

NEW REGULATIONS REGARDING THE FOREIGN INVESTMENT SCREENING REGIME IN ROMANIA

Following a general trend of tightening foreign direct investments ("FDIs") rules and in view of aligning the national legislation with Regulation 2019/452 establishing a framework for the screening of foreign direct investments in the EU (the "FDI Regulation"), the Romanian Government adopted on 14 April Emergency Ordinance no. 46/2022 (the "GEO") updating the mechanism for screening FDIs in Romania.

The GEO entered into force upon its publication in the Official Gazette on 18 April and its submission to the Parliament for approval.

AUTHORISATION REQUIREMENTS

Foreign investors

The new screening mechanism applies to FDIs made or intended to be made by *foreign investors*, defined as (i) non-EU citizens, (ii) non-EU based legal entities, (iii) EU-based legal entities controlled, directly or indirectly, by non-EU citizens or non-EU entities, or (iv) trustees of non-legal entities or similar persons that are non-EU citizens or non-EU based entities.

Types of investments

The FDIs which are subject to the authorisation requirements are the transactions meeting one of the following criteria:

- aim to establish or to maintain lasting and direct links between the foreign investor and the target to which the capital is or will be made available in order to carry on an economic activity in Romania, which enable the exercise of control over the management of the target; *or*
- represent a change of shareholding at the level of a foreign investor which is a legal entity, if such entity becomes, directly or indirectly, controlled by a non-EU citizen or non-EU entity; *or*
- represent *new investments*, defined as (i) an initial investment in assets connected to the establishment of a new independent undertaking, (ii) an extension of an existing undertaking, (iii) the diversification of the production activity of an undertaking, or (iv) a fundamental change to the general production process of an undertaking.

IMPACT ON ONGOING OR PLANNED INVESTMENTS

- On the basis of the very limited transitional measures of the GEO, it appears that it will become applicable to FDIs which have not been fully implemented by 18 April 2022.
- Transactions not fully implemented on 18 April 2022, but authorised under the previous FDI regime, may still become subject to an ex-post analysis under the GEO, since the criteria for clearing FDIs and the authorities involved differ.
- The parties to transactions which will be submitted for FDI authorisation after 18 April 2022 should consider the risk of delays in obtaining the clearance decisions until CSFDI is established, its members are appointed and its internal regulations are enacted.
- Completion of unauthorised transactions during the transitional period should be carefully considered until more legal certainty is available.
- The sanctioning regime becomes applicable within 30 days after the entry into force of the GEO,

Activities of the target and applicable thresholds

FDIs which are subject to authorisation are those with a value exceeding the RON equivalent of EUR 2,000,000 and concerning target companies whose activities relate to national security strategies in one of the following sectors:

- security of the citizens and of the communities;
- security of the borders;
- security of energy or transports;
- security of the systems of supply of essential resources;
- security of critical infrastructure;
- security of IT and communication systems;
- security of financial, fiscal, banking and insurance activities;
- security of production and trade of weapons, ammunition, explosives or toxic substances;
- industrial security;
- protection against disasters;
- protection of agriculture and environment;
- protection of privatizations of state-owned enterprises or the management thereof.

The GEO provisions are not clear as to how the investment value should be calculated (i.e. by reference to the transaction price, the value or turnover of the Romanian target company etc).

We note that FDIs not reaching the above threshold may still be subject to examination if they are deemed as likely affecting or representing risks to national security or public order, by reference to the criteria set out in Article 4 of the FDI Regulation.

NEW SCREENING AUTHORITY

Under the new regime, the FDIs screening will be made by a newly created Commission for Screening of Foreign Direct Investments (CSFDI) comprising representatives of the Government, various ministries and of the Romanian Competition Council (RCC), with the permanent participation of intelligence services representatives. The CSFDI is subordinated to the Government and its secretariat will be managed by the RCC. The RCC will also act as the contact authority for the cooperation mechanism set up between the European Commission and various Member States examining FDIs under the FDI Regulation.

CSFDI will be established within 30 days after the entry into force of the GEO and its organization and functioning will be regulated within 60 days.

The new CSFDI will replace the Supreme Council of National Defence (CSAT) as the authority in charge with the review of the FDIs. CSAT will only remain competent to issue binding opinions in case of FDIs which require a detailed analysis.

