Romania

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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?

In Romania, the national policy with regard to the reviewing of foreign direct investments (“**FDI screening**”) has been traditionally very liberal, favouring a pro-investment climate through various economic measures adopted to encourage foreign investors (e.g., lower tax rates, various tax incentives for investments, etc.). The FDI mechanism has been established in 2012, covering investments in specific business sectors as defined in the CSAT sensitive sectors list detailed in question 2.3 below.

As a general rule, foreign investments made by non-EU based investors are subject to the same regulations as investments made by EU-based investors. 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.

Currently, the Romanian FDI screening regime has undergone a reform aiming to strengthen the control of foreign investments as further detailed below under question 1.3.

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

The national security and public order of Romania are the main strategic considerations applied during the foreign investment reviews.

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

Romania is currently in the process of implementing into the national legislation Regulation No. 2019/452 establishing a framework for the screening of foreign direct investments into the Union (“**FDI Regulation**”). A draft government emergency ordinance (“**Draft FDI Ordinance**”) was published for public consultation but has not yet been adopted.

The new proposed regime imposes stricter scrutiny for investments made by non-EU investors that could potentially raise national security and public order risks, or that may impair projects and/or programmes of EU interest. The new regime is provided as a standalone process, with a specific timeline and procedure, applicable to acquisitions of control made by non-EU investors.

For EU-based investors, it is expected that the simplified FDI control mechanism currently in force shall continue to apply.

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 (“**CSAT**”) No. 73 dated 27 September 2012 (the “**CSAT Decision**”).

In addition, (iv) the FDI 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.

A noteworthy development is the current FDI screening reform, which aims to align the Romanian mechanism to the FDI Regulation, but also to strengthen the powers of the Romanian Government in this respect.

Separately, a recent sector-specific development has been the draft law adopted by the Romanian Government in March 2021 (approving the Government Emergency Ordinance No. 27/2020 for the amendment and completion of the Petroleum Law No. 238/2004), which reinforces the Government’s authority to scrutinise the transfer of a petroleum agreement to a non-EU company based on national security grounds.

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Furthermore, as regards the telecommunication sector, in June 2021, the Romanian Government adopted Law No. 163/2021 on measures relating to information and communication infrastructures of national interest and the conditions for the implementation of 5G networks ("**5G Law**"). The 5G Law establishes that all manufacturers and suppliers of 5G technology shall undergo an authorisation procedure based on national security grounds. The telecom operators shall only use in their 5G networks equipment provided by such authorised manufacturers or suppliers.

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 RCC that might raise national security risks, the CSAT has the right to conduct its own assessment of merger cases featuring potential national security risks in certain strategic 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, even if a transaction falls below the merger control thresholds but involves a change of control on targets active in the defined sensitive sectors, it should be notified to CSAT, via the RCC (the "standalone FDI filing").

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 CSAT with regard to a particular transaction, as long as such operation might affect the strategic sectors listed in the CSAT Decision (please see question 2.3 below).

Notably, the new FDI regime to be implemented will consider several criteria related to (i) the amount of the transaction, and (ii) the nationality of the investor, as further detailed in questions 2.5 and 3.2 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 CSAT Decision, transactions in the following sectors are subject to review from a national safety perspective:

- 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.

Under the new FDI regime, the current list of sensitive sectors is expected to be aligned with the "critical infrastructure" and "critical technologies" definitions under Article 4 of the FDI Regulation. According to the Draft FDI Ordinance, besides the specific sensitive sectors listed above, the following sectors shall be considered:

- critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- critical technologies and dual-use items, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- supply of critical inputs, including energy or raw materials, as well as food security;
- access to sensitive information, including personal data, or the ability to control such information; or
- the freedom and pluralism of the media.

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

As the current law does not distinguish between EU-based and non-EU based investors, such terms are not addressed in the list of Romanian normative acts set out under question 2.1 above.

