ZESZYT STUDENCKI KÓŁ NAUKOWYCH
WYDZIAŁU PRAWA I ADMINISTRACJI UAM
2019 • nr 9

MICHAŁ BAŁDOWSKI

Doktorant w Katedrze Prawa i Postępowania Administracyjnego
Wydział Prawa i Administracji, Uniwersytet Warszawski

Critical reflection on administrative aspects of the Control of Investment Act

Introduction

One of the most important and basic principle under Polish Constitution[1] is expressed in Article 5 of the Constitution which constitutes an obligation to take actions protecting the independence of the country[2]. The principle consists of several elements including *inter alia* safety of citizens, a value strongly connected with the national safety and public order directly expressed in Article 31 section 3 of the

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended).

[2] P. Sarnecki, *Komentarz do art. 5*, [in:] L. Garlicki, M. Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I*, Warsaw 2016, p. 234.

Constitution[3]. These values constitute basis for limitation of constitutional freedoms and rights that may be imposed in a form of an act (*ustawa*), if necessary and proportional. The effective functioning of every country, and thus its safety and safety of its citizens, strongly depends on several industry sectors, as primarily widely understood energy and telecommunications sectors. Usually in modern countries energy and telecommunication sectors are in a large part privatized and controlled by private companies or by state through private companies. As a result, there is a risk that such companies may be a subject of acquisition conducted by foreign, and sometimes hostile entities.

This may be well exemplified by a controversial case of Grupa Azoty S.A.[4] – a large Polish public company operating in a chemicals industry which in 2012 was a subject of a failed take-over trial conducted through Norica Holding S.a.r.l., a Luxembourg fund controlled by the Acron Group, a global chemical concern owned by a Russian billionaire Viatcheslav Moshe Kantor. The peak of attempts to take control over the company occurred in 2012 when Acron announced a tender offer for 66% of shares in Azoty Tarnów through Norica Holding, which was interpreted as an attempt of a hostile take-over of the company. In order to defend the company against the tender offer, the former Minister of Treasure, which was representing the State Treasury – a minority shareholder of Azoty Tarnów, personally attended the general meeting of Azoty Tarnów to persuade the other shareholders not to answer the tender offer. As a result, Acron acquired only about 13% of shares in Azoty Tarnów. Between 2012 and 2014 Acron finally managed to acquire a total stake of 20% of shares in Grupa Azoty S.A. and subsequently made some further attempts to take over control over the company controlled by the State Treasury.

In order to protect the companies of a strategic importance for the national safety and public order against such attempts in the future, on 5 August 2015 the President of the Republic of Poland signed

---

[3] Ibidem; M. Florczak-Wątor, *Komentarz do art. 5*, [in:] M. Safian, L. Bosek (eds), *Konstytucja RP. Tom 1. Komentarz*, Warsaw 2016, p. 288.

[4] Grupa Azoty S.A. was created in 2014 as a result of a merger between Azoty Tarnów and Zakłady Azotowe in Puławy.

the Act f 24 July 2015 on the control of certain investments[5]. The Control of Investment Act stipulates the rules of the control of acquisition of (i) shares, (ii) general partner's rights or (iii) enterprise or its organized part of companies protected under the Control of Investment Act, as well as sanctions for infringement of these rules.

In order to qualify a company as a protected company under Article 4 of the Control of Investment Act the following two criteria have to be met jointly: (a) the company operates in certain strategic industries listed in Article 4 point 1 of the Control of Investments Act, including *inter alia* electric energy production, gas production, chemicals production or telecommunications, and (b) the company is included on the list of strategic companies enacted by the Council of Ministers by way of an annually issued government regulation.

Currently, the list of protected companies is included in the Regulation of the Council of Ministers on the list of protected entities, of 27 December 2018[6] and it contains the following companies: Emi-Tel S.A., Grupa Azoty S.A., innogy Stoen Operator sp. z o.o., KGHM Polska Miedź S.A., Polski Koncern Naftowy ORLEN S.A., PKP Energetyka S.A., Tauron Polska Energia S.A., and TK Telekom sp. z o.o.