MAIN FDI REGIME CHANGES

- **Transactions concerned:** investments by persons from outside the EU or which are directly or indirectly controlled by persons from outside the EU exceeding the RON equivalent of EUR 2,000,000, although the GEO also includes a catch-all provision for FDIs which may have a significant impact on, or represent a risk to, security or public order, that do not meet the threshold.
- **Sanctions:** breaching the stand-still obligation or providing incorrect, incomplete or misleading information may be sanctioned with fines of up to 10% of the investors' total turnover achieved in the year prior to the sanction
- **New screening authority:** Commission for Screening of Foreign Direct Investments (CSFDI)

SCREENING PROCEDURE AND TIMELINE

An FDI authorisation request will be submitted to the CSFDI secretariat and will include at least the information requirements provided under Article 9 of the FDI Regulation (ownership structures, products, services and business operations of the foreign investor(s) and of the target(s), funding sources, transaction timeline, etc.).

The FDI authorisation request becomes effective (i) after the complete submission by the notifying parties of any additional information requested by CSFDI and (ii) after the issuance by all competent authorities of any relevant opinions requested by CSFDI. Generally, such opinions must be issued within 20 days from CSFDI's request; however, in case of a detailed analysis, CSAT may issue its binding opinion within 90 days from CSFDI's request.

Within 60 days after the date when the FDI authorisation request becomes effective, CSFDI shall issue mandatory endorsements for the **authorisation** of an FDI or a consultative endorsement for the **conditional authorisation** (i.e. subject to commitments) or **prohibition** of an FDI.

Based on a mandatory FDI endorsement, the RCC shall issue an **authorisation decision** within 30 days, which shall be communicated to the parties within 45 days.

In case of a consultative endorsement for the **conditional authorisation** or **prohibition** of the FDI, the final decision rests upon the Government.

The Government is expected to enact a decision regulating further details regarding the screening procedure and timeline.

Specific transparency provisions relevant for media enterprises

A specific preliminary procedure of public consultation for a 30-day period must be observed in case of FDIs related to certain categories of media outlets or online platforms.

STANDSTILL OBLIGATION AND SANCTIONS

The implementation of an FDI without its authorisation under the GEO is forbidden. CSFDI may review any transaction *ex officio* or upon notice from another Romanian authority.

Failure to notify and breaching the standstill obligation could result in fines of up between **10% of the foreign investors' total global turnover** achieved in the year previous to the sanction. Also, incomplete, inaccurate or misleading information may be fined with the same amount.

In case of new investments which have not achieved a turnover during the previous year, the applicable fine would amount between **RON 10-50 million (approximately, EUR 2-10 million)**.

TRANSITIONAL MEASURES

The new FDI regime is also applicable to ongoing FDIs for which an intention to conclude an agreement or to submit a public bid has been announced. The intention to conclude a binding agreement must be evidenced by a preliminary agreement or a precontractual commitment which confirms with certainty such intention.

CONNECTION WITH MERGER CONTROL PROCEDURES

- The FDI authorisation requirement is triggered irrespective of whether the FDI represents or not an economic concentration from a merger control perspective.
- If an FDI also triggers a merger control notification, both FDI authorisation request and merger control notification will be submitted by the foreign investor; however, the timeline of the merger control procedure may be delayed and will be finalized subject to the solution under the FDI procedure.

The GEO further provides that the sanctioning regime enters into force 30 days after the GEO is published.

POSSIBLE IMPACT

Given the rather low thresholds and quite general areas entailing FDI review under the GEO, transactions in many industry sectors could be deemed as falling under the new Romanian FDI regime. Also, the transitional provisions of the GEO do not clearly set out the regime applicable to transactions currently in various stages before completion and/or intended to be completed prior to the establishment of the CSFDI. In particular, the GEO does not clarify if an authorisation obtained under the previous FDI regime for a transaction yet to be implemented remains valid.

As such, investors will need to carefully review their ongoing and planned investments and consider the necessity of a filing for authorisation under the new FDI regime. Pending further clarification or amendments to the GEO as part of its approval process in the Parliament, the calendar of ongoing and future transactions may be impacted by delays or lack of clarity in the authorisation process.

EXCLUSIONS

- The new regime is not applicable to portfolio investments, defined as the acquisition of securities on organized and regulated capital markets which do not entail direct participation in the management of a company.

CONTACTS



Nadia Badea
Partner, Head of
Corporate M&A
T +40 21 6666 102
E nadia.badea@cliffordchance.com



Loredana Ralea
Counsel
T +40 21 6666 122
E loredana.ralea@cliffordchance.com



Eleonora Udriou
Of-Counsel
T +40 21 6666 127
E eleonora.udriou@cliffordchance.com



Mihnea Niculescu
Senior Associate
T +40 21 6666 105
E mihnea.niculescu@cliffordchance.com



Radu Costin
Senior Associate
T +40 21 6666 278
E radu.costin@cliffordchance.com

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Clifford Chance Badea SPRL, Excelsior Center, 28-30 Academiei Street, 12th Floor, Sector 1, Bucharest, 010016, Romania

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