

# Foreign Direct Investment Screening in Romania: An evolving and challenging legal landscape

Romania's Foreign Direct Investment (FDI) screening has significantly evolved in the past two years, reflecting a sharpened focus on national security in line with global and European trends. Traditionally, starting with 2012, the screening involved the Competition Council (RCC) and the Supreme Council of National Defense (CSAT), mechanism which, as it didn't include specific sanctions (i.e., fine/nullity) for failure to notify, was perceived exclusively as an additional bureaucratic step in case of notifiable mergers.

Against a backdrop of heightened geopolitical tension and the adoption of EU Regulation 2019/452, Romania shifted towards a strict FDI screening through the enactment of Government Emergency Ordinance (GEO) 46/2022<sup>1</sup>. In this context, the Commission for the Examination of Foreign Direct Investments (CEISD) which operates under the authority of the Government of Romania has been established.<sup>2</sup> Starting with this step, the local legal framework has undergone several subsequent amendments to expand the scope of FDI regulations, ensuring that, among the numerous transactions that do not raise security concerns, those that do are at the end identified and scrutinized. The FDI screening field continues to evolve, with CEISD's practice gradually crystallizing, and the safeguarding of national security emerging as a pivotal element. This article aims to review the main legal provisions and insights drawn from the practice of CEISD and offer a glimpse into the challenges encountered by investors.

## A broad and comprehensive FDI legal screening mechanism

Under the auspices of GEO 46/2022, Romania's approach to FDI screening has significantly expanded, now encompassing a diverse array of investments that are required to undergo the screening process. In a nutshell, a European or foreign investment of any nature which exceeds €2 million realised in a sensitive sector as defined in CSAT Decision no 73/2012 and by reference to the criteria listed in Article 4 of Regulation 2019/452 is subject to FDI review<sup>3</sup>.

The notion of "investor" concerns not only foreign investors, but also EU investor which also encompass Romanian investors. Similarly, the concept of "investment" is broad, encompassing any investment intended to establish or maintain lasting, direct relationships between the investor and the Romanian business receiving funds, including those enabling active involvement in the management of the company. However, terms like "maintaining lasting and direct links" can lead to varied interpretations due to the absence of precise definitions or criteria, such as a minimum shareholding threshold found in other countries. Consequently, even the acquisition of a minority stake may be subject to FDI screening if it permits involvement in the company's management. At the same time portfolio acquisitions as defined by article 2, letter b) of Government Emergency Ordinance No. 92/1997 on the promotion of direct investments are excluded from FDI screening scope.

Furthermore, Romania's FDI regime has introduced the concept of "new investment," which expands the scope of eligible

investments to include initial investments, capacity expansion of existing enterprises, and diversification of a company's production.

## An extensive interpretation of FDI regulations

CEISD appetite of FDI screening leads to the encompassment of a wider spectrum of transactions than initially anticipated, requiring a prudent and informed approach from investors. Looking at current practice, the focus appears to be primarily on non-EU investments; however, this does not mean that Romanian and EU investors should let their guard down. This trend is illustrated by several current developments:

- 1. Sensitive sectors** - The specific activities that may fall under the "national security" banner are quite diverse, given that the list of relevant sectors is generic. For example, the CEISD has determined that corporate footwear production falls under the concept of industrial security<sup>4</sup>, whereas the acquisition of agricultural land is included in the sensitive domain of agricultural and environmental protection<sup>5</sup>. As CEISD evaluates each case on an individual basis, there may be inconsistencies which could lead to unpredictability in FDI assessments.
- 2. Internal reorganizations** - Given that the FDI legislation does not exclude expressly internal reorganizations at group level (with no change of control being involved), CEISD's interpretation leans towards including them within the scope of screening. Thus far, there is no formal exclusion for intra-EU group reorganizations; however, CEISD has considered as subject to FDI screening only internal reorganizations of groups outside the EU<sup>6</sup>.

<sup>1</sup> The Emergency Ordinance of the Government no. 46/2022 regarding the measures for implementing the EU Regulation 2019/452, as well as for amending and supplementing Competition Law no. 21/1996, approved by Law 164/2023, modified by Emergency Ordinance 108/2023 approved by Law 231/2024.

