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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The Relationship between FDI Screening and Merger Control Reviews – Note by Poland

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This document reproduces a written contribution from Poland submitted for Item 13 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/the-relationship-between-fdi-screening-and-merger-control-reviews.htm

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Poland

1. Foreign direct investment screening

1. In Poland, the foreign investment screening regime came into force in July 2020 as part of the government's Anti-Covid Shield 4.0¹. Initially, the screening mechanism was introduced for 24 months. In 2022 it was prolonged for another 3 years (until July 2025). It should be noted, though, that the control over investments in some strategic sectors has existed before. Specifically, the minister of state assets, the minister of defence and the minister of maritime economy hold a veto right on investments, which would result in the acquisition of 20% or more shareholding in some strategic industries such as energy, explosives, chemical, telecommunications, irrespective of investor's nationality/corporate seat.

2. Since 2020 the Polish Competition Authority, the Office of Competition and Consumer Protection (hereinafter "UOKiK" or "the Authority"), has been able to block acquisitions of Polish companies that have strategic importance for public order, public security, or public health by investors from outside of a member state of the EEA and OECD. Entities from the EEA and the OECD member states are not under scrutiny of FDI screening mechanism.

3. The jurisdiction of UOKiK in FDI screening mechanism would cover three types of transactions:

1. acquisition of dominance (exercising decisive influence over another entity);
2. acquisition of significant participation which is defined as holding at least 20% of shares;
3. acquisition or lease of an enterprise or of an organized part of the enterprise from a protected entity (gaining the effective control over facilities operating in Poland).

4. The protection applies to companies based in Poland, whose revenue from sales and services in Poland exceeded the equivalent of EUR 10 million in one of the two financial years preceding the notification of the intent to take over. In order to be subject to protection, the target (direct or indirect) should be a listed company or operate at least one of the following activities: (1) management of assets (buildings, installations, facilities, and services) qualified as the critical infrastructure, (2) developing software for the following industries: energy, water supply or sewage disposal, Internet and telecommunications, banking and finance, medical and pharmaceutical, transport and logistics, food supply, (3) providing cloud computing services, (4) operating in one of the strategic sectors i.e. electricity generation, manufacture of petrol or diesel, pipeline transportation of crude oil, petrol or diesel, warehousing and storage of petrol, diesel or natural gas, underground storage of crude oil or natural gas, manufacture of chemicals, fertilizers or chemical products, production and trade in explosives, weapon, ammunition and products/technologies of military or police use, regasification and liquefaction of natural gas, crude oil transshipment in maritime ports, distribution of natural gas or electricity, transshipment in ports of primary importance for the economy, telecommunications, transmission of gas

¹ The Act of 24 July 2015 on Control of Certain Investments (Dz.U. of 2020, item 2145).

fuels, production of rhenium, extraction and processing of metal ores used for production of explosives, weapon and ammunition and products/technologies of military or police use, (5) operating in one of strategic industries, i.e. manufacture of appliances, instruments and medical products, manufacture of medicines and other pharmaceutical products, cross-border trade in gas fuels and gas, generation, transmission or distribution of heat, trans-shipment in inland ports, processing of meat, milk, grain, fruits and vegetables.

5. Active party directly involved in the transaction, even if it is an EEA/OECD-based subsidiary of non-EEA/OECD entity, is obliged to notify UOKiK of the transaction.

6. Investment control proceedings are divided into two phases. The Authority conducts a verification proceeding (phase 1) after receiving a notification of the intended transaction.

7. If a transaction raises no objections from the authority, UOKiK issues a decision on the refusal to initiate inspection proceedings and non-opposition to the transaction.

8. An order to initiate inspection proceedings (phase 2) is issued if further investigation is necessary because of public safety or public order concerns or if the notifying party failed to submit all the requested information or documents.

9. The decision to block the transaction may be issued if: there is at least the potential threat for public order, public safety or public health in Poland or if the transaction could affect projects or programmes of European Union interest. It can also be issued on formal grounds if the notifying party failed to submit complete information, documents or additional explanations in writing within the deadline fixed by the authority, or if the country affiliation of the acquirer cannot be determined.

10. Until now, only one of the proceedings, namely concerning the acquisition of Odlewnia Zawiercie (foundry) by a Chinese company Meide Group, has been referred to the second phase and was conducted as inspection proceedings. The analysis concluded by the Authority showed that the investment did not pose a threat to public security or public order. Therefore, UOKiK discontinued the proceedings, as there were no objections to the transaction (decision DKK-243/2021).

11. The Authority's decision may be appealed to the Voivodeship (regional) administrative court from which the judgement may be further appealed to the Supreme Administrative Court. There has not been any court case regarding foreign direct investment yet.

2. Concentration control

12. In concentration control proceedings the Authority controls transactions that have or may have consequences for the Polish market. This applies to the concentration of undertakings through a merger, the acquisition of control over another entity, the creation of a joint venture, and the acquisition of part of the assets of another entity².

13. The obligation to notify UOKiK of the intention of concentration applies to undertakings whose total turnover exceeded, in the year preceding the year of the notification, the equivalent of EUR 1 billion or whose total turnover in the territory of the

² Act of 16 February 2007 on competition and consumer protection (Dz. U. of 202, item 275 with amendments)

RP exceeded the equivalent of EUR 50 million. There are exemptions from the obligation to notify the intention of concentration: i.e. if the acquisition of control over the undertaking whose turnover, in the territory of the RP, did not exceed the equivalent of EUR 10 million in any of the two years preceding the notification or undertakings belonging to the same capital group.

14. Concentration control proceedings consist in the assessment of the impact that a transaction may have on the market. The procedure may be conducted in two phases. Most cases concerning concentration, which do not raise concerns regarding their impact on competition, are resolved at phase 1, which lasts up to one month. Phase 2 of the proceedings is initiated for more complex transactions, which require i.e. further market analysis. In that case, the deadline is extended by additional 4 months.

15. The Authority evaluates notified intention to concentrate exclusively in terms of whether, as a result of its implementation, competition in the market would not be substantially restricted, in particular through the creation or strengthening of a dominant position in the market. The President of the Office has no jurisdiction to evaluate the transaction in terms of other factors. Therefore, the concentration is approved if market competition will not be significantly restricted as a result of it and issues a decision to prohibit if the evidence shows otherwise. The Authority also issues conditional decisions; if after the undertaking fulfills specific conditions, so that competition in the market would not substantially restricted, the decision may then be approved. There is also co-called extraordinary approval of a transaction, in case of significant restriction of competition, derogation from the prohibition of concentration is reasonable, in particular, where it contributes to economic development or technical progress or may have a positive impact on the national economy.