

Romania amends foreign direct investment control regime

In line with the EU approach of adopting stricter measures of scrutiny for vetting foreign transactions that could potentially raise national security and public order risks, Romania has put forward a draft Foreign Direct Investment (FDI) Ordinance that is scheduled to go into force on 11 October 2020.

This FDI Ordinance, which is currently undergoing public review and debate, could be subject to further amendments, which in turn may postpone its enactment. Nevertheless, this FDI Ordinance, similar to regulations currently in place in other EU markets, is likely to be enacted before the end of the year.

Even though Romania, for national-security reasons, already has a FDI-control process in place for transactions in certain economic areas, the FDI Ordinance now being debated is far stricter, bringing more clarity and predictability for relevant stakeholders and also added obligations, conditions and sanctions for foreign investors looking to invest in Romania

Under the new FDI regime, transactions with an investment value of more than EUR 2 million must be reported to the Romanian Competition Council (RCC) if the economic activity concerns one of the following sectors:

- Security of Romania's citizens; borders; energy sector; transport sector; supply systems for vital resources; critical infrastructure; information systems and communications systems; financial, fiscal, banking and insurance activity; industry; production and circulation of weapons, ammunitions, explosives and toxic substances.
- Protection against disasters.
- Protection of agriculture and environment.
- Protection of operations for the privatisation of state-owned enterprises or its related management.

Other foreign-direct investments can also be subject to examination if national security or public order may be affected. Transactions in any of the above sectors will be reviewed if they could have an impact on 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 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 urbanisation; local and county public transport.
- access to critical technologies and dual-use products, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, chemical technologies, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies.
- access to raw materials for health security or food security.
- access to information concerning the protection of Romania's security, sovereignty and legal order, including investments that involve large-scale access or potential access to the personal data of Romanian citizens or Romanian residents.
- ability to significantly influence public opinion through information distributed via mass-media, which means mass-media entities or 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 defence of the state.
- other technologies which, improperly used, could threaten the security or public order of Romania.
- other actions or economic and strategic areas relevant to the security, sovereignty and internal order of Romania.

Who must submit notifications?

FDI filings must be submitted by the following groups: non-EU citizens, non-EU based companies and EU-based companies controlled by non-EU citizens or non-EU legal entities that intend to make an investment in Romania and meet the filing requirements indicated above.

Not only investments triggering an 'acquisition of control' will be covered. The new FDI regime will also apply to FDIIs that provide 'access' to information, systems or technologies that may have an impact on national security and public order.

In the absence of detailed provisions explaining the notion of 'access' and the degree of 'access' triggering the application of the new rules, the enforcement of these provisions may be prone to bias (It is hoped that additions will be made to the final version of the FDI Ordinance, which will address this issue).

As a result, irrespective of the level of shareholding acquired through the investment, if a transaction exceeds the above-mentioned threshold and impacts one of the above economic sectors (within the meaning of the Ordinance), a filing will be mandatory and it is possible that the investment will not be implemented before obtaining the relevant clearance. However, as per the current draft, portfolio investments do not fall under the new regime.

Process

When there is a parallel merger control review, the RCC makes the FDI filing directly to a dedicated FDI screening commission based on information received in the merger filing.

However, even where the transaction does not meet the criteria triggering a mandatory merger-control filing, FDI filings will still need to be submitted to the RCC, which will then forward them to the FDI Commission.

The FDI Commission carries out the assessment of the foreign direct investment. However, if the FDI Commission identifies major national security concerns during the examination, approval of the Supreme Council of State Defence will also be required.

The FDI Commission will clear the FDI (followed by a decision issued by the Prime Minister to this effect) or it will decide that there is a potential risk and will issue a conditional clearance, prohibition or cancellation decision.

In principle, the FDI Commission must finalise its assessment within 45 days from receipt of all information. If an extended assessment is required, the process could be extended by an additional 45 days.

Furthermore, the draft enactment contains specific provisions for undertakings operating in the mass-media industry. This includes companies holding an audio-visual license at national or regional level and periodic publications with an average circulation of at least 5,000 printed copies per day in the last calendar year or a web portal with a minimum of 10,000 'accesses' per month.

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 result in fines ranging from 1% to 5% of the investor's total turnover in the financial year preceding the transaction. Penalties will also be applied for providing inaccurate, misleading or incomplete information during the filing process.

To conclude, Romania is one of many countries around the world that is becoming increasingly protective of its economy and industries. Given the rather low thresholds and wide areas of interest envisaged by the new Romanian legislation, almost any transaction could fall within the Romanian FDI regime.

Investors and buyers will need to look closely at the operations of their investment targets in order to ascertain the risk of a filing or approval, since a bad decision could result in the addition of costs, fines and time to a transaction.

*For further information about Romania's FDI Ordinance, contact your regular CMS advisor or one of our local experts: **Rodica Manea** and **Claudia Nagy**.*