

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

**FREEDOM OF INVESTMENT PROCESS  
Summary of Discussions of Freedom of Investment Roundtable 24**

(Note by the Secretariat)

**15 March 2016**

*This note is a Secretariat summary of discussions at Freedom of Investment (FOI) Roundtable 24, held on 15 March 2016.*

*Fifty-six governments are invited to participate in the Roundtable.*

*For general information on the Roundtable and its work please refer to [www.oecd.org/daf/inv/investment-policy/foi.htm](http://www.oecd.org/daf/inv/investment-policy/foi.htm).*

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## FREEDOM OF INVESTMENT ROUNDTABLE 24

15 March 2016, OECD, Paris

### SUMMARY OF DISCUSSIONS

1. The Freedom of Investment (FOI) Roundtable supports countries' efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also helps countries to address policy concerns that international investment may raise (e.g. in relation to national security). Policy monitoring by Roundtable participants promotes observance of countries' international investment policy commitments, including those taken under the OECD investment instruments and in the context of the G20. It also promotes sharing of experiences with investment policy design and implementation.

2. The present document summarises views and information contributed by participants at Roundtable 24, held on 15 March 2016. Participants included representatives of governments of the then 34 OECD members as well as the European Union, of the then twelve other governments that had adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Peru and Romania) as well as government representatives from P.R. China, Paraguay, the Russian Federation, Saudi Arabia, Singapore and South Africa.<sup>1</sup>

3. The discussions at Roundtable 24 addressed several topics including: (1) the Conference on investment treaties held on 14 March 2016; (2) the balance between investor protection and the right to regulate in investment treaties; (3) societal benefits and costs of international investment agreements; (4) recent investment treaty developments; and (5) recent investment policy developments.<sup>2</sup>

#### **1. The 14 March 2016 Conference on investment treaties: The Quest for balance between investor protection and the right to regulate**

4. Roundtable participants expressed strong appreciation for the annual OECD investment treaty Conference which took place on 14 March 2016 just prior to the Roundtable. They generally welcomed the focus on the quest for balance between investor protection and the right to regulate. Both the general theme and the specific topics addressed (how governments are addressing balancing through varying approaches to fair and equitable treatment (FET) provisions and to dispute settlement) were recognised as crucial ones for governments and for investment treaty negotiators in particular.<sup>3</sup>

5. Participants also welcomed the broad range of participation from governments, business, civil society, academics and others, and the wide range of views expressed. It was noted that all government speakers had recognised that they are seeking to achieve a balance both in the areas of substantive law and dispute settlement. It was valuable to have the opportunity to exchange views about different approaches and to hear from a range of stakeholders and experts. Participants were also invited to provide suggestions for consideration with regard to future investment treaty conferences. They welcomed the expected

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<sup>1</sup> Latvia became a full member of the OECD on 1 July 2016.

<sup>2</sup> Roundtable participants also discussed State-owned enterprises in the global marketplace. The discussions of this topic are part of a broader work programme involving several OECD committees and working groups, and are not documented here at this stage.

<sup>3</sup> The [detailed agenda](#) and other information about the Conference are available on the OECD website.

organisation of the next investment treaty Conference in 2017. They made suggestions with regard to possible future topics, organisation and outcomes from the Conferences, and the role of the OECD.

## 2. The balance between investor protection and the right to regulate in investment treaties

6. Roundtable participants continued their discussion, initiated in October 2015 at [Roundtable 23](#) and further developed at the investment treaty Conference, of the balance between investor protection and the right to regulate in investment treaties. Participants discussed revised versions of two background papers. The first provides a preliminary outline for the topic. The second begins a fact-finding process by examining action by some governments to address the balance between investor protection and the right to regulate in investment treaties by limiting the fair and equitable treatment (FET) standard to the minimum standard of treatment under customary international law.

### *a. Balancing investor protection and the right to regulate in investment treaties: preliminary outline*

7. The preliminary outline notes that there is active public and policy debate about how to balance investor protection and the right to regulate in many jurisdictions. It notes that the impact of international economic law on the right to regulate has been considered in other contexts, including the WTO. The significant analysis, discussion and experience in the WTO system addressing the right to regulate suggests that comparative analysis may be valuable.

8. The preliminary outline recognises that investor-state dispute settlement (ISDS) is a core part of the public and policy debate over the impact of investment treaties on the right to regulate. However, despite its importance, at this initial stage ISDS has been generally excluded from the preliminary outline for two reasons: (i) the Roundtable has already engaged in scoping level analysis of ISDS and the OECD Secretariat is engaged in further analysis of dispute settlement as part of a specific mandate from the Roundtable<sup>4</sup>; and (ii) policy issues raised by substantive law are a new area for the Roundtable and deserve attention in the first instance. Accordingly, the exclusion of dispute settlement from the outline at this stage should be seen as for analytical purposes rather than as suggesting that it is not relevant to the question of balancing.<sup>5</sup>

9. The outline notes that investment treaties typically apply to the full range of government action and thus can potentially encompass regulation of very different kinds, extending from national legislation of general application to individual decisions on licenses and permits. These different types of regulation raise different issues and involve different sensitivities. Treaties are also increasingly including special rules for particular policy areas (such as tax or financial services) or specific economic sectors, generally to provide additional protection to regulation.

10. The outline notes that providing investors with recourse against governments is valuable. Governments can and do expropriate investors or discriminate against them. Domestic judicial and administrative systems provide investors with one option for protecting themselves. Investment treaty provisions give substantial additional leverage to covered foreign investors in their dealings with host

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<sup>4</sup> David Gaukrodger & Kathryn Gordon (2012), "[Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community](#)", OECD Working Papers on International Investment, 2012/03, OECD Publishing; [FOI 21, Summary of discussion](#), p. 8.

<sup>5</sup> As noted above, the 2016 OECD Investment Treaty Conference on [The Quest for Balance](#) addressed both substantive law and dispute settlement aspects of balancing.

governments. The outline notes that different levels of protection for different investors may complicate the regulatory process. This can occur where a government has multiple treaties with different investor protection provisions. Many governments have sought to define model treaties with a well-defined and consistent level of exposure to covered investor claims in part for this reason. Others are engaged in reform processes after agreeing to a range of treaties with differing provisions which may raise the issue of how to deal with existing treaties. The regulatory complexity of differing treaties can be a particular problem for developing countries because of the complexity of managing the differing rights of different investors.

11. The debate over balancing is frequently framed as a question of whether investment treaties cause “regulatory chill”. For analytical purposes, it is useful to distinguish two issues with regard to the impact of treaties on regulatory policy: (i) the degree of impact; and (ii) whether the impacts are good or bad from a policy perspective. The preliminary outline addresses the first question. For this inquiry, the more neutral notion of dissuasive effect is preferred to the more connoted term of “regulatory chill” although the latter is also used in light of wide use.

12. The degree of impact of treaties on regulatory policy may depend on several factors including the degree of awareness of treaties among relevant government actors, the dissuasive power of treaties and in particular of the applicable remedies for breach, and the different types of treaty rules and standards. The outline underlines the importance for dissuasiveness of governmental awareness of treaties, both in general and as a result of investor or investor counsel interventions on particular issues. The impact on dissuasiveness of different types of rules is also noted. For example, the damages remedies generally available to treaty-covered investors in ISDS may have different dissuasive power than the non-pecuniary remedies to which investors are generally limited under domestic law.<sup>6</sup> More generally, unclear rules are frequently considered to have broader dissuasive effects.