Furthermore, similar regulations are functioning in numerous other member states of the European Union[7]. According to Article 63 and 66 of the Treaty on Functioning of the European Union[8] intervention of the member state in trading in assets or shares of private companies must not interfere with the principle of the free movement of capital, unless it is justified by a threat to public policy and public security as set forth in Article 52 Section 1 and Article 65 Section 1 of the Treaty on Functioning of the European Union in accordance with Article 4

[5] The Act of 24 July 2015 on the control of certain investments (Journal of Laws of 2017, item 1857, as amended). Hereinafter referred to as: "Control of Investment Act".

[6] Regulation of the Council of Ministers regarding the list of protected entities of 27 December 2018 (Journal of Laws of 2018, item 2524). Hereinafter referred to as: "Regulation".

[7] Hereinafter referred to as: the EU.

[8] Treaty on Functioning of the European Union (Journal of Laws of 2004, No. 90, item 864/2).

Section 2 of the Treaty on the European Union[9]. As a result of this exception a number of member states, such as *inter alia* Germany[10], France[11] or Spain[12] enacted similar regulations imposing a state control over the disposal of share or assets of companies of a strategic importance for the state. Furthermore, similar regulations function outside the EU, including the United States of America[13], Canada, Russia, China or Japan[14].

Additionally, the Control of Investment Act is not a *novum* under Polish law. The first trial to impose a state protection over strategic companies was introduced through the Act of 3 June 2005 on Special Prerogatives of the State Treasury and their Implementation in Companies of Material Significance for Public Order and Safety[15], which was widely criticized in the Polish legal doctrine[16], and subsequently after issuing a formal notice by the European Commission which contained opinion that the 2005 Act infringed Article 63 and 49 of the Treaty on

[9] Treaty on the European Union (Journal of Laws of 2004, No. 90, item 864/30).

[10] Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung vom 18. April 2009 (BGBl. I.S. 770).

[11] Décret no 2005–1739 du 30 décembre 2005 réglementant les relations financières avec l'étranger et portant application de l'article L151-3 du code monétaire et financier, JORF of 30 December 2005.

[12] Royal Decree 664/1999 of 23 April 1999, on external investments (RD 664/1999).

[13] 50 U.S. Code, Section 2170 (U.S. Code, Title 50-Appendix–War and National Defence – Defence Production Act of 1950, § 2170. Authority to review certain mergers, acquisitions and takeovers.

[14] P.M. Wiórek, *Ochrona giełdowych spółek Skarbu Państwa i bezpieczeństwa Rzeczypospolitej Polskiej poprzez kontrolę inwestycji*, [in:] A. Kidyba, M. Michalski (eds), *Spółki skarbu państwa na rynku kapitałowym*, Warsaw 2017, p. 204.

[15] The Act of 3 June 2005 on Special Prerogatives of the State Treasury and their Implementation in Companies of Material Significance for Public Order and Safety (Journal of Laws of 2005, No. 132, item 1108, as amended). Hereinafter referred to as: "The 2005 Act".

[16] See: L. Wyrębkowska, *Ustawa o „złotym vecie"*, "Temidium" 2011, no. 11, p. 56–57; G. Cern, *„Złota akcja" a zasada równego traktowania akcjonariuszy w spółce akcyjnej*, „Przegląd Ustawodawstwa Gospodarczego" 2009, no. 11, p. 326; J. Karman, *Nowa konstrukcja instytucji „złotego veta"*, "Przegląd Corporate Governance" 2009, no. 4, p. 80–84; M. Mataczyński, *„Złote veto" w prawie polskim na tle ustawy z 3 czerwca 2005 r.*, „Przegląd Prawa Handlowego" 2005, no. 11, p. 22–23.

