

Global Foreign Direct Investment

Romania

In April 2022, Romania introduced an overhaul of its foreign direct investment (“**FDI**”) regime through Government Emergency Ordinance no. 46/2022 on measures for applying EU Regulation 2019/452 establishing a framework for the examination of foreign direct investment in the Union (the “**EU FDI Regulation**”) and amending Competition Law no. 21/1996 (“**GEO 46/2022**”). Secondary rules to GEO 46/2022 were approved later, in November 2022, leading to the new FDI screening body becoming operational.

Filing criteria under the new FDI regime

FDI screening in Romania is governed by GEO 46/2022 and is carried out by a newly established FDI Screening Commission (the “**CEISD**”), which has taken over the role from its predecessor under the previous FDI regime, the Supreme Council of National Defence (“**CSAT**”).

Romania’s new FDI regime provides for the screening of both (i) foreign investments, as well as what GEO 46/2022 defines as (ii) “*new investments*” (also including greenfield investments). An investment triggers a filing obligation under the new FDI regime if it meets the following cumulative criteria:

- the investment is made by a non-EU investor (generally, either a non-EU national or company registered outside the EU; an EU-registered company directly or indirectly controlled by a non-EU national; or a non-EU company or another legal entity without legal personality organised under the laws of a non-EU state) who would acquire control (defined as per competition rules) over an undertaking and the investment allows the investor to carry out economic activities in Romania;
- the value of the investment exceeds EUR 2m. However, investments below the threshold could also be subject to screening if they could impact or raise concerns regarding national security or public order; and
- the investment falls under a list of broadly defined sensitive sectors, whilst also considering the criteria under Art.4 of the EU FDI Regulation.

New investments considered for the purposes of the FDI regime pertain to initial investments in tangible and intangible assets within the same perimeter related to (i) the start of the activity of a new undertaking (in a new location, technically independent from other existing units); (ii) the expansion of the capacity of an existing undertaking (in an existing location, due to unmet demand); (iii) the diversification of the production of an undertaking with products/services not available before (in the respective unit); or (iv) a fundamental change in the general production process of an existing undertaking.

Sensitive sectors covered by the FDI regime

FDI screening covers investments that fall under the following list of sensitive sectors put forward by CSAT Decision no. 73/2012 (which is the same as under the old FDI regime), while also considering the criteria in the EU FDI Regulation:

- (a) security of the citizen and the communities;
- (b) border security;
- (c) energy security;
- (d) transport security;
- (e) security of vital resources supply systems;
- (f) security of critical infrastructures;
- (g) security of information and communication systems;
- (h) security of financial, tax, banking and insurance activities;

- (i) security of the production of arms, ammunition, explosives and toxic substances;
- (j) industrial security;
- (k) protection against disasters;
- (l) protection of agriculture and the environment;
- (m) protection of privatisation operations of state-owned undertakings or of their management;

Specific transparency rules apply to foreign investments in the media sector: for target companies holding an audio-visual license or running a periodical with an average circulation of at least 5.000 printed copies/day in the last calendar year or a website with at least 10.000 visits/month, the CEISD would run a market test for a 30-day period with respect to the mass-media target company.

Notification and screening process

GEO 46/2022 formally designated the CEISD as the new competent body for screening in Romania since its enactment in April 2022. However, in the absence of secondary rules on its functioning and organisation, which came into force only on November 8, 2022, the CEISD was still a dormant body under the new FDI regime, with the CSAT continuing rather on a de facto basis to screen foreign investments. Since the adoption of the secondary rules, the CEISD started fulfilling its role under the FDI screening procedure.

As regards timing, for a no-issues, phase I clearance, the authorities have up to 135 calendar days from the moment the filing is deemed complete to issue and communicate the clearance decision, as follows: (i) up to 60 days for the CEISD to screen the filing and issue a clearance opinion; (ii) another 30 days for the Romanian Competition Council (“RCC”), which also acts as the CEISD secretariat (through its newly-established Foreign Investments Directorate), to issue a clearance decision based on the CEISD’s opinion; and (iii) up to another 45 days from issuance of the clearance decision for the RCC to communicate it to the investor. If the CEISD believes that remedies are necessary to approve an investment or that a proposed investment would affect national security, public order, or projects or programmes of EU

interest, it would forward its opinion to the Romanian government, which would issue a final decision on the matter. There are no currently applicable deadlines in case the government becomes involved in the process.

With respect to sanctions, a clear standstill obligation is included under the new FDI law, meaning that foreign investments cannot be implemented prior to their approval and significant fines can be applied otherwise. More specifically, fines can amount to up to 10 percent of the investor’s worldwide turnover in the financial year prior to the sanctioning decision for: (i) gun jumping the FDI clearance obligation, (ii) deliberately providing inaccurate, incomplete or misleading information during the filing process, or (iii) breaching the remedies offered, in case of a conditional clearance.

Open points and further amendment of the new FDI regime

Given the recent change to Romania’s FDI regime, there is still a number of open points and the authorities’ decisional practice could provide further clarification. As such, important questions still remain (e.g., with respect to the scope of the new regime in terms of sensitive sectors or type of (new) investments covered, the manner of determining the investment value, or the clearance timeline for more sensitive cases) and a case-by-case analysis is recommended to mitigate risks, especially given the high fines introduced by GEO 46/2022.

Additional clarity and also further material amendments to the new FDI regime could be brought by an upcoming law for the approval of GEO 46/2022, currently under debate in Parliament.

Such a new law could introduce a series of material changes to the new FDI regime, including:

- extending the scope of the FDI filing obligation to also cover (certain) transactions by EU investors; and
- introducing an examination/authorisation fee, potentially as a lump sum depending on specific investment value thresholds, similar to the merger control authorisation tax in Romania.

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