13. The balancing of interests in investment treaties can involve many institutions. For governments, there are variations in the respective roles of the executive and legislative branches in the balancing process in investment treaties, and of different levels of government in federal-type systems. As public interest in treaties and concerns about the impact of treaties on the right to regulate have grown, parliaments have become more active in seeking to influence the balance that is struck. It has been suggested that development of a model treaty, while challenging, can help address concerns about one government binding a future and differently-oriented government to policy constraints.

14. Questions can also arise about what role adjudicators should have, if any, in balancing policy goals. Courts generally lack the democratic legitimacy of parliaments and their role in balancing policy goals, if any, is often perceived as controversial. However, different national and regional traditions may have different views about the balancing of policy goals by courts. The specificities of ISDS compared to courts raise additional issues. The potential to reduce the scope for balancing by adjudicators through careful treaty drafting is noted.

15. Participants engaged in a broad discussion of issues relating to balancing and the right to regulate. A participant noted increased interest in the right to regulate in his jurisdiction notably as a result of the increase in ISDS cases in recent years. They welcomed the comprehensive scope of the outline and its attention to the wide variety of issues embedded in the right to regulate. Participants noted that the outline included many issues for discussion which would merit additional consideration.

16. A participant welcomed the scope of the background paper in recognising that balancing and the right to regulate have many facets; he contrasted an occasional tendency to equate the right to regulate

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<sup>6</sup> David Gaukrodger & Kathryn Gordon (2012), “[Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community](#)”, OECD Working Paper on International Investment 2012/03, Annex IV.

issue with the narrow question of whether and how to introduce a specific treaty clause expressly addressing the right to regulate. He noted to the contrary that treaty policy in his jurisdiction today considers balancing throughout the negotiation of all the provisions of an agreement and beyond, and pays particular attention to the impact of dispute settlement institutions and the nature of adjudicators. In this regard, he suggested adding the issue of the impact of the availability of an appeal on the right to regulate to the scope of issues under discussion.

17. A participant pointed to the importance of addressing the nature of the right to regulate. Governments should recognise that if and when they accept international rules, they are accepting limitations on their policy space. He noted that the right to regulate is never absolute and that domestic law places limits on the right, notably in constitutional provisions. Another participant stated that the right to regulate is part of customary international law, and that it has evolved as a result of the perceptions of our societies and democratically elected parliaments.

18. Some participants emphasised that requiring the exhaustion of domestic recourse before making arbitration available is valuable because it allows domestic courts to play their accustomed role in upholding the rule of law, or expressed interest in exploring the impact of requiring exhaustion on the right to regulate.

19. Several participants welcomed the inclusion of comparative analysis of balancing and the right to regulate in the revised outline, notably with regard to the WTO. A participant suggested comparative attention to domestic law as well, as the Roundtable has done in its discussions of shareholder claims and reflective loss. Another stated that the issue of balancing investor interests with the right to regulate extends beyond treaties to good economic policy generally.

20. A participant stated that governments want to avoid regulatory chill, and suggested that measures to seek to counter-balance such chill could be explored. Another participant questioned whether regulatory chill actually exists, and noted that it is good policy to consult potentially affected parties in considering regulation. A NAFTA government participant noted with regard to regulatory chill that analysis in 2002 showed her government had adopted many environmental regulations following the 1994 entry into force of NAFTA, a fact which needed to be considered in evaluating claims of regulatory chill from treaties.

21. Some views were expressed about particular treaty approaches and types of treaties. A participant suggested that the recent TPP agreement reaches a good balance notably through a variety of exceptions, reservations, notes of interpretation and provisions to prevent frivolous claims. Another participant noted his government's agreement with the approach in the EU's proposals for TTIP as a good way to strengthen the right to regulate and to define protections more precisely. He noted the relevance of dispute settlement and supported an investment court both for that agreement and as a multilateral solution for a broader range of treaties. However, he did not support uniform multilateral rules for substantive rules, considering that they should be adapted for each relationship.

22. Some participants pointed to the need to find a solution for existing treaties in order to ensure that the current knowledge about balancing also applies to them. Difficulties have been experienced by others in addressing the right to regulate in current treaties without creating problems for the interpretation of existing treaties. While the government considered it always has the right to regulate, existing treaties provide broad scope for interpretation. It is important to find ways to address that issue.

23. A participant stated that the issue of different levels of investor protection complicating the regulatory process was not applicable to his government despite having many treaties in place. He stated that the level of protection provided by those treaties does not exceed the level of protection pursuant to

domestic law in his country. Domestic regulators are bound by domestic law. Because domestic regulations are checked for domestic law compliance and treaties do not provide additional protections, there is no concern about damages awards for non-compliance with investment treaties.

24. Participants also described the contributors to developing treaty policy on balancing in their jurisdictions. A participant noted that a number of ministries are involved in treaty policy in his jurisdiction. Another suggested possible analytical attention to how governments address treaties, not just when they are preparing regulations, but also in taking positions on the interpretation of treaties. She noted that her government uses a process in which the interests of both regulatory agencies and those more focused on outward investment and investors abroad are represented both in treaty drafting and negotiation, and in the preparation of interpretive positions in ISDS. A participant emphasised that the two papers on balancing and the right to regulate had already been very useful in internal discussions between different ministries in his government.

25. Interest was also expressed in the treatment of particular economic sectors in treaties. It was suggested that some issues from the outline or discussion could be further addressed in a future session of the Investment Treaty Dialogue at the OECD.<sup>7</sup>

***b. Government action to address the balance between investor protection and the right to regulate in investment treaties: The limitation of the fair and equitable treatment standard to the minimum standard of treatment under customary international law***

26. The Secretariat also presented a revised version of a background fact-finding paper addressing government action to address the balance between investor protection and the right to regulate in investment treaties. Policy analysis today is increasingly focused on the impact of individual rules rather than treaties as a whole. Reflecting this interest, the initial focus in this area was on government views with respect to obligations to provide “fair and equitable treatment” (FET). FET is often included as part of the protection provided to covered foreign investors in investment treaties although some recent treaties and model treaties do not refer to FET.

27. FET clauses are of different kinds. A key distinction is between FET provisions that are limited to the minimum standard of treatment of aliens under customary international law (referred to herein as “MST-FET”), and FET clauses that are autonomous from the minimum standard of treatment. The first incorporates a body of external law into the treaty; the second sets an autonomous treaty standard.

28. The first and best known example of an MST-FET approach is the 1994 NAFTA as authoritatively interpreted by the NAFTA governments. The paper noted that for several reasons, NAFTA government views on the MST-FET standard are a valuable initial reference in an examination of the balance of investor protection and the right to regulate. Review of recent treaty practice also shows growing use of FET provisions that expressly limit FET to MST-FET.

29. The paper accordingly summarises the views of the NAFTA governments on the nature and content of the MST-FET standard. It contains some preliminary information about other approaches to FET and some initial general comparisons. It was noted that the paper had been presented and initially discussed in Roundtable 23.<sup>8</sup> Revisions since then addressed the issue of the application of the most-favoured nation (MFN) clause in this context as well as revisions to reflect comments of a more technical

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<sup>7</sup> The Dialogue was launched following the 2015 OECD Ministerial meeting to provide an additional government-led forum for regular exchanges between governments on investment treaty policy issues.