<sup>2</sup> CEISD includes representatives from the Prime Minister's office, the President of the Competition Council or a Plenary member, and representatives from various ministries involved in sectors such as economy, finance, national security, internal affairs, and health. Additionally, representatives from the Romanian Intelligence Service, the Foreign Intelligence Service, and the Romanian Agency for Foreign Investments and Trade serve as permanent guests

<sup>3</sup> By exception, foreign direct investments below €2,000,000 may be reviewed by CEISD if their nature or potential effects, according to the criteria in Article 4 of Regulation 2019/452, could impact national security or public order.

<sup>4</sup> RCC, Decision 56/2024

<sup>5</sup> RCC, Decision 7/2024

<sup>6</sup> RCC, Decision 82/2024, Decision 5/2024, Decision 102/2024

**3. Capacity expansion** - In relation to operations involving capacity expansion and/or diversification of production, CEISD practice indicate that FDI regulations apply not only to operations through which the enterprise receives new capital from external sources but also to those involving internal financing<sup>7</sup>. Moreover, there is no predetermined threshold for the extent of capacity expansion, meaning that any increase could potentially fall within the scope of FDI screening if the other conditions for FDI scrutiny are fulfilled.

#### Serious sanctions for breaching of stand still obligations

Both foreign investors and, more recently, since December 2023, EU investors are subject to standstill obligation and face severe penalties for breach of this obligation. Sanctions include fines of up to 10% of the total turnover from the previous year, along with the nullity of the contract through which the investment is realised. As per CEISD's public intervention, the nullity sanction is expected to be enforced primarily concerning investments that have not been notified and that pose security risks.

#### Efforts to clarify FDI Screening regime and ensure a balance between national security concerns and investors' interests

CEISD and the RCC - FDI division are generally open to engaging with stakeholders to strike a balance between ensuring national security and fostering a predictable and investment-friendly environment. The approach to ongoing investments, which are common in certain industries such as fuel stations, logistic projects and energy, reflects CEISD's commitment to simplify procedures for investors. According to CEISD's public statements, such transactions may be notified under an overall investment plan that encompasses anticipated investments over a two-year period. In an effort to enhance transparency, the decisions issued by the RCC based on CEISD's advisory opinions are made public<sup>8</sup>. However, to ensure predictability and equip investors with tools for self-assessment, these decisions should ideally include the specific

screening criteria applied. Another issue that should be addressed is the interplay between FDI screening and existing legislation for regulated sectors, such as telecommunications and energy, which already incorporate national security considerations and approvals from CSAT. To navigate the complexities of this relationship, a potential solution is to establish a fast-track procedure for investments in these regulated sectors or to exclude them from FDI screening altogether. An important step in clarifying and streamlining the FDI regime is the current collaboration between the RCC's FDI Direction CEISD and stakeholders to develop a set of guidelines which, according to the director of RCC FDI Direction, are expected to be enacted until the end of this year.

#### Take-aways and further developments

For the time being, given the broad scope of sectors subject of the FDI screening, limited transparency regarding specific screening criteria, and generally extensive interpretation approach, many non-critical M&A transactions may fall within the scope of FDI regulations. In this context and given the severity of financial sanctions, investors have shown increased caution and under the principle of "better safe than sorry" decided to notify also investments that normally do not fall under the FDI scrutiny. However, this approach serves as a critical test for the CEISD, which should operate as a selective filter, issuing decisions only for investments that fall within the scope of FDI in accordance with legal provisions, while disregarding generalized approaches. The new FDI regime is still in its infancy - the legal landscape will remain dynamic in the foreseeable future. Over time, current ambiguities and potential hurdles are expected to be resolved, aiming to ensure a more stable and predictable investment environment. At the same time, looking ahead, a relaxation of the screening mechanism is not expected. According to public information from CEISD, the list of sensitive sectors will remain unchanged. This approach aligns with broader EU trends that are continually reshaping FDI screening to be both more expansive and more stringent.



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<sup>7</sup> RCC, Decision 107/2024

<sup>8</sup> <https://www.consiliulconcurentei.ro/documente-oficiale/concurenta/decizii/investitii-straine/>