Functioning of the European Union[17], repealed by the Act of 18 March 2010 on Special Prerogatives of the Minister Competent for Energy Matters and their Use with Respect to Certain Companies and Groups Conducting Business in the Sectors of Electricity, Oil and Gas Fuels[18].

Although formally the Control of Investments Act is designed to control acquisition of assets of protected companies conducted by both domestic and foreign entities it is rather clear that the particular interest of this act is primarily targeted to foreign investors[19]. Nevertheless, the controlling mechanism regulated by the Control of Investments Act imposes several difficult obligations on entities willing to conduct certain transactions on assets of protected companies, which in particular increase the legal uncertainty of success of such transactions.

The aim of this article is to analyze certain selected aspects of the Control of Investments Act from the perspective of substantive and procedural administrative law in order to provide the Author's opinion on certain ambiguities occurring under the Control of Investments Act and to provide a critical reflection on the act itself by showing how it can eliminate in practice any transactions on the protected company assets by giving a broad level of administrative discretionary powers to the competent authority.

As a result, analysis of the compliance of the Control of Investments Act with EU law and its constitutionality is not covered by the scope of this article[20].

---

[17] L. Wyrębkowska, op. cit., p. 57.

[18] The Act of 18 March 2010 on Special Prerogatives of the Minister Competent for Energy Matters and their Use with Respect to Certain Companies and Groups Conducting Business in the Sectors of Electricity, Oil and Gas Fuels (Journal of Laws of 2016, item 2012, as amended).

[19] P.M. Wiórek, op. cit., p. 202.

[20] See: A. Opalski, *Rozdział XIV. Prawa i obowiązki akcjonariuszy*, [in:] S. Sołtysiński (ed.), *System Prawa Prywatnego. Tom 17B*, Warsaw 2016, p. 372; T. Regucki, *Chrońmy strategiczne spółki. Ale nie tak!* <http://archiwum.rp.pl/artykul/1285141-Chronmy-strategiczne-spolki-Ale-nie-tak!.html> [accessed: 31.03.2019]; M. Wiórek, op. cit., p. 220–223.

1. General mechanisms of control under the Control of Investment Act

1.1. *Ex ante* notification

The most important consequence of entering a company on the list of protected companies under the Regulation is related to imposing a certain limitation on the trading of shares and assets of such protected companies constituting a special legal regime for such trading[21].

In general, if the investor intends to:

(a) acquire new or existing shares of a protected company in a number resulting in reaching or exceeding 20%, 25%, 33% of the total votes at the shareholders' meeting (defined as a "material interest") or 50% of the total votes at the shareholders' meeting (defined as a "dominant position") – such acquisition of a material interest or dominant position is qualified as a direct acquisition";
(b) acquire a material interest or a dominant position in a protected company indirectly;
(c) acquire an enterprise or an organized part thereof from protected company;
(d) acquire a material interest or a dominant positions as a result of one of the following events:
    i. a redemption of shares or interests in a protected company or an acquisition of treasury shares by a protected company,
    ii. merger or demerger of a protected company,
    iii. amendments to the articles of association or bylaws of a protected company affecting the preferences attached to shares or interests, or any personal rights or privileges of the protected company's partners or shareholders, and
    iv. a cancellation of shares or share certificates of a protected company – such acquisition is defined as a "subsequent acquisition",

[21] A. Szumański, *Odrębna regulacja prawna spółek z udziałem Skarbu Państwa prowadzących działalność w sektorach energii elektrycznej, ropy naftowej oraz paliw gazowych*, [in:] A. Szymański (ed.), *System Prawa Handlowego*, *Tom 2B*, Warsaw 2019, p. 732.

such investor, or a protected company itself in case of a subsequent acquisition, must notify, depending on the sector in which protected company operates, (i) the Minister of National Defense, (ii) the minister competent in matters concerning energy, (iii) the minister competent in matters of economy, or (iv) the minister competent in matters of maritime affairs, about intention of such acquisition prior to the transaction.

