions in strategic sectors of Polish economy

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On 30 September 2015, the Act on Control of Certain Investments (the “Act”) enters into force. The Act aims to create mechanisms to protect against hostile takeovers of companies operating in key sectors of Polish economy.

According to the Act, prior to the acquisition of shares of strategic companies (including the acquisition of proprietary interests in entities and/or their enterprises) the purchaser will need to notify the Minister of the State Treasury and get the required approval. The obligation to inform the Minister of the State Treasury is to apply to transactions involving the acquisition of at least a “material stake” in companies doing business in the sectors that are deemed strategic for Polish economy (i.e., companies operating in the gas, power generation, chemical, petrochemical and defence sectors). Furthermore, the Act gives the Minister of the State Treasury the opportunity to create, by way of an ordinance, a list of entities subject to protection under the new regulation.

As a rule, the Act defines “material stake” as a situation allowing to influence the activity of an entity by:

- holding shares entitling to at least 20% of the total number of votes in the period of the last two years, calculated as a weighted average in that period, in the decision-making body of such entity, in particular at the general meeting or a shareholders’ meeting, or
- holding an equity interest in a partnership with a value of at least 20% of the value of all contributions made to the partnership.

Upon the receipt of the notification, the Minister of the State Treasury will assess the impact of a given acquisition on strategic sectors of the Polish economy. The Act provides for broad and general criteria for assessment (“the market share of the entity in question”; “the scale of the business”, as well as the transaction’s potential to “upset public order or public security”). This means that the Minister has a large margin of discretion when deciding about the faith of the transaction.

The decision should be taken within 90 days from the receipt of the notification or from the initiation of proceedings ex officio (i.e., when no notification is made). This is a relatively long period that needs to be taken into account by the purchaser when an acquisition is planned.

As a rule, an objection made by the Minister of the State Treasury will block the transaction. Any acquisition performed against the negative decision or without notification will be null and void. Furthermore it will be impossible to exercise rights attached to acquired shares (except for the right to sell such shares) and all resolutions adopted by the decision-making bodies of the target will also be null and void.

The Act stipulates that the failure to comply with the notification obligation carries a fine of up to

PLN 100,000,000 (+/- EUR 25,000,000) or a penalty of imprisonment between 6 months and 5 years (or both penalties together) for person acting on behalf of legal person or organizational unit without legal personality that acquires at least material stake without prior notification.

Objection decisions will be subject to judicial review by way of complaint to the administrative court.

The new regulations mean that the Minister of the State Treasury becomes another authority, next to the President of the Office of Competition and Consumer Protection and the Financial Supervision Authority, authorised to scrutinise mergers and acquisitions in Poland. What may be worrying for foreign investors is the large margin of discretion, resulting from very general criteria for assessment of the potential transaction and relatively long waiting period (90 days).

There are many voices signalling doubts as to conformity of the new law with EU law. The future will tell whether the Act can be successfully defended against such allegations.

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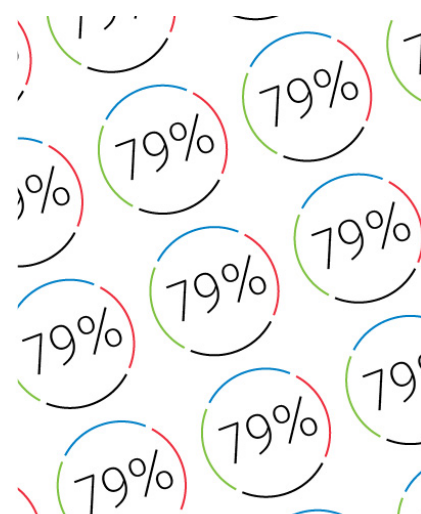
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