However, the new FDI regime to be implemented introduces specific definitions on "foreign investor" and "foreign investment", considering the "foreign investor" as any non-EU citizen and/or non-EU based company (including a trustee), as well as an EU-based company controlled, directly or indirectly, by a non-EU citizen and/or non-EU legal entities which made or intends to make a direct foreign investment in Romania. Similarly, the "foreign investment" is referred to as any investment made by a foreign investor pursuant to which the foreign investor gains the control over the management of the Romanian-based company, or any change in the ownership structure of a legal entity foreign investor giving direct or indirect control to a non-EU citizen or non-EU-based company. Note that new foreign investments and greenfield operations may also be considered for FDI screening, while portfolio investments are exempted.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU / non-WTO), including state-owned enterprises (SOEs)?

As per the current law, there are no particular rules or procedures applicable to a specific category of foreign investors. As

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mentioned under question 2.2 above, the same law applies to transactions/operations that may raise national security risks irrespective of whether EU-based or non-EU based investors are involved.

However, as mentioned under question 1.3 above, the new FDI screening mechanism is set to specifically apply to non-EU citizens and/or non-EU-based companies.

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.)?

Notification or review of an investment is only required where an investor is (directly or indirectly) acquiring control of a Romanian-based undertaking performing activities related to one of the sensitive sectors listed in question 2.3 above. Notably, a branch may also be considered as falling under the scope of an FDI screening, as there are no specific provisions in the national legislation as to exclude a branch from the FDI screening rules.

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 CSAT assessment as detailed under question 2.2 above, as long as the transaction/acquisition involves a change of control within the meaning of EU Merger Regulation, which may potentially raise national security risks.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

As per the current law, there are no minimum thresholds set regarding the value of the assets/turnover of the investors or the target undertaking.

Under the Draft FDI Ordinance, an investment threshold value of EUR 2 million is provided. By exception, foreign investments with a lower value are subject to an *ex officio* examination by the commission appointed to handle the FDI screening ("**FDI Screening Commission**"), only if potential national security or public order risks are identified.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

The current FDI screening regime does not condition the review of transactions by meeting a certain threshold. Any transaction amounting to a change of control in the sense of EU Merger Regulation which may raise national security risks should be subjected to the CSAT review.

The Draft FDI Ordinance reflects the same spirit, considering the *ex officio* review described above under question 3.1.

3.3. Is the filing voluntary or mandatory and is there a specific filing form? Are there any filing fees?

Filing with CSAT is mandatory in the case of economic concentrations that may raise national security risks; however, even if a transaction falls below the merger control thresholds but involves a change of control on targets active in sensitive sectors, it should be notified to CSAT.

There is no specific filing form and no particular filing fees are set out under the CSAT Decision. We do note that a fixed filing fee of approximately EUR 1,000 is applicable for submitting the merger 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.

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

The parties involved must notify the RCC and not CSAT 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 CSAT by RCC through an administrative procedure between the authorities.

3.5 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 CSAT is handled only by RCC (and not the parties directly).

3.6 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 CSAT 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.

As per the Draft FDI Ordinance, investors shall provide the following information for the purpose of the filing: (i) the ownership structure of the foreign investor and of the target, including information on the final investor and the shareholding; (ii) the estimated value of the investment; (iii) the products, services and business operations of the foreign investor and of the target; (iv) the Member States whereby the foreign investor and the target carry out their business activity; (v) the financing of the investment and its source; and (vi) the estimated date for the implementation of the investment.

3.7 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 CSAT Decision or the Merger Regulation in the case of non-observance of the

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filing obligation. However, the law may be interpreted such that CSAT 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 CSAT and in the past such a notification has constituted merely a formality.

As per the new proposed regime, a standstill obligation and fines for standstill breach between 1% and 5% out of the investor's global turnover are introduced and transaction unwinding could be ordered in case a deal falls within the newly defined sensitive sectors.

3.8 Is there a filing deadline and 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 CSAT Decision, CSAT must inform the RCC as soon as possible regarding the approval or prohibition of the transaction. In the case where a risk to national security is found, the transaction is sent for review to the Romanian Government, which may ban it. Nonetheless, the results of the assessment of the CSAT 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.

There is no legal deadline at this moment, but in practice CSAT issues a letter confirming that the transaction does not raise national security concerns, generally, within 30–45 days.