Such notification entitles competent authority to initiate administrative proceedings pursuant to Article 9 Section 1 in connection with Article 11 Section 5 of the Control of Investment Act[22].

In such administrative proceedings the competent authority may make an objection in the form of an administrative decision within 90 days from filing a notification or initiation of the proceedings *ex officio*. An acquisition of shares or execution of another transaction covered by the Control of Investments Act without making the notification or despite an objection is invalid. If the competent authority does not issue an objection against the acquisition within the prescribed term, the notifying entity is entitled to process with the transaction.

Pursuant to Article 5 Section 6 Point 1 of the Control of Investment Act the investor willing to acquire a material interest or a domination in the protected company is obliged to file a notification prior to the first agreement of another legal act which creates an obligation to acquire shares or enterprise of a protected company. It is unclear whether the preliminary purchase agreement would fall under the scope of this provision. According to M. Saczywko a notification should be filed prior to concluding a preliminary purchase agreement, including conditional preliminary purchase agreement, if it meets criteria set in Articles 389 and 390 of the Civil Code[23]. Such a preliminary agreement creates direct obligation to conclude a final agreement, and thus indirect obligation to acquire material interest or dominance over the

[22] A. Szumański, *Szczególna regulacja sankcji z tytułu wadliwych czynności prawnych spółek z udziałem Skarbu Państwa*, „Przegląd Prawa Handlowego" 2017, no. 10, p. 13.

[23] M. Saczywko, *Komentarz do art. 5*, [in:] M. Mataczyński (ed.), *Ustawa o kontroli niektórych inwestycji. Komentarz*, Warsaw 2016, p. 110; The Act of 23 April 1964 – Civil Code (Journal of Laws of 2018, item 1025, as amended).

protected company. However, in accordance to the Supreme Court jurisprudence a preliminary agreement creates an obligation only to conclude the final agreement[24]. Therefore, a preliminary purchase agreement does not create an obligation to acquire a material interest or dominance in a protected company, and therefore a notification may be filled after concluding a preliminary agreement, but before concluding a final agreement.

Notification described above required prior to the transaction will be further referred to as *ex ante* notification.

1.2. *Ex post* notification

Pursuant to Article 5 Section 7 in connection with Article 5 Section 3 and Article 3 Section 6 of the Control of Investments Act in case of certain transactions *ex ante* notification is not required. Therefore, if the acquisition of a material interest or a dominant position occurred as a result of a transaction, concluded on the basis of law other than Polish law, in particular as a result of a merger of foreign companies, or acquisition of shares of a foreign company, which hold(s) a dominant position in the protected company.

In such a case an *ex post* notification to the competent authority is required within 7 days from the acquisition of a dominant position or material interest company, and if it is difficult to establish the date of the *in rem* effect of the acquisition, then the notification should be submitted within 30 days from the day of the transaction (in practice from a day of concluding a share purchase agreement or an enterprise purchase agreement).

Provisions concerning an *ex post* notification are very ambiguous as to which entity is obliged to file such a notification. It seems that in accordance with a linguistic interpretation of the Control of Investment Act a subsidiary entity which holds a dominant position in a protected entity and not the factual beneficiary is obliged to file a notification[25]. Consequently, the Control of Investment Act imposes

[24] Resolution of the Supreme Court of 21 March 1968, III CZP 23/68.

[25] M. Saczywko, op. cit., p. 108.

an obligation on an actual direct target of an acquisition instead of the investor concluding the transaction. Such a regulation has material negative consequences and is highly impractical. In practice it requires from the investor and the target company strict cooperation in preparation of documents necessary for filing a notification prior to the acquisition itself. This creates practical problems with disclosure of confidential information between entities that are often in a different capital groups, as it is practically impossible to prepare required documentation within prescribed term of 7 days after the acquisition of material position or a dominance in a protected company.

