THE LEADING GUIDE TO THE COMMERCIAL LAW MARKET

GOVNET
Romania's Business News Gate

WHICH LAWYER IN ROMANIA

17th edition

2024

whichlawyer.ro

contents

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GOVNET
Romania's Business News Gate

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New barriers to access public procurement in the EU?

DEVELOPMENTS & TRENDS

Since the adoption of the 2014 Directives on public procurement [Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on utilities] the EU has passed several defense instruments to safeguard its objectives and the Single Market as well as to ensure a level playing field for all participants to EU public procurement. While they may arguably be considered as a step back or a reevaluation of the openness of the EU towards the trade with third countries, the efficiency of such measures [mostly] hinges on the political support of the Member States towards the European Commission and the EU[1].

The public procurement landscape based on the principles of the Treaty including equal treatment, non-discrimination and transparency was not immutable and static, but changed by means of transposition by the Member States, mandatory interpretation by the European Court of Justice (ECJ) or by other acts adopted by the EU, such as:

The Framework for the screening of foreign direct investments into the Union [Regulation (EU) 2019/452], whose objective is to make sure that the EU is better equipped to identify, assess and mitigate potential risks to security or public order, while remaining among the world's most open investment areas[2]. Though this framework regulation is generally referred to and applied in M&A/Corporate/Private transactions, it should be mentioned that being asked whether the regulation also apply in the context of public procurement or privatization, the Commission answered that 'a public tender awarding a concession for the building and operation of critical infrastructure could, for example, involve a foreign direct investment and thus fall under the scope of the FDI Screening Regulation'[3]. Moreover, the Commission stated that whether a specific public contract or concession might fall under the scope of the Regulation shall be assessed on case-by-case basis prior to the tender and recommended for the tender notice/documentation to mention from the outset that the procedure or the award of the contract is subject to the FDI Screening Regulation.

The European Commission Guidance on the participation of third-country bidders and goods in the EU procurement market [2019/C 271/02] aimed to assist public buyers by improving understanding of certain practical aspects of the public procurement procedures laid down in the relevant EU legislation when dealing with third country participation in tenders.

The Romanian Government Emergency Ordinance no. 25/05.04.2021 amended the definition of the 'economic operator' entitled to participate in Romanian public procurement tenders as being a natural or legal person established in the EU; EEA; third countries that have ratified the WTO Agreement on public procurement; third-countries in the process of accession to the EU; and third countries which are signatories to other international agreements by means of which EU is bound to grant open market access in the field of public procurement. For clarity, this piece of legislation expressly requires contracting authorities/entities to **exclude** economic operators that do not fall within the definition mentioned above. Furthermore, the Explanatory Memorandum to the EGO no. 25/2021 states that the ordinance was issued to transpose art. 43 of the Directive 2015/25 and that it was [priorly] notified to DG Regio and DG Grow.

International Procurement Instrument – IPI [Regulation (EU) 2022/1031] aimed to achieve reciprocity in the opening of public procurement and concessions markets to third country trading partners and improving market access opportunities for EU economic operators.

The Foreign Subsidies Regulation – FSR [Regulation (EU) 2022/2560] targeted to ensure fair conditions for all undertakings engaging in an economic activity in the internal market.

The Kolin Decision [C-652/22], by means of which the ECJ ruled that: EU law does not preclude third-country operators from being allowed to participate in procurement procedures governed by the Directive 2014/25/EU, but it precludes them from relying on the directive and thus to demand that their tender is treated equally to those submitted by other bidders; any act of general application specifically intended to guarantee equal access to such operators falls within the exclusive competence of the EU; national authorities are not allowed to interpret the national provisions transposing the Directive 2014/25/EU as also applying to third-country operators; in the absence of such general provisions, it is for the national authorities to decide whether it should allow such operators to participate and what will be the conditions of treatment that should apply.

What to expect next?

- The Decision of the ECJ in the CRRC Qingdao Sifang case (C-266/22)

The ECJ is expected to rule on the interpretation of art. 25 of the Directive 2014/24/EU, this time in a request from the Bucharest Court of Appeal in relation to the participation of a Chinese operator to a tender organized by a railway authority. While the context seems different from the Kolin case, as the question refers mainly to the application

[1] As also highlighted by Enrico Letta in his report on the Single Market as of April 2024, which may be accessible here: https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf

[2] https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en

[3] See the Frequently asked questions on the EU framework for FDI screening: https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfcec5283/library/7c76619a-2fcd-48a4-8138-63a813182df2/details

in time of the EGO no. 25/2021, it will still be interesting to see the position of the Court[4].

