CMS | Romania amends foreign direct investment control regime

The Romanian government passed a Government Emergency Ordinance (GEO), which amends the framework for screening foreign direct investments in Romania and ensures the application of Regulation (EU) 2019/452 of the European Parliament and of the Council.

This GEO radically transforms the current regime, which calls for the *Supreme Council for State Defence* (**SCSD**) to carry out an assessment intermediated by the Romanian Competition Council (RCC) of investments relating to several sectors identified by the SCSD, irrespective of any turnover thresholds or the nationality of the investor.

The new regime includes the creation of a newly constituted body, the *Commission for the Examination of Foreign Direct Investment* (CEISD), which will assess foreign direct investments.

Although the GEO sets forth a much more detailed procedure, several questions remain: Will the SCSD review lead to blocking (or at least delaying) transactions? How will ongoing and future investments be impacted by the enactment of this legislation? Which of the ongoing transactions will be caught by the regime?

<u>What sectors are caught by the new foreign investment control?</u>

Pursuant to the GEO, investments impacting the following economic sectors will be subject to the CEISD’s review:

- Security of Romanian citizens and the community;
- Security of Romania's borders;
- Security of Romania's energy sector;
- Security of Romania's transport sector;
- Security of Romania's supply systems with vital resources;
- Security of critical infrastructure;
- Security of information systems and communications systems;
- Security of financial, fiscal, banking and insurance activity;
- Security of production and circulation of weapons, ammunitions, explosives and toxic substances;
- Industrial security;
- Protection against disasters;
- Protection of agriculture and the environment; and
- Protection of operations for the privatisation of state-owned enterprises or their related management.

<u>Which investors are caught by the regime?</u>

One important clarification in the GEO is that the regime is only applicable to investments by an investor who is not a citizen of or headquartered in a EU member state, or an EU person who is controlled (directly or indirectly) by a non-EU person. This change will significantly reduce the number of transactions reviewed from a national security perspective as compared to the previous regime where arguably any investment into the above-mentioned sectors would have been scrutinised, even if the investor was an EU national (and even a Romanian national).

Notwithstanding the above, we believe that the current wording of the GEO is unclear about whether new investments also subject to the scrutiny of the CEISD cover investments made by EU nationals (including Romanian citizens) because the definition of “new investments” does not refer to a foreign investor.

More specifically, a new investment is defined as an initial investment in tangible and intangible assets within the same perimeter, related to the start-up of a new business, capacity expansion of an existing company, and diversification of production either by developing new products or a fundamental change of the existing production process.

Although the GEO's construction and recitals state that the GEO should not be applicable to EU or Romanian investors that are not controlled by non-EU nationals, the legislator should clarify this matter and amend the definition of 'new investments' in order to avoid confusion.

What are triggering thresholds for the regime to apply?

The assessment of foreign direct investments covers investments of more than EUR 2 million.

The exception to this is foreign direct investments not exceeding the above-mentioned threshold which may be subject to CEISD review if, by their nature or potential effects (based on the criteria provided in art. 4 of the Regulation), these investments may have an impact on national security or public order or present risks to them.

Which government or other body reviews foreign investments?

The CEISD will chiefly carry out assessments of foreign direct investments. Pursuant to the GEO, the CEISD should be set up within a maximum of 30 calendar days after the entry into force of the GEO. Hence, if the membership of the CEISD has not already been agreed upon, then it may take longer for the regime to be implemented. Furthermore, the government has 60 calendar days to prepare the regulations on the functioning of the CEISD, which again could lead to further delays in the implementation of the GEO.

If, however, during its assessment, the CEISD identifies major national security concerns, or due to the specifics and complexity of the authorisation request, the CEISD considers a consultation with the SCSD to be necessary, the SCSD must also provide preliminary consent.

Is there a standstill obligation?

If the transaction exceeds the EUR 2 million threshold and impacts one of the sectors specified above, notification is mandatory and the completion of the transaction must be suspended pending clearance by the CEISD.

There is, however, no deadline for filing, the only condition being for the transaction not to be implemented before clearance.

Implementation of a foreign direct investment without proper notification or the submission of incorrect or incomplete information can be sanctioned with fines of up to 10% of the worldwide turnover generated in the previous financial year by the investor.

Procedural aspects

The filling (to be made by the entity acquiring control) must include the following information:

→ ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital;
→ approximate value of the foreign direct investment;
→ products, services and business operations of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed;
→ the member states where the foreign investor plans to undertake or has completed the foreign direct

investment, and where it will conduct all relevant business operations;

→ funding of the investment and its source;

→ the date when the foreign direct investment is scheduled to be completed or has been completed.

Other procedural matters

Several other amendments have been brought to the review procedure, including the possibility that the CEISD will revert with additional information requests prior to considering the notification as being validly submitted. This rarely occurred under the present regime.

The CEISD must finalise its assessment within 60 days from receipt of all information and any other notices or preliminary consent (e.g. from the SCSD or government). If input from the SCSD is requested, the SCSD's preliminary consent must be given within 90 days from the date of the CEISD's request, which would add additional time on the process.

Following the assessment, the CEISD may authorise the investment, declaring that it does not pose any threat to national safety, or, alternatively, submit the investment to an extended assessment by the government. Following an extended assessment, a decision will be issued to either:

→ authorise the investment under certain conditions to be agreed upon with the CEISD; or

→ reject the request for approval of the foreign direct investment.

For further information on foreign direct investments in Romania, contact your CMS client partner or local CMS experts: Horea Popescu, Claudia Nagy and Cristina Ciomos.