2. Approving the acquisition of a material interest or a dominant position

It should be noted that there is a difference in opinions in the Polish legal doctrine on the competence of the competent authority to issue a positive decision for the notifying entity, i.e. decision on approving the transaction. According to the first opinion the competent authority is entitled to issue a decision on approving the transaction as a "logical consequence" of this type of controlling proceedings[26]. According to the second opinion, if the competent authority decides that prerequisites of issuing the objection are not met, then the decision on discontinuance of the proceedings pursuant to Article 105 of the Code of the Administrative Procedure[27] should be issued on a basis of the groundlessness of such proceedings[28].

It should be noted that both those opinions are wrong. Firstly, the competent authority may not issue a decision on approving the acquisition because there is no competence norm that would give it

[26] M. Mataczyński, E. Kochowska, *Komentarz do art. 11*, [in:] M. Mataczyński (ed.), *Ustawa o kontroli…*, p. 158.

[27] M. Wiórek, op. cit., p. 217.

[28] The Act of 14 June 1960 – the Code of the Administrative Procedure (Journal of Laws of 2018, item 2096, as amended).

a legal basis to issue such a decision. The principle that constitutes basis under the administrative law is a prohibition to presume competence[29]. Since there is no legal norm that would explicitly entitle any authority listed in the Control of Investment Act to issue a decision on the approval of the transaction, under no circumstances such a decision may be issued.

The second opinion is contrary to Article 105 of the Code of the Administrative Procedure which obliges the authority to issue a decision on discontinuation of the proceedings if such proceedings became unsupported. In legal doctrine usually two types of groundlessness are specified: subjective groundlessness and objective groundlessness[30]. In first, the groundlessness will occur in case of certain situations related to the notifying entity such as liquidation or death in case of a private investor. The second groundlessness would occur if the proceedings would lose its administrative character or the object of the proceedings would cease to exist. That could be the case for example if the protected entity which would be a target of an acquisition would cease to exist as a result of a liquidation. The fact that the acquisition or the notifying entity does not meet the prerequisites entitling the competent authority to issue an objection pursuant to Article 11 of the Control of Investment Act may not constitute basis for issuing a decision on discontinuance of the proceedings pursuant to Article 105 of the Code of the Administrative Procedure.

If there is no basis for issuing an objection pursuant to Article 11 of the Control of Investment Act the competent authority may only stay passive and as soon as the prescribed period of 90 days lapses, the investors may continue with an acquisition in case of an *ex ante* notification or may consider the acquisition approved in case of an *ex post* notification.

---

[29] S. Dudziak, *Wyrok Naczelnego Sądu Administracyjnego z dnia 16 stycznia 2018 r., II OSK 2868/17*, „Orzecznictwo Sądów Polskich" 2019, no. 2, p. 139.

[30] A. Krawczyk, *Komentarz do art. 105*, [in:] Z. Kmieciak, W. Chrościelewski (eds), *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2019, p. 601.

3. Application of rules on fictional positive decision

Pursuant to the amendment to the Code of the Administrative Procedure enacted in 2017[31] a new institution to the administrative procedure was introduced in Chapter 8a – a so-called "tacit authorization" (*milczące załatwienie sprawy*), which in principle constitutes a fiction of a positive decision in case the competent authority fails to issue a decision in a particular case within a prescribed time, or fails to issue an objection within a prescribed time.

According to Article 122a of the Code of the Administrative Procedure the provisions on fictional positive decision may be applicable if a specific regulation so provides. There are in principle two separate opinions regarding the understanding of the term "if a specific regulation so provides" – the first one, which states that the specific provision needs to explicitly refer to the fictional decision in order to apply its provisions[32] and a more liberal one, according to which such provisions may apply without an explicit reference. According to the more liberal approach, if particular legal regulations indicate indirectly the possibility to apply such provisions (for example by constituting an objection as a form of settling a case), then provisions of Chapter 8a of the Code of the Administrative Procedure apply[33]. Although, in my opinion a more liberal approach should be considered to determine whether provision of Chapter 8a should apply to particular proceedings, nevertheless this should not be applied

[31] The Act of 7 April 2007 on amendment of the Code of the Administrative Procedure and certain other acts (Journal of Laws of 2017, item 935).