- **Contracting entities to pay more attention to the provisions of art. 23[5] [Conditions relating to the GPA and other international agreements] under Directive 2014/24/EU following Kolin Decision**

While the Kolin Decision does not interpret the Utilities Directive as encompassing a prohibition to participate in EU public procurement tenders, it clearly stressed that the obligation to accord to the third-country operators no less favorable than the treatment accorded to the economic operators of the Union is strictly applied to those economic operators, works, supplies and services that are covered by Annexes 3, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound. As the GPA contains also some caveats and exclusions of certain types of services coming from its signatories, it is expected for national authorities to pay more attention to the terms of the GPA and to apply different treatment to economic operators coming from the same country depending on the scope of the contract[6].

- **More investigations and complaints under the FSR & Investigations under the IPI**

Besides the already known cases of in-depth investigations under the FSR followed by notifications submitted by bidders in public procurement procedures that were closed to date in all cases as a result of the withdrawal of their bids, a [new] trend appears to be shaping due to the reporting system embedded in the FSR. As any legal or natural person may report to the Commission any information relating to foreign subsidies distorting the internal market under the FSR, it seems that this 'whistleblowing' instrument is used by competitors to ask the Commission to investigate financial contributions received by other party/ies[7].

Also, with the aim to remove discrimination in public procurement, the Commission is expected to launch new investigations under the IPI, especially where there are barriers to EU companies due to unfair differentiation between local and foreign companies or between locally produced and imported products. To date, the Commission has initiated its first investigation under the IPI in response to measures and practices in the Chinese procurement market for medical devices which are unfairly discriminating against European companies and products[8].

- **An evaluation of the Public Procurement Directives**

As requested by the European Court of Auditors (ECA)[9] and the Council[10], the European Commission is set to carry out an in-depth evaluation of the existing legislative framework on public procurement. This measure was announced in the Political guidelines for the next term 2024-2029[11] and appears to be currently in preparation[12], with public consultation planned for the fourth quarter of 2024 and Commission adoption planned for the third quarter of 2025. The aim is to assess whether the rules are working as intended and whether a revision is necessary during the 2024-2029 term.

The results of such exercise and most importantly the measures that will be taken, including around third-country bidders' access to public procurement procedures will most likely be prompted by the shifts in the political landscape of many European countries and in the European Parliament and on the foreseeable policy change following the election of a new administration in the United States of America.

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[4] Especially as the General Advocate proposed to the Court an interpretation similar to the one in the Kolin case, in the sense that the bidders established in third countries that are not signatories to the agreements mentioned in art. 25 of the Directive do not benefit from the rights set under the directive and cannot effectively invoke a breach of the equal-treatment, non-discrimination or legal certainty and the protection of legitimate expectations laid down by Union law.

[5] Art. 43 under the Directive 2014/25/EU

[6] See a more detailed analysis on this subject in the article published by Jean Heilman Grier on November 4. 2024, which is accessible here: https://trade.djaghe.com/court-restricts-access-of-third-countries-to-eu-procurement/

[7] See for example: https://www.laliga.com/en-GB/news/laliga-files-complaint-against-psg-with-european-commission

[8] See the press release here: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2044

[9] Available here: https://public-buyers-community.ec.europa.eu/news/european-court-auditors-eca-publishes-special-report-public-procurement-eu

[10] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C_202403521

[11] Available here: https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf

[12] Available here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14427-Public-procurement-directives-evaluation_en

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[1]. 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.[2] 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[3].

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[4], whereas the acquisition of agricultural land is included in the sensitive domain of agricultural and environmental protection[5]. 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[6].

[1] 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.

[2] 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

[3] 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.

[4] RCC, Decision 56/2024

[5] RCC, Decision 7/2024

[6] 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[7]. 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[8]. 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 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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[7] RCC, Decision 107/2024

[8] https://www.consiliulconcurentei.ro/documente-oficiale/concurenta/decizii/investitii-straine/