<sup>8</sup> The summary of discussion of Roundtable 23 is available on the OECD website. [add link]

nature. It was noted that additional work on other approaches to FET and other aspects of FET would be forthcoming.

30. A participant stated that it was noteworthy that NAFTA governments have had a much higher success rate in defending cases under the MST/FET provision in NAFTA than governments in FET claims under BITs, 78% overall and 100% for one government vs. much lower rates of success for governments defending FET claims outside NAFTA. The NAFTA approach appears to give governments a better likelihood of successfully defending against FET claims, but he asked whether that is the goal of a FET provision. Rather, we should agree on what we want to cover in this provision. MST-FET gives more guarantees to governments to defend, but that is not the goal. Moreover, governments do not agree on all aspects of the MST-FET standard; the paper noted some diverging approaches between the NAFTA governments on the issue of whether certain types of legitimate expectations are a relevant consideration that can be taken into account under MST-FET.

31. He considered that discussions about the source of the standard in customary international law were interesting, but a broader discussion about content is important. He noted that his jurisdiction was working on defining the appropriate scope of content of FET. It is important to consider the common and the less common elements among the various views about FET. It is important to consider the evolution of arbitral practice as well as government views. This could then allow consideration of how different rules under the FET rubric can affect the right to regulate.

32. Another participant also requested broader analysis of all possible approaches to and interpretations of FET. He noted that some rules considered to fall within FET, such as denial of justice, are widely accepted. He stated that there is a big difference between denial of justice, which is widely recognised as applicable standard under FET, and the issue of legitimate expectations. No government would consider that it can deny justice in engaging in environmental or health sector regulation, but the impact of recognising legitimate expectations in that area is quite a different matter. So he agreed that it is important to look more closely at the potential content of the standard in order to evaluate on a case by case approach the potential impact on regulatory action.

33. It was noted that the fact-finding paper does not take a position about whether any particular approach is better than another. The comparative NAFTA success rates in defending FET claims are of interest as a reference point. Given the use of MST-FET as opposed to autonomous FET in NAFTA, the substantially higher success rates are also some evidence of the impact of treaty language on case outcomes. As such, they are relevant for example to a debate in which it is sometimes claimed that ISDS arbitrators will reach similar outcomes regardless of changes to treaty language. Of course, other reasons besides treaty language, including different underlying government conduct, better lawyering or active governmental interventions in the interpretive process, may explain the different NAFTA government success rates. Nonetheless, governments could consider the different outcomes as part of the context in making their policy choices about their approach to the issue of FET. Work on FET was continuing and other approaches and aspects would be addressed in more detail.

34. A NAFTA government participant indicated that there are certain limiting and disciplining aspects of a customary international law standard that can provide discipline and guidance for ISDS tribunals in interpreting a treaty obligation. The paper provides a summary of the NAFTA government approaches to the MST-FET limitations on the scope of the FET standard. These limitations on FET can affect the right to regulate. With regard to the differing government success rates, she stated that the MST-FET approach is used by her government not in order to win cases, but rather to guide arbitral tribunals with regard to a specific obligation that may be harder to define than some other provisions such as expropriation.

35. A participant welcomed the attention to MFN and FET in the revised paper. With regard to overall discussion of balancing in both papers, he noted the decision to exclude ISDS in the first instance from the discussion of balancing. But he noted that the paper focuses on government views and he said it was important to consider how arbitral tribunals address governments' interpretations. He stated that it is important in particular to consider how governments act to minimise the ability of tribunals to circumvent government interpretations. Methods used to do this, such as joint interpretations, should be explored.

36. Participants considered that the paper addressing FET was a valuable start to the discussion. It was noted that the discussion in the panel about FET at the investment treaty Conference the previous day suggested that there is strong interest in the question of the content of FET in both its autonomous and MST-FET versions, and in how that content can affect the right to regulate.

### **3. Societal benefits and costs of international investment agreements**

37. Participants were informed about ongoing research by the Secretariat to further the understanding of societal benefits and costs of international investment agreements (IIAs). This research seeks to determine to what extent treaty design and economic parameters of individual countries influence the societal benefits and costs that are likely to accrue from IIAs. The Secretariat presented data that shows that different countries had widely differing treaty coverage of their inward and outward FDI stock and suggested possible interpretations and implications of these findings.

### **4. Recent investment treaty developments**

38. Brazil informed Roundtable Participants about the signature of several Cooperation and Facilitation Investment Agreements (CFIA) by Brazil and: Angola, Chile, Colombia, Malawi, Mexico, and Mozambique that took place in 2015. All six agreements are based on the model agreement that Brazil had developed and progressively improved.<sup>9</sup> The model agreement, which was developed in consultation with the private sector, puts an emphasis on investment promotion and facilitation, including on issues such as visas. It includes a dispute prevention mechanism and provides for state-to-state arbitration as a last resort. Brazil noted its government had additional mandates to negotiate with other countries, after a first round of negotiations with countries with large stocks of Brazilian investment. Brazil also informed participants about ongoing negotiations within Mercosur for a regionalised version of its model agreement. Brazil offered to share its new model treaty with the Secretariat, which the Acting Committee Chair encouraged them to do.<sup>10</sup>

39. Roundtable participants also noted the publication of India's new model investment treaty; assent by the President of South Africa to the Protection for Investment Act; and the signature of the Trans-Pacific Partnership agreement (TPP) between twelve countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Viet Nam) on 4 February 2016.

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<sup>9</sup> Brazil presented its model to the Roundtable in March 2015 and the presentation is available in the [summary of discussions of Freedom of Investment Roundtable 22 in March 2015](#). Since the meeting of the FOI in March 2016, Brazil has signed, on 29 April 2016, with Peru the Brazil-Peru Economic and Trade Expansion Agreement, which includes a chapter that follows the provisions of the CFIA model.

<sup>10</sup> Upon a request from Brazil, the Secretariat subsequently distributed a copy of the model CFIA to Roundtable participants.

## 5. Recent investment policy developments

40. Roundtable participants discussed recent investment policy developments that had taken place since the last Roundtable in October 2015. The discussion was based on an inventory of measures taken between 16 September 2015 and 15 February 2016. Three countries – Australia, Poland, and the United States – provided information on recent policy changes:

### *Australia*

41. Australia was asked about planned reforms to Australia’s foreign investment review mechanism with respect to the acquisition of critical infrastructure. The Australian Treasurer – who oversees the foreign investment review mechanism – had announced on 10 December 2015 plans to amend rules on the acquisition by foreigners of “strategic critical infrastructure assets” at state and territory level in order to subject them to reviews by the Foreign Investment Review Board (FIRB). Australia explained that at the time of the Roundtable on 15 March 2016, the proposal had not been finalised.

42. In substance, the purpose of the reform is to ensure that all sales of critical infrastructure are scrutinized under the foreign investment framework. At present, acquisitions directly from Australian governments – at the national, state or territorial levels – are not formally reviewed unless the acquirer is a foreign government; such acquisitions by private entities are thus not subject to scrutiny. According to the Australian government, some of the intended changes formalise existing practice, as sub-national governments typically cooperate in the context of sales of critical infrastructure assets.

