

FDI Screening Regulation in Romania

Implementation of Regulation (EU) 2019/452

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Discreetly and without impact on either media or on general public awareness, on 11 October was entering into force the 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 (the “**Regulation**”) (<https://eur-lex.europa.eu/eli/reg/2019/452/oj>).

The Regulation establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of **security or public order** and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order.

In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on, inter alia:

- (a) **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;
- (b) **critical technologies** and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- (c) **supply of critical inputs**, including energy or raw materials, as well as food security;
- (d) **access to sensitive information**, including personal data, or the ability to control such information; or
- (e) **the freedom and pluralism of the media**.

Romania has declared a pre-existing investment screening mechanism implemented by the Competition Council and the National Defence Council (*Consiliul Suprem de Aparare al Tarii - CSAT*) as corresponding to Regulation (EU) 2019/452

(https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf).

The pre-existing investment screening mechanisms on areas potentially affecting the national security

There was a long time existing investments screening mechanism in Romania, in the currently applicable form since 2012, not particularly for foreign direct investments (FDIs) but for any acquisition, by domestic, EU or non-EU investors, potentially affecting the “national security”. It is considered acquisition any direct acquisition of shares or other form of taking control over businesses or assets in the relevant areas.

The screening is exercised by CSAT through the Competition Council (art. 46 para 9-12 of the Competition Law 21/1996, republished, and application norms, corroborated with CSAT Resolution no. 73/2012) and approval / rejection is issued either by CSAT or, if CSAT deems necessary, is included on the Government agenda which may approve / reject a specific transaction.

The **areas under scrutiny** are: citizens and community security, frontier security, energy, transportation, critical inputs and supply, critical infrastructure, security of IT and communication systems, financial and taxation activity, banking and insurance activity, production and movement of armament, ammunition, explosives and toxic materials, industrial security, disasters management, agriculture and environment protection, privatisation of state owned companies or of the management of such companies.

Approval / rejection, or recommendation to the Government for the approval / rejection, is based on discretionary assessment of CSAT – can be rejected if CSAT believes that the revised transaction might present risks for the national security. CSAT may request opinions from state intelligence structures and public authorities directly involved in the corresponding sector.

Although in broad lines the areas under current scrutiny in Romania overlaps with the areas from the Regulation, given also their quite generality, it worth to mention that Regulation brings on the table some **new aspects** such as the freedom and pluralism of the media or access to sensitive information, as well as specific definitions of critical technologies.

The Regulation being of direct application and while Romania has declared the current mechanism as corresponding to that one referred by the Regulation, it is therefore a logical conclusion that the potential investments of non-EU investors in the new areas would enter under the existing scrutiny mechanism.

Adjustment and supplementation of the Investment Screening Mechanism

The Romanian Government has initiated a draft Emergency Ordinance for the implementation of the Regulation and adjustment and supplementation of the pre-existing mechanism, which is now under public consultation (<http://e-consultare.gov.ro/w/consultare-publica-proiectul-de-ordonanta-de-urgenta-privind-masurile-de-punere-in-aplicare-a-regulamentului-ue-452-2019-al-parlamentului-european-s%CC%A6i-al-consiliului-din-19-martie-2019/>)

What brings new the draft Government Emergency Ordinance?

The draft ordinance creates an inter-institutional consultative body named the Screening Commission for Foreign Direct Investment (CEISD) that will review all foreign direct investment plans and bans or propose bans for those that pose potential threats for security or public order.

CEISD works in the Government and it is established by decision of the Prime-Minister. It shall include representatives of the prime minister's office, Presidency, Ministry of Economy, Energy and Business Environment, Ministry of Finance, Ministry of Foreign Affairs, Ministry of National Defence, Ministry of Justice, Ministry of Internal Affairs, Romanian Intelligence Service (SRI), Foreign Intelligence Service (SIE), and Competition Council.

CEISD is a **deliberative and pre-screening body**, being also entitled to take decision. However, in case of identification of potential threats to national security or disagreement between members, the opinion of CSAT should be required, CSAT being also entitled to escalate the case to the Government.

The draft ordinance also provides requesting the approval of the Cyber Security Operational Council (*Consiliul Operativ de Securitate Cibernetica - COSC*), in situation where foreign direct investments target or involve IT&C technologies that may affect or harm Romania's security or public order. COSC is an inter-institutional executive body responsible with the operational aspects of the National Cyber Security Strategy, working within Romanian Intelligence Service (SRI).

A new aspect brought by the draft ordinance, in line with the Regulation, is the establishment not only of a pre-approval process, with simple or conditional approval or rejection, but also of a monitoring activity and **potential later withdrawal of the authorisation**, with potential protective measures such as suspension of the ownership rights and further forced sale of the participations in public tenders can be applied.

Furthermore, the draft enactment contains specific provisions for undertakings operating **in the mass-media industry**. This includes companies holding an audio-visual license at national or regional level and periodic publications with an average circulation of at least 5,000 printed copies per day in the last calendar year or a web portal with a minimum of 10,000 'accesses' per month.

Let's see the final form of the Government Ordinance approved and published.