The Draft FDI Ordinance provides for specific timeframes of review, based on a simplified or in-depth review to be conducted. Decisions are communicated within a maximum of 45 days following the adoption and may be appealed within 30 days at the Bucharest Court of Appeal.

3.9 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?

CSAT should be notified prior to closing of the transaction. As to suspensive effect, see question 3.7 above.

3.10 Are there any penalties if the parties implement the transaction before approval is obtained? Can the parties close the transaction at global level prior to obtaining local clearance?

Under the current law, there are no sanctions (e.g. fines) for implementing the transaction prior to FDI clearance or in case of breaching the notification obligation. As there is no standstill obligation in this respect, parties may close the transaction at global level prior to obtaining local clearance. Nonetheless, such approach is not advisable considering that the Government may assess and veto the transaction even post-closing.

Conversely, under the new proposed regime, parties will be bound to a standstill obligation whose breach is sanctioned with fines as indicated in question 3.7 above.

3.11 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, CSAT 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 CSAT in this respect.

In the case of economic concentrations, the RCC will publish a press release on its website regarding the envisaged merger and any interested persons may submit their comments and objections.

As per the proposed new regime, the FDI Screening Commission may decide upon inviting other public authorities/institutions/renowned experts to participate in the decision-making process.

3.12 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 an economic concentration is communicated to the parties and published in the Official Gazette of Romania. The review process of the RCC and the assessment of CSAT in particular are not publicly disclosed.

The new proposed regime, however, establishes specific transparency measures for foreign investments in the media sector, whereby the information related to the targeted media company may be published for public review.

3.13 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 CSAT and the competent authorities from the national security system and from the specific sectors listed in the CSAT Decision will be involved in the process.

Under the new regime, the FDI Screening Commission is responsible for national security scrutiny. Considering the particularities of the sector under review, the FDI Screening Commission may involve other authorities, such as the Cybersecurity Task Force, the CSAT or other competent authorities pertaining to the specific sector under FDI screening. Whereby foreign investments may impair projects or programmes of EU interest, the European Commission and/or the CSAT's endorsement should also be considered.

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

The only applicable test provided under the CSAT Decision consists of assessing whether the envisaged transaction would

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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 CSAT regarding the assessment of the transaction's impact upon national security.

The new FDI screening regime is expected to bring more clarity and legal certainty in respect of the evaluation criteria for foreign investments qualifying for FDI screening. The FDI Screening Commission's assessment will mainly focus on potential effects of the foreign investment in the sectors provided in question 2.3 above, particularly considering:

- whether the investor is state-owned by a non-Member State;
- whether the investor has been already involved in activities impairing the national security or public order of a Member State; and
- whether there is a high risk for the foreign investor to carry out illegal or criminal activities.

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 CSAT.

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, as currently there is no legal deadline in this respect, in practice CSAT informs the RCC, within 30–45 days, via a formal letter that the transaction does not raise national security concerns, as indicated in question 3.8 above.

Nonetheless, under the Draft FDI Ordinance, the FDI Screening Commission will be bound by specific procedural deadlines. The FDI Screening Commission will have the right to approve, conditionally or not, the foreign investment, to annul or to reject it.

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 CSAT 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.

However, the Draft FDI Ordinance expressly allow investors to challenge the FDI Screening Commission decisions with the administrative courts within 30 days from communication.

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 CSAT in case of objections to a particular transaction. Under the current law, remedies may be provided to the RCC by the undertakings concerned only in relation to a merger control procedure.

The proposed new regime provides that conditional authorisation decisions may be issued by the FDI Screening Commission. For example, the following behavioural or structural remedies may be offered:

- Certain participation rights offered to the Government (i.e. minority share with veto rights).
- Protection of sensitive information/know-how/patents.
- Restriction of governance rights or access to information for the acquirer post-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?

As of today, there has been no prohibition of foreign investments in Romania, thus showing that Romania is a welcoming environment when it comes to foreign investments. However, in line with the European trend to tighten the FDI screening under the new envisaged FDI regime, a closer scrutiny for non-EU based investors, with an impact on the timeframe of the transaction's closing, is expected.

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