International
Comparative
Legal Guides

Foreign Direct Investment Regimes 2021

A practical cross-border insight into FDI screening regimes

Second Edition

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

Romania is positioning itself as a welcoming environment for investors, whereby foreign investments are considered to have contributed significantly to the modernisation and integration of the Romanian economy into the European and global markets in the past years.

To this end, while various economic measures were adopted to encourage foreign investors (e.g., lower tax rates, various tax incentives for investments, etc.), no particular foreign investment screening mechanism or strategy has been implemented to date at the national level.

As a general rule, foreign investments are subject to the same regulations as domestic investments. The competent authorities are entitled to analyse and object to investments in strategic sectors, irrespective of the nationality of the investor or of the value of the transaction. We note an exception with legislation that was recently enacted to restrict certain foreign direct investments in Romanian oil and gas concessions; however, we do not believe this represents a trend for Romania.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

Romanian law does not provide for any specific considerations that would apply during foreign investment reviews. Moreover, no specific rules or guidelines are in place regarding potential state-owned investors.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

No major proposal for revising the current laws is currently published.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

In Romania, the legal regime regarding the control of foreign investments is primarily governed by the following legislative/regulatory enactments:

(i) Law No. 21/1996 on competition, as subsequently completed and amended (the "**Competition Law**");

(ii) the Regulation on economic concentrations, approved by Order No. 431/2017 of the President of the Romanian Competition Council (the "**Merger Regulation**"); and

(iii) the Decision of the Supreme Council of National Defence ("**SCND**") No. 73 dated 27 September 2012 (the "**SCND Decision**").

In addition, (iv) Regulation (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 ("**FDI Screening Regulation**"), and (v) the Guidance for the Member States concerning foreign direct investment and the free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of the FDI Screening Regulation issued by the European Commission on 25 March 2020 applies.

Regarding the most recent developments related to this matter, on 27 February 2020 the Romanian Government issued an Emergency Ordinance amending the Petroleum Law No. 238/2004, by which:

- the National Agency for Mineral Resources ("**NAMR**") was empowered to refuse the awarding of an oil and gas concession agreement to any non-EU entity or to a company controlled by such an entity on grounds of national security;
- any (i) change of control at the level of the holder of the oil and gas concession agreement, or (ii) change in the structure of the shareholders with control over said holder, must be notified to NAMR and approved by the Romanian Government, under the sanction of terminating the oil and gas concession agreement; and
- NAMR may also unilaterally terminate these ongoing concession agreements based on national security grounds.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

Pursuant to the Competition Law, in the case of economic concentrations notifiable to the Romanian Competition Council ("**RCC**") that might raise national security risks, the SCND has the right to conduct its own assessment of merger cases featuring potential national security risks in certain national security domains such as financial, fiscal, banking and insurance safety, agriculture and environmental protection, energy safety, industrial safety, etc.

Economic concentrations refer to operations where a change of control in the undertakings concerned occurs on a lasting basis, resulting from:

(i) the merger of two or more previously independent undertakings or parts of undertakings;
(ii) the acquisitions of direct or indirect control over undertakings or parts of undertakings by one or more persons, already holding control over at least one undertaking (by share deals, asset deals, contractual provisions, shareholder agreements, etc.); or
(iii) the incorporation of a joint venture which operates like an independent economic entity.

We note that transactions notifiable to the RCC are those resulting in economic concentrations where the undertakings concerned generated a combined worldwide turnover exceeding the equivalent of EUR 10 million in the previous financial year and each of at least two of the undertakings concerned achieved a Romanian turnover exceeding the equivalent of EUR 4 million in the previous financial year, irrespective of the nationality of the involved parties/investors to the respective transaction.

Nevertheless, the Merger Regulation expressly provides that the parties to a merger that falls below the above-mentioned thresholds must still notify the SCND in case the transaction might raise national security risks.

To this end, no criteria related to (i) the acquired participation, (ii) the amount of the transaction, (iii) the nationality of the investor, and (iv) whether the assets/subsidiaries are directly or indirectly acquired, are relevant for the assessment of the SCND with regard to a particular transaction, as long as such operation might affect the strategic sectors listed in the SCND Decision (please see question 2.3 below).

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

According to the SCND Decision, transactions in the following sectors are subject to SCND screening:

- citizens' and communities' security;
- border security;
- energy security;
- transport security;
- supply systems of vital resources security;
- critical infrastructure security;
- security of information and communication systems;
- security of the financial, tax, banking and insurance activities;
- production and distribution of weapons, ammunition, explosives and toxic substances;
- industrial security;
- protection against disasters;
- protection of the agriculture and the environment; and
- protection of the privatisation of state-owned companies or of their management.

Although concentrations in certain sectors such as the energy, telecom and financial sectors are typically subject to notification obligations to the respective competent regulatory bodies, we note that there are no specific rules for foreign investments in any such sectors.

2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

Given that the legal framework applicable to merger control and the related assessment on potential risks to the national security does not distinguish between domestic or foreign investors, such terms are not addressed in the list of Romanian normative deeds set out under question 2.1 above.

2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

There are no particular rules or procedures applicable to a specific category of foreign investors. As mentioned under question 2.2 above, the same law applies to transactions/operations that may raise national security risks irrespective of whether domestic or foreign investors are involved.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

Although Romanian law does not expressly provide for such a requirement, we note that those transactions/operations that may result in a notifiable economic concentration to the RCC (that would also raise national security risks) must concern a Romanian undertaking.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Indirect acquisitions of local subsidiaries and/or other assets are still subject to merger control and/or SCND assessment as detailed under question 2.2 above, as long as the implicated operation may qualify as an economic concentration by which the indirect control is obtained.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?