43. Australia stated that it would keep Roundtable participants informed of developments in this area.

### *Poland*

44. Poland was asked about its new investment policy related to national security. The mechanism is set out in the Act of 24 July 2015 on *Control of Certain Investments*, which entered into effect on 1 October 2015. The law introduces to the Polish legal system a mechanism of State control of investments involving acquisitions of shares and property rights in certain entities. Several changes to the original law were adopted in December 2015 and January-February 2016.<sup>11</sup> Poland stated that the policy was not yet effectively implemented, as decrees and regulations necessary for the implementation had still to be prepared.

45. Once operational, the mechanism is to apply to transactions concerning entities subject to protection, which are defined as those operating in specific sectors (including generation of electric energy; production of motor gasoline or diesel fuel; pipeline transportation, warehousing and storage of fuels or natural gas; production of chemicals, fertilisers and chemical products; production of and trade in explosives, weapons and ammunition, as well as products and technology for military or police purposes; telecommunications activity; production of rhenium; and extraction and processing of metal ores used in the manufacture of explosives, weapons and ammunition, as well as products and technologies used by armed forces and police). The specific list of entities covered by the legislation is determined by the Council of Ministers in a regulation.

46. Poland stated that the substantive scope of the Act primarily includes the control of transactions consisting in acquiring or gaining significant participation or a dominant stake in entities subject to

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<sup>11</sup> An unofficial translation of the consolidated version of the Act as of February 2016 is available in the [Annex](#) to this document.

protection. The Act provides for a list of situations in which an obligation will arise to notify the control body of the intent to perform activities subject to control. It also addresses the formal and substantive prerequisites for the control body to submit an objection to the planned transaction. Acquisitions by both domestic and foreign acquirers may be subject to review under the legislation.

47. Poland emphasised that only companies which could be associated to national security concerns can be included in the list; economic considerations would not play a role. Furthermore, Poland stated that the mechanism would only be used if a fundamental interest of the society is at stake, and if the interest could not be safeguarded through mitigation measures. Some formal guarantees have been established to ensure that the law operates as intended: A consultation committee is heard prior to the decision on a specific acquisition, and judicial review is also available.

### *United States*

48. The United States was asked about the operation of its national security review system, handled by the Committee on Foreign Investment in the United States (CFIUS), in light of several recent reviews.

49. On 22 January 2016, Dutch company Royal Philips announced that it and a Chinese-led consortium led by GO Scale Capital had terminated an agreement pursuant to which the consortium would acquire an 80.1% interest in a Philips subsidiary. The announcement stated that concerns expressed by CFIUS could not be resolved despite extensive efforts to mitigate CFIUS's concerns.<sup>12</sup> The Philips subsidiary, *Lumileds*, produces LEDs for lighting applications. *Lumileds* has U.S. patents and manufacturing and research-and-development facilities in the United States.

50. On 14 September 2015, *Nokia*, a Finnish company, announced that it had obtained CFIUS clearance for the planned acquisition of the French company *Alcatel-Lucent*. It is not known whether any concessions were made to obtain CFIUS approval in this case.

51. On 3 February 2016, it became known that the Chinese company *National Chemical Corp.* was seeking to acquire *Syngenta AG*, a Swiss seed and pesticides group which has operations and sales in the United States. *Syngenta* management recommended acceptance of the *National Chemical Corp.* bid in February 2016. This acquisition was subject to a CFIUS review.<sup>13</sup> *Monsanto*, a U.S. multinational, had unsuccessfully bid in 2015 and early 2016 for *Syngenta*.

52. These three cases are the first major known cases in which CFIUS scrutinised planned transactions that primarily involved acquisitions of non-U.S. assets by a third-country acquirer.<sup>14</sup> In the case of *Lumileds*, this was potentially costly for the owner, given that the next highest bid for the business were reportedly significantly lower than the Chinese company bid.

53. In response to a question about whether these cases indicated an evolution of policy towards intervention in acquisitions of non-United States targets, the United States responded that they were not in

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<sup>12</sup> [“\*Philips and consortium led by GO Scale Capital terminate Lumileds transaction\*”](#), Philips press release, 22 January 2016.

<sup>13</sup> At the time of the Roundtable, this information had not become known.

<sup>14</sup> An earlier case, the takeover of British *P&O* by *DB World* of Dubai in 2006, also involved a non-U.S. acquirer and a target that held U.S. assets (lease contracts for the operation of 22 U.S. ports). At the time, CFIUS had approved the takeover, but resistance in the U.S. Congress eventually led *DB World* to sell *P&O*'s U.S. assets to American International Group (AIG).

a position to provide information on these cases. US law prohibits disclosure of information filed with CFIUS, including on whether a specific company had filed a case.

54. It was noted that major multinationals will almost always have some link to the United States economy. The U.S. was asked whether CFIUS could in principle oppose a merger or acquisition of primarily non-U.S. assets by a third-country acquirer on the grounds that the operation threatens U.S. national security. The United States responded that CFIUS is authorized to review any transaction that may result in foreign control of a United States business.

55. The United States also responded to a question whether it wished to estimate the likely impact of actual or potential CFIUS reviews on market conditions for international mergers and acquisitions that do not concern U.S.-owned targets. The United States explained that most foreign investment does not raise national security concerns, and that most transactions that go through the CFIUS process are cleared without mitigation or conditions. Also, the United States considered that export controls were an important means to address national security concerns.

**ANNEX: ACT OF 24 JULY 2015 ON THE CONTROL OF CERTAIN INVESTMENTS (AS AMENDED) – UNOFFICIAL TRANSLATION<sup>15</sup>**

**Article 1.** The Act defines:

- 1) the rules and procedures related to the control of some investments subject to the acquisition of:
  - a) shares or stocks,
  - b) overall rights and obligations of a shareholder authorised to run a company or to represent a partnership,
  - c) an enterprise or its organised part– resulting in the purchase or gaining the significant participation, or acquiring the domination over a company representing an entity subject to protection;
- 2) sanctions for the infringement of the obligations arising from the Act.

**Article 2.** The aim of the control referred to in Article 1 paragraph 1 is to protect the public order or public security referred to in Article 52 paragraph 1 and Article 65 paragraph 1 of the Treaty on the Functioning of the European Union, taking into consideration Article 4 paragraph 2 of the Treaty on the European Union.

**Article 3.1.** Whenever in the Act reference is made to:

- 1) parent undertaking – it shall mean an entity:
  - a) holding, directly or indirectly through other entities, the majority of the total number of votes in the governing bodies of other entity, inter alia, pursuant to agreements with other persons; or
  - b) that is authorised to appoint or dismiss the majority of members of the governing bodies or supervisory boards of other entity; or
  - c) in case of which more than a half of management board members of other entity simultaneously act as members of the management board, proxies or persons holding managerial positions of the first entity, or other subsidiary of such first entity; or
  - d) that holds equity share in a partnership with the value of at least 50% of the value of all the contributions paid to this company; or
  - e) that has the capacity to decide on the directions of other entity's activity, in particular, under the agreement providing for the management of such an entity or transfer of profit by such an entity;
- 2) subsidiary – it shall mean an entity in relation to which other entity is the parent undertaking, whereas all subsidiaries of such a subsidiary shall be also considered as subsidiaries of such a parent undertaking;
- 3) total number of votes – shall mean the total number of votes attached to all stocks or all shares of the entity;
- 4) significant participation – shall mean the situation making influence on the activities of an entity possible, through:
  - a) holding shares or stocks carrying, in the period of the last 2 years, at least 20% of the total number of votes, calculated as the weighted average in this period, in the decision-making authority of the entity, in particular, at the general meeting or meeting of shareholders, whereas the changes in the shareholding, including the disposal of a part of shares or stocks in this period and their acquisition, shall not affect defining of the significant participation; or
  - b) holding equity share in a partnership with the value of at least 20% of the value of all the contributions paid to this company;

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<sup>15</sup> Journal of Laws of the Republic of Poland, Warsaw, 31 August 2015, Item 1272; amendments Journal of Laws of the Republic of Poland of 2015, item 2281.

