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English - Or. English

15 November 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**The Relationship between FDI Screening and Merger Control Reviews – Note by
Romania**

30 November 2022

This document reproduces a written contribution from Romania submitted for Item 13 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/the-relationship-between-fdi-screening-and-merger-control-reviews.htm

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Romania

Foreign Direct Investment Regime in Romania The Romanian Competition Council – an authority playing multiple roles

1. Previous mechanism.

1. In Romania the legal regime of foreign direct investments was governed by the Competition Law and the Decision of the Supreme Council of National Defense (hereinafter referred to as SCND).
2. A screening mechanism was established in Romania in 2012 and it was linked to the merger review from the Competition law. The screening was covering investments in specific business sectors as defined by our Supreme Council of National Defense (hereinafter referred to as SCND).
3. As a general rule, foreign investments made by non-EU based investors were subject to the same regulations as investments made by EU-based investors. The competent authorities were entitled to analyze and object to investment in strategic sectors, irrespective of the nationality of the investor or of the value of the transaction.
4. In the case of economic concentrations notifiable to the Romanian Competition Council (hereinafter referred to as “RCC”) that might raise national security risks, the SCND had the right to conduct its own assessment of merger cases featuring potential national security risks in certain strategic domains such as financial, fiscal, banking, environmental protection, energy, industrial safety, etc. SCND had the right to conduct its own security assessment having the possibility to block a transaction.
5. Regarding the timeframe of the review in the previous mechanism, according to the law, our Supreme Council of National Defence was supposed to inform the RCC as soon as possible the approval or prohibition of the transaction. So no legal deadline set forth but in practice SCND was issuing a letter confirming that the transaction does not raise national security concerns, generally within 30 – 45 days. From 2012 until now all the transactions have been approved.
6. The main problem of the previous mechanism was that the law did not have any provisions regarding the timeframe of the review to obtain the security approval, and because of that, sometimes, it happened to have the merger review finalized while the security review still ongoing with no perception of when it must be completed. This uncertainty sometimes was costing us and the companies involved a delayed merger review.
7. By having the Secretariat of the FDI Committee, our main goal is that the two analyzes, the one on competition and the one on national security take place at the same time and the merger review timeline doesn’t get affected because of the security screening.
8. Under the previous law there were no sanctions set forth under the SCDN Decision or the Competition Law prior to FDI clearance or in the case of breaching the notification obligation. This won’t be the case in the new regime presented below.

2. The entry into force of Regulations (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

9. With the entry into force of the Foreign Direct Investment (hereinafter referred to as „FDI”) Screening Regulation, Romania had to amend the legislation regarding the foreign direct investments’ mechanism.

10. RCC being involved in the previous mechanism and having the experience with an „economic examination”=merger review, took the lead and coordinated the process of the modification of the FDI legal regime in Romania.

11. Romania finally adopted the new screening mechanism after almost 2 years of discussions, debates, contradictory opinions and multiple Government changes.

12. Government Emergency Ordinance (GEO) no. 46/2022 on measures to implement Regulation (EU) 452/2019 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the examination of foreign direct investment in the Union and for amending and supplementing Competition Law no. 21/1996, published in the Official Gazette of Romania no. 379/2022 (hereinafter referred to as GEO 46/2022) aims to establish at national level a regulatory framework of authorization as well as of examination of foreign direct investments from the national security point of view, in order to implement the provisions of the Regulation.

13. GEO no. 46/2022 introduces specific provisions regarding the authorization by the Commission for the examination of foreign direct investments (hereinafter referred to as CEFDI) of certain categories of investments that investors from outside the EU wish to implement in Romania.

14. CEFDI brings together Government representatives, the RCC and works closely with the Secret Intelligence Services and has the attributions of examining foreign direct investments. As general rule, CEFDI will examine the foreign direct investments that fulfill two cumulative conditions: (i) have as object the fields of activity provided in the SCND Decision (i.e., the security of the infrastructure in certain vital areas for the Romanian State) and (ii) the value of transaction exceeds the threshold of 2,000,000 euros, calculated at the exchange rate communicated by the National Bank of Romania and valid for the last day of the financial year prior to the operation.

15. An authorisation request will be submitted by the investors to the CEFDI secretariat and will include information requirements about ownership structures, products, services and business operations of the foreign investor(s) and of the target(s), funding sources, transaction timeline, etc..

16. According to GEO 46/2022, as mentioned before, the examination will be made by CEFDI. CEFDI will issue opinions as follows:

1. CEFDI will issue an opinion approving the authorization of FDI in Romania if it considers that they do not affect the national security or public order of Romania and, by their nature, do not affect projects or programs of interest for the European Union;
2. CEFDI will issue an opinion approving the conditional authorization of FDI in Romania in the situation where it considers that these can be performed through measures/behavioral or structural commitments of the foreign investor; in this situation, the FDI can be made or can continue to exist exclusively within the limits