[32] J. Piecha, *Komentarz do art. 122a*, [in:] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2018, p. 886.

[33] Z. Kmieciak, *Komentarz do art. 122a*, [in:] Z. Kmieciak, W. Chrościelewski (eds), *Kodeks postępowania administracyjnego…*, p. 664–665; A. Wiktorowska, *Milczące załatwienie sprawy*, [in:] M. Wierzbowski, A. Wiktorowska, M. Szubiakowski (eds), *Postępowanie administracyjne*, Warsaw 2017, p. 193. It seems that more liberal approach was also taken by the Voivodeship Administrative Court in Poznań in Judgement of the Voivodeship Administrative Court in Poznań of 17 January 2018, IV SA/Po 973/17 (LEX no. 2453528).

to proceedings initiated by either a notification or *ex officio* under the Control of Investment Act.

Under the Control of Investment Act, we may distinguish the following three different situations that trigger the proceedings: (i) *ex ante* notification, (ii) *ex post* notification, (iii) proceedings initiated *ex officio* due to a lack of either *ex ante* or *ex post* notification. Only in the first of these three situations an objection may be issued by a competent authority, in other two the competent authority has 90 days to issue a decision that the rights attached to the shares in a protected company may not be exercised. Pursuant to Article 9 Section 1 in connection with Section 5 of the Control of Investment Act, in all of these three situations we deal with the same type of proceedings. In that case it may be questionable whether Chapter 8a applies, as two different types of "tacit authorization", i.e. termination of proceedings without notice (*milczące zakończenie postępowania*) and tacit approval (*milcząca zgoda*) would be mixed in one proceedings. In the Author's view the application of Chapter 8a of the Code of the Administrative Procedure should be directly excluded from the Control of Investment Act mainly because in such proceedings Article 10 of the Code of the Administrative Procedure, regulating the party's right to be heard and giving a right to the party to present its position as to the collected evidence and materials as well as submit demands, is excluded. Is such complex and political proceedings as the one regulated under the Control of Investment Act, with a large amount of evidence and materials collected during the proceeding, Article 10 of the Code of the Administrative Procedure plays a fundamental role and should not be excluded.

4. Legal character of decisions under the Control of Investment Act

As stated in the previous chapter of the article, under the Control of Investment Act two main administrative decisions may be established: (i) an objection under Article 11 Section 1 of the Control of Investment Act in case of *ex ante* notification and (ii) a decision under

Article 11 Section 2–3 of the Control of Investment Act that the rights attached to the shares in a protected company may not be exercised in case of proceedings initiated *ex post* or *ex officio*[34].

Article 11 of the Control of Investment Act lists formal and substantial prerequisites occurrence of which obliges the competent authority to issue one of the decisions mentioned above. Formal prerequisites include: (i) any formal defects in the notification that have not been cured in due time, and (ii) failure to file additional written explanations within the deadline set by the Authority, while material prerequisites include: (i) ensuring the implementation of Poland's obligations concerning the safeguarding of the independence and integrity of the territory of Poland, (ii) preventing actions or social or political phenomena preventing or obstructing the performance of Poland's obligations ensuing from the North Atlantic Treaty, (iii) preventing actions or social or political phenomena that might disrupt Poland's foreign relations, or (iv) ensuring public order or security or satisfying basic public needs concerning the protection of human health and life.