- 5) entity subject to protection – shall mean an entity included in the specification referred to in the regulations issued pursuant to Article 4 paragraph 2;
  - 6) control authority – shall mean:
    - a) the minister competent for Energy - to the extent specified in Article 4 paragraph 1 points 1-5, 8-10 and 12,
    - b) the minister competent for the State Treasury - to the extent specified in Article 4 paragraph 1 points 6, 7, 11, 13 and 14.
2. Whenever in the Act reference is made to a company, domination over a company and significant participation in a company, it shall also mean, respectively, a general partnership, a partnership, a limited partnership, a limited joint-stock company, the domination over any such company and the significant participation in any such company. In such as case, the domination relationship and the significant participation shall be also determined through ascertaining that the parent undertaking is authorised to make decisions on the company-related issues independently or jointly with other persons.
3. The acquisition of the domination shall mean achieving or exceeding 50% of the total number of votes in the decision-making authority of the entity subject to protection, in particular, at the general meeting or the meetings of shareholders, or the interest in the share capital, through the purchase of stocks or shares, or rights attached to stocks or shares, or the acquisition of stocks or shares.
4. The acquisition or gaining of the significant participation shall mean the purchase of shares or stocks, or rights attached thereto, or the acquisition of stocks or shares, in the number providing for achieving or exceeding, respectively, 20%, 25%, 33% of the total number of votes in the general meeting or meetings of shareholders, or interest in the share capital, gaining of the significant participation upon the lapse of a period referred to in paragraph 1 (4)(a), as well as the purchase of an enterprise or its organised part.
5. The acquisition or gaining of the significant participation, or the acquisition of the domination shall also mean cases when:
- 1) the acquisition or gaining of the significant participation in an entity subject to protection, or the acquisition of the domination over such an entity is executed by the parent undertaking, including, inter alia, pursuant to agreements concluded with the parent undertaking or the subsidiary of such an entity,
  - 2) the acquisition or gaining of the significant participation in an entity subject to protection, or the acquisition of the domination over such an entity is executed by the entity whose articles of association or other act regulating its functioning contains provisions related to the right to its assets in case of winding-up of the entity, or other form of its liquidation, including the right to dispose of such assets without their acquisition,
  - 3) the acquisition or gaining of the significant participation in an entity subject to protection, or the acquisition of the domination over such an entity is executed on one's own behalf, but also on instructions of other entity, including, under the execution of the portfolio management agreement within the meaning of the provisions of the Act of 29 July 2005 on trading in financial instruments (Journal of Laws of 2014 paragraph 94, as amended<sup>16</sup>),
  - 4) the acquisition or gaining of the significant participation in an entity subject to protection, or the acquisition of the domination over such an entity is executed by the entity with which other entity concluded the agreement whose subject is the transfer of powers to exercise the voting right or other rights to stocks or shares, or rights arising from stocks or shares of an entity subject to control,
  - 5) the acquisition or gaining of the significant participation in an entity subject to protection is executed by a group of two or more persons, if at least one of these persons is the entity with whom other entity concluded the agreement related to the acquisition of stocks or shares of a company subject to protection, or at least the acquisition of stocks or shares of companies established in the Republic of Poland, if the subject of such an agreement is the transfer of powers to exercise the voting right or other rights to stocks or shares, or rights arising from stocks or shares of an entity subject to control,
  - 6) the acquisition or gaining of the significant participation in a company being an entity subject to protection, or the acquisition of the domination over such a company is executed by an entity acting pursuant to a written or oral agreement related to the acquisition by the parties to such an agreement of stocks or shares in

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<sup>16</sup>

The amendments to the uniform text to the aforementioned Act were announced Journals of Laws of 2014 items 586 and of 2015 items 73, 978, 1045, 1223 and 1260.

an entity subject to control, or the acquisition of stocks or shares of companies established in the Republic of Poland – hereinafter referred to as an "indirect acquisition".

6. The indirect acquisition shall also mean cases when, as a result of a transaction other than specified in paragraphs 3–5 the entity acquires the status of a parent undertaking towards an entity holding at least 20% of the total number of votes at the general meeting or the meetings of shareholders, or the interest in the share capital of a company being an entity subject to protection, or being a parent undertaking towards a company being an entity subject to protection, or holding the significant participation therein, or towards an entity holding a legal title to an enterprise of such a company or its organised part. If the indirect acquisition takes place as a result of regulation of a state other than the Republic of Poland, in particular, as a result of the merger of companies established outside the territory of the Republic of Poland, or the purchase, or acquisition of stocks or shares of a company established outside the territory of the Republic of Poland, being a parent undertaking towards a company being an entity subject to protection, the provisions of the Act shall apply in the scope of the effects defined in the first sentence.

7. The acquisition or gaining of the significant participation, or the acquisition of the domination referred to in paragraph 3 shall also mean cases when an entity holds stocks or shares, or rights arising from stocks or shares of a company being an entity subject to protection, including also in cases defined in paragraph 5, in the number providing for reaching or exceeding, respectively, 20%, 25%, 33%, 50% of the total number of votes in the general meeting or meetings of shareholders, or interest in the share capital, or being a parent undertaking towards a company being an entity subject to protection, or acquires the significant participation, in the case of:

- 1) the redemption of shares or stocks of a company being an entity subject to protection, or the acquisition of treasury shares or stocks of such a company,
- 2) the division of a company being an entity subject to protection, or its merger with other company,
- 3) the amendments to the company deed or articles of association of a company being an entity subject to protection, in the scope of privileged shares or stocks, establishing or abolishing of entitlements allocated to individual partners or shareholders of such a company,
- 4) the cancellation of stocks or documents of stocks of a company being an entity subject to protection – hereinafter referred to as a "consequential acquisition".

8. The significant participation within the meaning of paragraph 1 (4)(a) shall be also determined if it occurs as a result of holding shares or stocks, or rights arising from the stocks or shares referred to in paragraph 5, irrespective of the number and type of transactions concluded between them.

**Article 4.1.** An economic operator engaged in economic activity in the scope of:

- 1) generation of electricity; or
- 2) production of motor gasoline or diesel fuel; or
- 3) pipeline transport of oil, motor gasoline or diesel fuel; or
- 4) warehousing and storage of motor gasoline, diesel fuel, natural gas; or
- 5) underground storage of oil or natural gas; or
- 6) production of chemicals, fertilisers and chemical products; or
- 7) manufacturing and trade of explosives, weapons and ammunition as well as products and technologies used by Armed Forces and Police; or
- 8) regasification or liquefaction of natural gas; or
- 9) transshipment of oil and its products in sea ports; or
- 10) distribution of natural gas or electricity; or
- 11) telecommunication services; or
- 12) transmission of gaseous fuel; or
- 13) production of rhenium, or
- 14) extraction and processing of metal ores used in the manufacture of explosives, weapons and ammunition, as well as products and technologies used by Armed Forces and Police;

– may be recognised as an entity subject to protection.