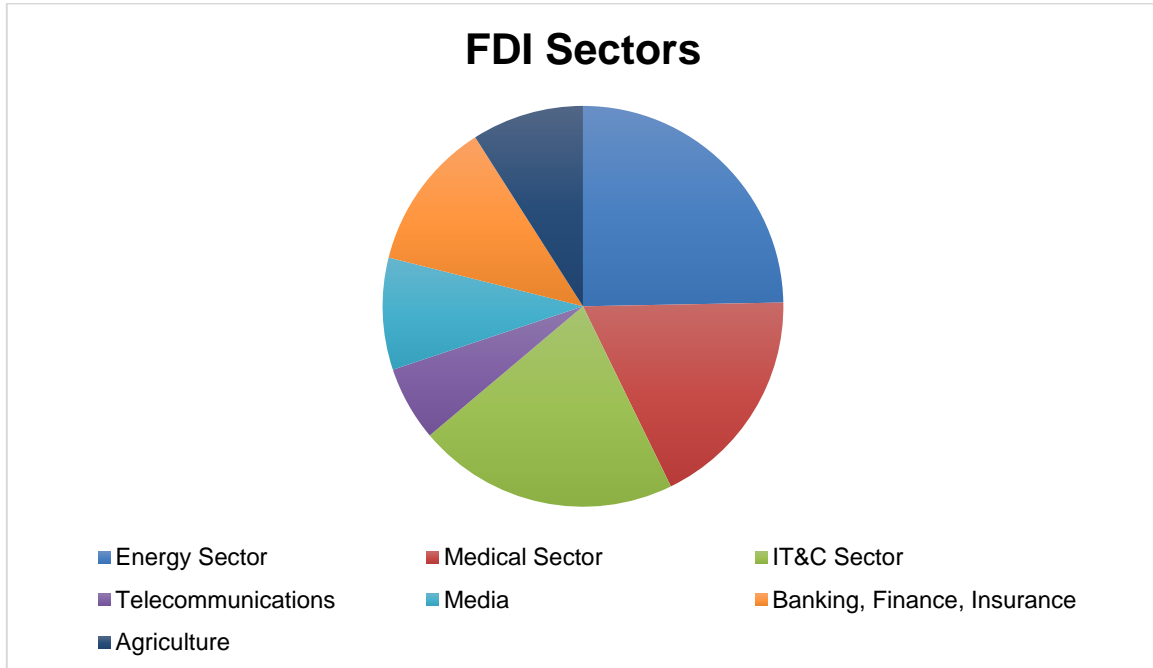
and according to the provisions and conditions specified in the conditional authorization decision;

3. CEFDI will issue an opinion rejecting the application for authorization of the FDI in the situation where it considers that they affect the national security or public order of Romania or is likely to affect projects or programs of interest for the European Union;
17. The decision for authorization is taken by the RCC based on the opinion issued by CEFDI. In the case of conditional authorization or rejection of the investment the decision is taken by the Government (the Government will issue a Government Decision to authorize the investment with conditions or to reject it).
18. The GEO 46/2022 establishes the procedure, the timeline, confidentiality provisions and also sanctions. 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. The GEO 46/2022 provides the possibility for investors to seek recourse against screening decisions of the authorities.
19. There are no particular rules or procedures applicable to a specific category of foreign investors. As mentioned above, the same law applies to transactions/operations that may raise national security risks irrespective of whether domestic or foreign investors are involved. The SCND Decision provides a list of domains, the companies whose activities relate to national security strategies in the domains such as the security of the citizens and of the communities, 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 etc..
20. In addition to this, the Competition Law contains provisions according to which in the case of economic concentrations notifiable to the RCC that might raise national security risks, the CEFDI has the right to conduct its own assessment regardless the origin of the investor (but taking into consideration the object of activity of the investor).

3. New challenges for the Romanian Competition Council

21. The new legislation set forth is establishing multiple roles for the RCC. The RCC is voting member of CEFDI, the Secretariat of CEFDI, the national contact point for the member states and European Commission. Also, the RCC is in charge with receiving notifications from foreign investors to be screened by the CEFDI.
22. In order to cope with this complex role, the RCC created specialized department for receiving notifications that are sent to CEFDI in order to be analyzed from the national security point of view. The RCC is issuing the decisions for authorizing the investments based on the advisory opinion of CEFDI in the case that the investment do not affect the national security or public order of Romania. In the case of mitigation measures or rejections, the advisory opinion will be sent to the Government for issuing a Decision as mentioned above. This new mechanism entered into force on April 18, 2022 and the RCC issued already decisions of authorization of investments.
23. In the previous years (from 2012 until April 2022), under the previous legal framework, all the investments have been approved. Now, having the perspective of the new technologies, the Covid pandemic and the war in Ukraine, blocking an investment by a country may not be shocking.

24. Starting with April 2022, the number of FDI notified to RCC is 102. The most FDIs are in the energy sector and IT&C sector.



25. All the FDIs were approved by the RCC with 2 exceptions that might be ended with a conditional authorisation or rejection.

26. This new regime that imposes stricter scrutiny for investments made by non-EU based investors that could potentially raise national security and public order risks, or that may impair projects and/or programs of EU interest do not constitute a barrier for investments but we are living difficult times and we need to be much more aware of the risks we have in this economic, political and military context.

27. It is important to provide legal certainty for Member States' screening mechanisms on the grounds of security and public order, and to ensure Union-wide coordination and cooperation on the screening of foreign direct investments likely to affect security or public order.

28. The framework for the screening of foreign direct investments and for cooperation should provide Member States and the Commission the means to address risks to security or public order in a comprehensive manner, and to adapt to changing circumstances.

29. Romania needs foreign investments and we have to make sure that only the investments really affecting our national security will be blocked.