

Romania plans to tighten its foreign investment screening rules



The screening of foreign direct investments (FDIs) has been a hot topic for some time now across CEE (as also covered here). Several jurisdictions have adopted stricter measures of scrutiny allowing for the vetting of transactions potentially posing security risks.

In line with this trend, the Romanian Competition Council has put forward new draft legislation aimed at tightening the existing FDI screening rules. This draft is subject to public debate until 6 October.

Context

Under the current rules foreign (and domestic) investments in sensitive sectors would fall under the scrutiny of a state defence authority, directly subordinated to the President of Romania. However, this scrutiny is limited to investments leading to a change of control and to a limited number of sectors.

The new FDI regime will broaden the scope of the investment screening.

New filing requirements

Under the new FDI regime, all transactions that meet an investment value in excess of EUR 2m must be notified to the Romanian Competition Council if they occur in or have an impact on any of the following strategic areas:

- infrastructure in the following sectors: energy, transport, water management, healthcare, IT&C, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities; access to land and real estate of critical importance for the use of such infrastructure;
- essential public services: water supply and sewerage; sanitation and waste management; production, transport, distribution and supply of thermal energy in a centralised system; public lighting; land use planning and urbanism; local/county public transport;
- access to critical technologies and dual-use products, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, chemical technologies, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies;

- access to raw materials, health security or food security;
- access to important information concerning the protection of Romania's security and sovereignty, its legal order, including investments that involve large-scale actual or potential access to personal data of Romanian citizens or Romanian residents;
- ability to significantly influence public opinion through information distributed via mass-media (mass-media entities/online outlets will be subject to certain additional rules aimed at FDI transparency);
- critical (or potentially critical) IT&C infrastructure;
- non-military facilities, essential for the state defence;
- other technologies which, improperly used, could threaten the security or public order of Romania;
- other actions or economic or strategic areas relevant to the security, sovereignty or internal order of Romania.

Who will have to notify?

Non-EU citizens, non-EU based companies (including trustees) and EU-based companies controlled by non-EU citizens and/or non-EU legal entities that intend to make an investment meeting the filing requirements indicated above in Romania will have to submit an FDI filing.

Interestingly, not only an investment consisting in the acquisition of control is caught by the new FDI regime, but also those that allow to gain access to information, systems or technologies that may have an impact on national security and public order.

Process

While FDI filings will be submitted to the Romanian Competition Council, the actual screening of the investment is bestowed on a dedicated FDI screening commission (the "FDI Commission", in Romanian *Comisia pentru examinarea investițiilor straine directe*).

The FDI Commission can clear the FDI (and then a Prime Ministerial decision will be issued to this effect) or decide that there is a potential risk, and therefore issue either a conditional clearance or a prohibition or cancellation decision. The conditional clearance would mean that the investor and the FDI Commission would need to agree on those terms and conditions in which the transaction could move forward, in order to discard potential risks.

Standstill obligation and fines

The new FDI regime prohibits the implementation of a notifiable investment prior to its approval.

Failure to comply with this standstill restriction may be sanctioned with fines ranging from 1 % to 5 % of the total turnover achieved (by the investor) in the financial year before the transaction. The same goes for providing inaccurate, misleading or incomplete information during the filing process.

Outlook – what can investors expect?

The draft legislation setting up the new FDI regime is currently up for public debate (available here; Romanian

only). The new rules are expected to enter into force on 11 October 2020.