2. The Council of Ministers may define, by regulation, a list of entities subject to protection, taking into consideration the significant market share of a given entity, the scale of activity conducted, the real and sufficiently serious threats to the fundamental social interests, associated with conducting of activity by the entity to be covered by protection, as well as the lack of the possibility to introduce a less restrictive measure and the requirement, in relation to the entity operating in a given sector, to apply the control of the investment under the rules defined in the Act, for the purpose of ensuring the protection of public order or public security referred to in Article 52 paragraph 1 and Article 65 paragraph 1 of the Treaty on the functioning of the European Union, as well as the time justifying the application of such measures.

**Article 5.1.** An entity intending to acquire or gain the significant participation, or acquire the domination, shall be bound to notify the control authority, on a case by case basis, of its intention to do so, unless such an obligation lies with other entities, in accordance with paragraphs 2-5.

2. In case of indirect acquisition the notification shall be lodged by an entity referred to in Article 3 paragraph 5 that has exercised the transaction defined in this provision.

3. In case of indirect acquisition referred to in the second sentence of Article 3 paragraph 6, the notification shall be lodged by a subsidiary referred to in the first sentence of Article 3 paragraph 6.

4. In case of acquisition or gaining the significant participation referred to in Article 3 paragraph 1(4) and paragraph 4 in the company being subject to protection, the notification of the control authority is required. The notification shall be submitted by the entity that has acquired or gained the significant participation.

5. In case of the consequential acquisition, the notification shall be submitted by the company being the entity subject to protection.

6. In cases referred to in paragraph 1 or 2 the notification shall be effected:

- 1) prior to concluding any agreement generating the obligation to acquire, or prior to exercising any other legal act, or legal acts, leading to the acquisition; or
- 2) in case of the call to subscribe for shares of a public company within the meaning of the provisions of the Act of 29 July 2005 on public offering and conditions governing the introduction of financial instruments to the organised trading, and on public companies (Journal of Laws of 2013 item 1382 and of 2015 item 978 and 1260), being the entity subject to protection – prior to the announcement of the call.

7. In cases referred to in paragraph 3 or 4, the notification shall be given within 7 days following the day of acquiring or gaining the significant participation, or acquiring the domination over a company being the entity subject to protection, and if such an effect cannot be defined, in particular, if the provisions relevant for the activity referred to in the second sentence of Article 3 paragraph 6 do not stipulate the entry to the relevant register - within 30 days following the date of such an activity.

8. In the case referred to in paragraph 5 the notification shall be effected:

- 1) prior to holding the general meeting or the meeting of shareholders of the company being the entity subject to protection, or prior to adopting the shareholders' resolution; or
- 2) prior to exercising of other activity generating the effects referred to in Article 3 paragraph 7.

9. Where two or more entities act in agreement, the notification shall be submitted jointly by all parties to the agreement.

**Article 6.1.** While lodging the notification, the entity provides information concerning:

- 1) directly or indirectly held shares or stocks, or rights arising from shares or stocks of a company being subject to protection, as well as parent undertakings of such an entity and agreements concluded by such an entity as well as on factual or legal status applicable to such an entity, enabling other entities to exercise their rights arising from the shares or stocks of a company being subject to protection, or to exercise the rights of the parent entity of the company being subject to protection, or providing other entities with the right to acquire or take up shares of stocks of the company being subject to protection;
- 2) the method of execution of the intention referred to in the notification;
- 3) the professional, economic or statutory activity of the entity submitting the notification, in particular, the subject of such activity, its scope and site, as well as its progress hitherto, and the education of the entity

submitting the notification if such an entity is a natural person, or the education of persons included in the management and supervisory bodies, in case of an entity other than a natural person;

- 4) the capital group the entity submitting the notification belongs to, in particular, its structure, entities included therein, legal and factual capital, financial and personal relations with other entities; and in case the entity submitting the notification is not a commercial company – information on entities authorised to decide on the composition of its management and supervisory bodies, entities authorised to receive payment from its assets and entities authorised to its assets in case of its winding up or other form of its liquidation;
- 5) the economic and financial situation of the entity submitting the notification;
- 6) the conviction for an offence or fiscal offence, proceedings conditionally discontinued and disciplinary proceedings concluded with penalty, as well as other concluded administrative and civil proceedings concerning the entity submitting the notification, or persons referred to in paragraphs 3 and 4;
- 7) pending penal proceedings, proceedings in cases related to fiscal offence, proceedings on imposing sanctions for the infringement of the obligations related to the capital market or environmental protection, tax proceedings conducted against the entity submitting the notification, or persons referred to in paragraphs 3 and 4, or against such persons, or proceedings connected with the activity of such an entity or such persons, as well as on the lodged motions for extradition and the European Arrest Warrants issued against such entities and persons;
- 8) measures undertaken prior to the submission of the notification, aimed at acquiring shares or stocks, or rights arising from shares or stocks, or taking up shares or stocks of a commercial company established on the territory of the Republic of Poland, powers connected with such share, methods and sources of financing the acquisition of shares or stocks, or rights arising from shares or stocks, or taking up shares or stocks, agreements concluded in connection with such measures and activities undertaken in agreement with other entities;
- 9) intention of the entity submitting the notification with respect to the company being the entity subject to protection, its related investment plans, its long-term activity plans, foreseen changes in its organisation, in particular, a merger with other company, financing of its activity, its dividend policy and employment policy.

2. The Council of Ministers shall define, by regulation, the documents to be attached to the notification in order to confirm the information specified in paragraph 1, taking into consideration ensuring the requirement of detailed verification of the information provided by the entity submitting the notification.

3. In justified cases, in particular, if the governing law does not provide for the execution of documents referred to in paragraph 2, the entity submitting the notification or a person the case refers to may submit, to replace such documents, the relevant declaration containing the required information, and provides documents constituting its confirmation in accordance with the governing law, including the relevant explanation.

4. In case of the consequential acquisition, the provisions of paragraph 1 shall not apply. The company referred to in Article 5 paragraph 5, while submitting the notification, provides information concerning:

- 1) all partners or shareholders known to it;
- 2) the method of execution of the intention referred to in the notification.

**Article 7.1.** The notification and the documents attached thereto shall be prepared in Polish or in a foreign language, including the official translation into Polish executed by:

- 1) a sworn translator entered to the list maintained by the Minister of Justice;
- 2) a sworn translator authorised to execute such translations in member states of the European Union or the European Economic Area (EEA);
- 3) a consul, whereas the following documents shall be also recognised as documents translated by the consul:
  - a) documents in a foreign language translated into Polish by a translator in the host country and authenticated by the consul,
  - b) documents translated from a rare language to a language known to the consul, and subsequently translated by the consul into Polish.

2. Foreign official documents should be validated by a consul of the Republic of Poland prior to the translation unless otherwise provided in the relevant international agreement where the Republic of Poland is a party.

**Article 8.1.** The entity submitting the notification not domiciled or habitually resident, or established in the Republic of Poland, or other European Union member state, if it has not appointed a proxy domiciled in the Republic of Poland to conduct the procedure related to the notification, shall be bound to indicate the agent for service in the Republic of Poland.