The most important question regarding the nature of decisions regulated under the Control of Investment Act is to whether they constitute constrained decisions or discretionary decisions. Discretionary decision, undefined directly in Polish law, allows a competent authority to choose the outcome of the proceedings based on some level of administrative discretion[35]. Such decisions occur usually when the competence norm states that the authority "may" or "can" issue a decision[36]. Under the Control of Investment Act it is clear that if any of the above prerequisites occurs, the competent authority is obliged to issue a decision pursuant to Article 11 of the Control of Investment Act[37].

---

[34] The Control of Investment Act also regulates a decision requiring a disposal of shares of a protected entity and decision on refusal to initiate proceedings which are outside the scope of this article.

[35] J. Starościak, *Swobodne uznanie władz administracyjnych*, Warsaw 1948, p. 40.

[36] J. Borkowski, *Decyzja administracyjna*, Łódź–Zielona Góra 2001, p. 79–80.

[37] Ruling of the Voivodeship Administrative Court in Warsaw of 17 October 2017, VI SA/Wa 727/17.

However, it should be noted that material prerequisites specified in the Control of Investment Act contain general clauses which are included in the legal acts in order to reserve a broad level of interpretation to the competent authority[38]. This margin of decision reserved for the authority may not be unlimited, and such authority may not be arbitrary to prescribe a meaning to a particular general clause[39]. Unlike discretionary decision, a margin of interpretation is reserved to assess the facts of the case, but does allow the authority to choose between different outcomes of the case[40].

Nevertheless, general clauses incorporated in the prerequisites, as well as formal prerequisites are designed in such a broad way, then in practice the competent authority will always be able to issue a negative decision for the notifying entity by either applying broad interpretation of material prerequisites, which in practice is difficult to defend against in administrative court or by demanding large data in a short period of time in order to trigger formal prerequisites.

Krytyczna refleksja nad administracyjnoprawnymi aspektami ustawy o kontroli niektórych inwestycji

Streszczenie

W 2015 r. Sejm uchwalił ustawę o kontroli niektórych inwestycji, która wprowadza specjalny reżim dotyczący nabywania akcji, udziałów, przedsiębiorstwa lub zorganizowanej części przedsiębiorstwa spółek wpisanych jako podmioty podlegające ochronie. Głównym celem regulacji jest wprowadzenie administracyjnoprawnych mechanizmów chroniących spółki o strategicznym znaczeniu dla bezpieczeństwa państwa przed próbami przejęcia przez

[38] E. Łętowska, *Po co ludziom konstytucja*, Warsaw 1995, p. 131.

[39] A. Szot, *Klauzula generalna jako ponadgałęziowa konstrukcja systemu prawa*, „Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia" 2016, vol. LXIII, no. 2, p. 299.

[40] E. Ura, *Luz decyzyjny w działaniach administracji publicznej*, [in:] J. Korczak (ed.), *Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia*, Wrocław 2016, p. 13.

zagraniczne podmioty. W obecnym kształcie ustawa jest nieprecyzyjna oraz zapewnia właściwym organom bardzo szeroki luz interpretacyjny, tworząc instrumenty, które pozwalają w praktyce na uniemożliwienie dokonania wszelkich transakcji skutkujących osiągnięciem istotnego uczestnictwa lub dominacji w podmiocie podlegającym ochronie. Artykuł zawiera analizę najważniejszych instrumentów uregulowanych ustawą, takich jak zawiadomienie uprzednie i następcze, oraz wskazuje najważniejsze problemy interpretacyjne związane z regulacją. W szczególności omówione zostały kwestie stosowania przepisów dotyczących milczącego załatwiania sprawy do postępowań regulowanych ustawą o kontroli niektórych inwestycji, kwestia charakteru prawnego decyzji administracyjnych wprowadzonych ustawą, kwestia możliwości wydania decyzji aprobującej nabycie istotnego uczestnictwa lub dominacji w podmiocie podlegającym ochronie oraz wybrane zagadnienia związane z zawiadomieniem uprzednim i następczym.