As long as an operation may qualify as an economic concentration under the Competition Law (please see question 2.2. above), it must be notified to the SCND irrespective of its value, i.e. no minimum thresholds are set regarding the value of the assets/turnover of the investors or the target undertaking.

3.2 Is the filing voluntary or mandatory? Are there any filing fees?

Filing with SCND is mandatory in case of economic concentrations that may raise national security risks; however, no particular filing fees are set out under the SCND Decision. We

do note that a fixed filing fee of approx. EUR 1,000 is applicable for submitting the notification to the RCC, whilst an additional authorisation fee ranging between EUR 10,000 and EUR 50,000 will be applicable once the decision of the RCC is issued.

3.3 In the case of transactions, who is responsible for obtaining the necessary approval?

The RCC needs to be notified by the following persons:

- each concerned party in case of merger;
- the party acquiring the control in case of acquisitions of direct or indirect control; and
- all parties holding joint control.

The parties involved must notify the RCC and not SCND directly even if the transaction may not qualify as an economic concentration under the Competition Law and it must only be assessed from a national security perspective.

We note that the related application is communicated to SCND by RCC through an administrative procedure between the authorities.

3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

Although prior consultations with the RCC regarding the merger file are expressly recognised under the Merger Regulation, communication with SCND is handled only by RCC (and not the parties directly).

3.5 What type of information do investors have to provide as part of their filing?

Information and standard forms similar to those requested by the European Commission must be filed with the RCC, and the RCC will provide SCND with the following information for its assessment on national security risks: (i) details on the implementation of the transaction; (ii) the parties involved; (iii) the business activity of the parties involved; (iv) the object of the transaction; and (v) any further details required.

3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

No express sanction is set forth under the SCND Decision or the Merger Regulation in case of non-observance of the filing obligation. However, the law may be interpreted such that SCND remains entitled to assess a transaction and veto it even following completion. From a practical perspective, if a sensitive sector is concerned, a filing is thus advisable.

To our knowledge, no transactions have been rejected by SCND and in the past such a notification has constituted merely a formality.

3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

According to the Merger Regulation and the SCND Decision, SCND must inform the RCC as soon as possible regarding the approval or prohibition of the transaction. The results of the assessment of the SCND must be presented in the first meeting of the authority in the event a proposal to reject the transaction is made. In such case, the Romanian Government will issue the decision prohibiting the transaction that is further communicated to the RCC and to the involved parties.

To our knowledge, in practice SCND does not issue approvals of the transactions either. Lack of any objections from SCND within a 30-day period running from the submission of the notification entitles the parties to complete the transaction.

3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

SCND should be notified prior to closing of the transaction. As to suspensive effect and penalties, see question 3.6 above.

3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

In what concerns the assessment on the impact on national security, SCND will perform its assessment together with the competent public authority from the respective sectors. Although theoretically this would be qualified as an administrative procedure that may involve third parties if required, in practice no public statements or announcements are issued by SCND in this respect.

The RCC on the other hand will publish a press release on its website regarding the envisaged merger and any interested persons may submit their comments and objections.

3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

As a general rule, the RCC and its inspectors are bound by law not to disclose any business secrets or confidential information regarding the transaction to those third parties that have access to the file or to make it publicly available. To this end, the parties would typically mark the relevant documents and information filed with the RCC as *confidential* or *secret*. The decision of the RCC regarding the transaction is communicated to the parties and published in the Official Gazette of Romania. The review process of the RCC and the assessment of SCND in particular are not publicly disclosed.

3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

There are no other general administrative approvals required under the Romanian law for foreign investments.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The impact on national security is analysed by SCND and the competent authorities from the national security system and from the specific sectors listed in the SCND Decision will be involved in the process.

4.2 What is the applicable test and who bears the burden of proof?

The only applicable test provided under the SCND Decision consists of assessing whether the envisaged transaction would threaten to impair national security and the authority bears the burden of proof in this regard. The final decision for rejecting the transaction lies with the Romanian Government.

4.3 What are the main evaluation criteria and are there any guidelines available?

Neither evaluation criteria nor guidelines are issued by SCND regarding the assessment of the transaction's impact upon national security.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

No information in this respect is made available by SCND.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

The authorities involved have sole discretion and full powers to approve or reject the transactions on national security grounds. Nevertheless, in practice SCND does not issue approvals of the transactions as mentioned under question 3.7 above, but rather the authority does not adopt any decision at all, which allows the parties to proceed with the closing of the transaction if no objection was received within 30 days from filing.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

Neither the Merger Regulation nor the SCND Decision provide for a specific remedy against a potential veto decision issued by the Romanian Government. Government decisions may be challenged by interested parties in front of the administrative courts in accordance with the general procedural rules; however, in practice no such decision has thus far been issued with regards to a particular foreign investment and hence there are no precedents regarding any such challenges.

4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

The applicable law does not impose any form of remedies that may be approved by SCND in case of objections to a particular transaction.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Although the investment screening mechanism detailed under question 2.2 above has been in place for several years, there is no relevant practice of the authorities on rejecting transactions on national security grounds.

We note that the decision of the Romanian Government to amend the Petroleum Law No. 238/2004 at the beginning of 2020 is intended to strengthen investment screening in the highly strategic oil and gas sector. Nevertheless, we would not conclude that we see notable or general trends in the enforcement of the FDI screening regime in Romania as a result of this latest amendment to the Petroleum Law No. 238/2004.

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