2. In case of failure to fulfil the obligation referred to in paragraph 1, any written submissions during the course of the proceedings shall be put on file of the case with the effect of having been served, excluding the decision concluding the proceedings concerning the notification, of which the entity submitting the notification should be instructed prior to its exercising of the first activity.

**Article 9.1.** The proceedings shall be initiated as a result of lodging the notification. In cases referred to in Article 3 paragraphs 6 and 7 and Article 5 paragraph 4, a control authority may institute the proceedings ex officio.

2. In case of identifying any formal shortages in the notification, or in case of failure to attach the required information or documents thereto, the control authority shall summon the entity submitting the notification to supplement any such shortages within the time limit indicated, not shorter than 7 days.

3. Should the ex officio proceedings be initiated and in cases referred to in Article 3 paragraph 6, the control authority shall summon the relevant entity to submit information or documents referred to in Article 6. The entity receiving the summons, shall become a party to the proceedings upon its delivery. The provisions of Article 7 and Article 8 shall apply accordingly.

4. The refusal to initiate the proceedings justified by the fact that the activity covered by the notification is not subject to the act, shall be effected by means of the decision of the control authority. The right to apply for re-examination of the case and the right to appeal against the decision of the control authority to the administrative court is also granted to the company being the subject to protection, the notification refers to. The decision shall be served upon such a company.

5. The decision concerning the case initiated in accordance with paragraph 1 shall be issued, at the latest, within 90 days following the receipt of the notification or initiation of the ex officio proceedings, whereas it shall be delivered, at the latest, within 2 business days following its issuance, excluding the case referred to in Article 8 paragraph 2. The aforementioned time limits shall be deemed maintained if, prior to their expiry, the decision is dispatched in the post office of the operator appointed within the meaning of the Act of 23 November 2012 - the Postal Law (Journal of Laws item 1529).

6. In case of waiver of the decision by the administrative court on account of the essence of the case or pursuant to the provision concluding the proceedings in the case, the time limit of 90 days, referred to in paragraph 5, shall run from the day on which the legally effective judgement of the administrative court was served upon the control authority.

7. The time limits defined in paragraph 5 shall be suspended in the period running from the day on which the summons referred to in paragraphs 2 or 3 is served until the day of submission of all required information and documents.

8. The entity submitting the notification shall be bound to refrain from exercising the activity covered by the notification until the lapse of the time limit within which the decision should be issued.

9. The legal act covered by the notification may be exercised provided that no objection has been raised.

**Article 10.1.** Prior to issuing of the decision referred to in Article 9 paragraph 5 the control authority:

1) shall address the Consultation Committee referred to in Article 13, to issue, within the prescribed time-limit, a recommendation in the scope of the legitimacy of the decisions referred to in Article 11 or Article 12 paragraph 6;

2) may apply to the entity submitting the notification, to provide additional written explanations with regard to the information or documents referred to in Article 6, within the prescribed time-limit of no less than 7 days. The time limit referred to in Article 9 paragraph 5 shall be suspended until the day of receipt of the explanations referred to in paragraph 1(2) by the control authority.

**Article 11.1.** The control authority, by the relevant decision, shall raise the objection against the acquisition of shares or stocks, or rights arising from shares or stocks, or taking up the stocks or shares of a company being the entity subject to protection, resulting in the acquisition or gaining the significant participation, or acquisition of the domination over a company being the entity subject to protection, or against the acquisition

of an enterprise or its organised part from a company being the entity subject to protection, including, in case of the consequential acquisition, if

- 1) the entity submitting the notification failed to supplement, within the determined time limit, formal shortages in the notification or the documents or information attached thereto, or the entity summoned by the control authority failed to submit the requested information or documents, or
- 1a) the entity submitting the notification failed to provide additional written explanations within the time limit set by the control authority, or
- 2) it is justified by the goal of:
  - a) ensuring the implementation of obligations imposed on the Republic of Poland related to safeguarding the independence and integrity of the territory of the Republic of Poland, assuring the freedom and human and civil rights, citizens' security and environmental protection,
  - b) preventing social or political activities or phenomena making it impossible or difficult for the Republic of Poland to fulfil its obligations arising from the North Atlantic Treaty, executed in Washington D.C. on 4 April 1949, as well as to participate in the North Atlantic Treaty Organisation,
  - c) preventing social or political activities or phenomena that may potentially distort the foreign relations of the Republic of Poland,
  - d) ensuring, without prejudice for the provisions of letter a, public order or security of the Republic of Poland, as well as covering the indispensable needs of the population, in order to protect population health and life

– considering Article 52 paragraph 1 and Article 65 paragraph 1 of the Treaty on the Functioning of the European Union and Article 4 paragraph 2 of the Treaty on the European Union.

2. The control authority, in case of the notification referred to in Article 5 paragraph 3, by the relevant decision, determines the inadmissibility of exercising the rights arising from shares or stocks of a company being the subject to protection, acquired in cases defined in the second sentence Article 3 paragraph 6, in case of the fulfilment of the condition or conditions defined in paragraph 1.

3. The control authority, in case of initiating the ex officio proceedings, by the relevant decision, determines the admissibility of exercising the rights arising from shares or stocks of a company being the subject to protection, in the manner which would not go beyond the significant participation, in case of gaining the significant participation in a company being the subject to protection, in cases defined in Article 3 paragraph 1(4) and in paragraph 4, if in the course of the proceedings it was impossible to determine the activities based on which the entity gained the significant participation.

4. By issuing the decisions referred to in paragraphs 1-3, the control authority takes into account the assumptions of the state policy in areas of social or economic life with significant importance for the implementation of the goals defined in paragraph 1. The economic interest of the state may not provide basis for the decision of the control authority.

5. To proceedings conducted pursuant to the provisions of the Act, to the extent not settled herein, the provisions of the Act of 14 June 1960 – Code of Administrative Procedure shall apply (Journal of Laws of 2013 item 267, as amended<sup>17</sup>);

**Article 12.1.** The acquisition or gaining of the significant participation exercised:

- 1) under the failure to submit the notification referred to in Article 5 paragraphs 1, 2, 4 or 5; or
- 2) despite raising of the objection referred to in Article 11 paragraph 1

– shall be invalid unless the decision referred to in Article 11 paragraph 3 has been issued.

2. In case of:

- 1) failure to submit the notification referred to in Article 5 paragraph 3; or
- 2) issuing the decision referred to in Article 11 paragraph 2

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<sup>17</sup>

The amendments to the uniform text to the aforementioned Act were announced Journals of Laws of 2014 items 183 and 1195 and of 2015 items 211 and 702.

– neither the voting right nor other rights may be exercised based on shares or stocks of a company being the subject to protection, acquired in cases defined in Article 3 paragraph 6, excluding the right to dispose of such shares or stocks.

3. In case of failure to submit the notification referred to in Article 5 paragraph 4, neither the voting right nor other rights may be exercised, excluding the right to dispose in relation to all shares or stocks to which the entity bound to submit the notification is entitled. In case of issuing the decision referred to in Article 11 paragraph 3, neither the voting right nor other rights may be exercised based on shares or stocks of a company being the subject to protection, excluding the right to dispose of such shares or stocks providing the authorised person with less than 20% of the total rights allocated to partners or shareholders, without considering the privileges or rights granted to individual partners of shareholders.

4. The resolutions of the general meeting or the meetings of shareholders of a company being the subject to protection, adopted with the infringement of the provisions of paragraphs 1-3 shall be invalid, unless they fulfil the requirements related to the quorum and the majority of votes cast, without considering any invalid votes. The right to bring a legal action to state the invalidity of the resolution adopted by the general meeting or the meetings of shareholders is also granted to the control authority. The provisions of Article 252 and Article 425 of the Act of 15 September 2000 - Code of Commercial Companies (Journal of Laws of 2013 item 1030, as amended<sup>18</sup>) shall apply accordingly. The deadline for appealing against the Act shall be suspended over a period of the proceedings concluded by issuing of the decision referred to in Article 11 paragraph 2 or 3.

5. If the invalidity of the action referred to in paragraph 1 relates to actions performed in cases defined in Article 3 paragraph 6, the registry court relevant for a company being the subject to protection, shall delete, on an ex officio basis, the entries based on the invalid action in the relevant register. If, a consequence of such entries, other entries were made, a registry court or registry courts undertake actions relevant for the entries unacceptable due to the applicable regulations, in accordance with the provisions of the Act of 20 August 1997 on the National Court Register (Journal of Laws of 2015 item 1142).

6. In the case referred to in paragraph 2, the control authority may, by the relevant decision, order the disposal of the shares or stocks of a company being the subject to protection, within the time limit determined.

7. If shares or stocks are not disposed within the time limit referred to in paragraph 6, the control authority may appoint the administrator of shares or stocks, who shall be bound to undertake measures aimed at the disposal of the shares or stocks or their redemption. The administrator shall act on his/her own behalf, but on account of the partner or the shareholder who must not exercise the voting right. In the scope of adopting the resolutions on the redemption of shares or stocks and the associated reduction of the share capital, the administrator shall be authorised to exercise the voting right arising from shares and stocks, however, the voting through the administrator in the scope of remuneration for the redeemed shares or stocks shall require the approval of the control authority.

**Article 13.** 1. The Consultation Committee is established as the advisory body of the control authority.

2. The task of the Consultation Committee is to provide advice to the control authority in the scope covered by the act, and in particular:

- 1) to issue, within the time-limit prescribed by the control authority, a recommendation including factual and legal justification, in the scope of the legitimacy of the decisions referred to in Article 11 or Article 12 paragraph 6;
- 2) to present opinions on matters determined by the control authority.

3. The Consultation Committee comprises representatives of:

- 1) the minister competent for foreign affairs;
- 2) the Minister of Defence;
- 3) the minister competent for internal affairs;
- 4) the minister competent for economy;
- 5) the minister competent for State Treasury affairs;

<sup>18</sup>

The amendments to the uniform text to the aforementioned Act were announced Journals of Laws of 2014 items 265 and 1161 and of 2015 items 4 and 978.

- 6) the minister competent for environmental affairs;
- 7) the minister competent for agriculture;
- 8) the minister competent for public administration;
- 9) the minister competent for transport;
- 10) the minister competent for digitization;
- 10a) the minister competent for mineral deposit management;
- 10b) the minister competent for energy;
- 10c) the minister competent for maritime economy;
- 11) the Head of Internal Security Agency;
- 12) the Head of Intelligence Agency;
- 13) Director of the Government Centre for Security;
- 14) the Head of the Military Counterintelligence Service;
- 15) the Head of the Military Intelligence Service;
- 16) the President of the Energy Regulatory Office;
- 17) the President of the Office of Electronic Communications.

4. A person holding the security clearance authorising the access to classified information with the "top secret" clause may be a member of the Consultation Committee.

5. Members of the Consultation Committee are appointed and dismissed by the minister competent for the State Treasury, who simultaneously indicates the Chairman of the Consultation Committee.

**Article 14.1.** The Chairman of the Consultation Committee shall lead the activities of the Consultation Committee.

2. The Consultation Committee shall adopt resolutions in order to carry out the tasks specified in the Act. In case of an equal number of votes for and against the resolution, the Chairman of the Consultation Committee shall have the casting vote.

3. Costs of activities of the Consultation Committee shall be paid from the state budget, from the part at the disposal of the control authority.

4. The Consultation Committee shall adopt the by-laws defining its way of operation in the form of a resolution.

5. The organizational support of the Consultation Committee shall be ensured by the minister competent for the State Treasury.

**Article 15.1.** Any person acquiring or gaining the significant participation without the submission of the relevant notification

– shall be subject to a fine of up to PLN 100,000,000 or the penalty of deprivation of liberty from 6 months to 5 years, or both those sanctions jointly.

2. Any person committing the act defined in paragraph 1, acting on behalf of or for the benefit a legal person or a non-corporate entity shall be subject to the sanctions defined in paragraph 1.

**Article 16.1.** Any person bound to deal with the affairs of the subsidiary pursuant to the Act or a contract, who fails to submit the notification being aware of the acquisition performed in cases defined in Article 3 paragraph 6

– shall be subject to a fine of up to PLN 10,000,000 or the penalty of deprivation of liberty from 6 months to 5 years, or both those sanctions jointly.

2. The same sanctions shall apply to a person who, acting at the general meeting or the meetings of shareholders of a company being the entity subject to protection, exercises the rights arising from shares and stocks on behalf of the entity that, despite the obligation, did not notify of having gained the significant participation in the company, if it was aware of such circumstances or could have learnt based on the data made available pursuant to the agreement.

**Article 17.** In the Act of 2 July 2004 on the freedom of economic activity (Journal of Laws of 2015 item 584, as amended<sup>19</sup>), the following amendments shall be introduced:

- 1) in Article 56 subparagraph 3a is added in paragraph 1 which shall read as follows  
"3a) if the decision stating the unacceptability of exercising the rights arising from shares or stocks of an economic operator has been issued, pursuant to the provisions of the Act of 24 July 2015 on the control of certain investments (Journal of Laws item 1272), if it lies in the public interest;"
- 2) in Article 58 paragraph 3 shall read as follows:  
"3. The concession authority may withdraw the concession or change its scope due to the threat to the state defence or security, or the security of citizens, as well as if the decision on stating the unacceptability of exercising the rights arising from shares or stocks of an economic operator has been issued, pursuant to the provisions of the Act of 24 July 2015 on the control of certain investments, or in case of declaring the bankruptcy of the economic operator".

**Article 18.** In the Act of 9 June 2011 - Geological and Mining Law (Journal of Laws of 2015 item 196), the following amendments shall be introduced:

- 1) in Article 29 paragraph 3 is added which shall read as follows:  
"3. The concession authority may refuse granting the concession if the decision on stating the unacceptability of exercising the rights arising from shares or stocks of an economic operator has been issued, pursuant to the provisions of the Act of 24 July 2015 on the control of certain investments (Journal of Laws item 1272), if it lies in public interest, in particular, associated with the state security or environmental protection including the reasonable management of fossil deposits.";
- 2) in Article 37 paragraph 4 is added which shall read as follows:  
"4. The concession authority may withdraw without compensation, the concession if the decision on stating the unacceptability of exercising the rights arising from shares or stocks of an economic operator has been issued, pursuant to the provisions of the Act of 24 July 2015 on the control of certain investments if it lies in public interest, in particular, associated with the state security or environmental protection including the reasonable management of fossil deposits.".

**Article 19.** The Act shall enter into force following 30 days as of the date of its announcement.

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<sup>19</sup>

The amendments to the uniform text to the aforementioned Act were announced Journals of Laws of 2015 items 699, 875, 978, 1197 and 1268.