



# CELIS

## **CELIS Country Note**

**on**

**Romania, 2024**

**by**

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**07 March 2024**

## Abstract

Romania implemented the Regulation (EU) 2019/452 of the European Parliament and the Council via a foreign direct investment (FDI) regime which became effective in April 2022. While this initial FDI regime expressly covered non-EU investors only, defined by reference to the ultimate controlling entity or person, it was formally extended in June 2023 and December 2023, to specifically include EU-based investors.

The national screening mechanism is primarily aimed at identifying any potential risks or threats triggered by a transaction or a new (greenfield) investment on national security, public order or any relevant impact on EU projects or programmes. The national screening mechanism involves the Romanian Competition Council, which conducts a *prima facie* formal review, and the Commission for Screening of Foreign Direct Investments (in Romanian *Comisia pentru Examinarea Investițiilor Străine Directe*), which conducts the substantive review. CEISD is comprised of representatives of the Government, ministries, intelligence bureaus and the Romanian Agency for Investments and Foreign Trade.

The list of alleged sensitive sectors is very broad and there are no updates from 2012 onwards. Generally, all investors are bound to notify, subject to a standstill obligation, any investment exceeding a monetary threshold of EUR 2 million. Secondary legislation or guidelines particularly on process, calculation of the investment value etc., are expected to be issued by the relevant authorities.

## Author

### Georgiana Bădescu

Georgiana Bădescu is Romanian lawyer with 18 years of practice since Bar admission. She is a partner at Schoenherr and head of the firm's competition, EU & foreign trade practice group in Romania and Moldova, and of the data protection team in Romania. Her experience covers the full range of competition matters. Relevant projects include a consistent series of national and EU-level merger control cases, advice in virtually all large-scale sector inquiries or investigations for potential breaches conducted by the national competition authority, various competition assessments, general competition advice to a strong portfolio of clients, as well as state aid matters. She has advised on a considerable number of foreign direct investment filings in Romania. Georgiana is actively involved in advocacy projects, including legislation drafting in her areas of practice. Georgiana graduated from the University of Bucharest, Faculty of Law, Bucharest/Romania (Law Degree 2004) and the Université Paris 1 Panthéon Sorbonne, Collège Juridique d'Etudes Européennes, Paris/France (Maitrise, 2004).

### Cristiana Manea

Cristiana Manea is a Romanian lawyer with 10 years of experience since Bar admission. Currently a senior attorney at law at Schoenherr Romania, Cristiana specialises in competition, EU & foreign trade law. She has provided legal advice on the full range of competition matters, as well as on a considerable number of foreign direct investment filings in Romania. Her clients portfolio spans a variety of industries, such as consumer goods, retail, financial services, pharmaceuticals, IT&C, telecommunications and a wide array of players active in manufacturing & distribution. Prior to joining Schoenherr (in 2017), Cristiana worked for a national law firm, providing advice on corporate, commercial and competition matters. She graduated from the University of Bucharest, Faculty of Law, Bucharest/Romania (Law Degree, 2012) and the Nicolae Titulescu University, Faculty of Law, Bucharest/Romania (Master's Degree in Financial, Banking and Insurance Law, 2013).

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To cite this report: Georgiana Bădescu, Cristiana Manea, CELIS Country Report on Romania, 2024, 07 March 2024.

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## 1. Economic and Political Background

### 1.1. Foreign investment policy

Foreign direct investments are acknowledged as a key driver for economic growth and social development in Romania. As a testament to the foregoing, the Romanian National Security Strategy for 2020-2024 specifically refers to the importance of investments and entrepreneurial efforts and states that ensuring a predictable, competitive, well-performing and attractive economic environment is one of the milestone objectives for national security.<sup>1</sup>

This stated investor-friendly approach is supported by recent statistics,<sup>2</sup> which show that in 2022, foreign direct investment net inflows reached a value of EUR 10,039 million, up by 12.3 percent compared to the net inbound investments in 2021. Romania's investment landscape is still dominated by EU investors (mainly originating from Germany, Austria, the Netherlands or France), although non-EU investors (mostly from the US, UK, Israel or, to a more limited extent, China) also gain more presence particularly in some strategic sectors, such as energy, healthcare or agriculture.

While the current FDI regime may be *prima facie* considered as an indicator of a rather tight and invasive scrutiny policy, triggering hundreds of filings by non-EU and even established EU (and Romanian) investors, in practice Romania still remains an attractive investment hub, as there are only a handful of transactions ultimately abandoned for being deemed potentially problematic mostly for serious national security grounds. The Government has not issued an official decision prohibiting a transaction to this date; likewise, there are no public records or official reports on commitments or measures imposed to acquirers in the context of the FDI review.

### 1.2. Key features of the screening mechanism

National security screening in Romania pre-dates the FDI Regulation (EU) 2019/452. The Romanian Competition Law laid down the grounds for cooperation between the Competition

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<sup>1</sup> The National Defence Strategy of Romania for 2020-2024, page 15.

<sup>2</sup> The National Bank of Romania, (September 20, 2023) Foreign Direct Investment in Romania in 2022, page 5.

Council and the national security sector, represented by the National Defence Council. Mergers or acquisitions notified to the Competition Council<sup>3</sup> could ultimately be prohibited in the event national security risks or threats were identified during the review.<sup>4</sup>

The current screening mechanism, implementing the EU framework while adding an extra layer focused on EU investors and greenfield investments, follows the basic principles initially set by the National Defence Council, as it still factors in the very broad categories of sensitive sectors originally defined in 2012.

The most significant changes consist in (a) a new body in charge with the substantive assessment and new process rules that accompany it and (b) express reference to the screening test and criteria that may be relied on.

On the first limb, the new FDI regime foresaw the creation of the Commission for the Screening of Foreign Direct Investments (in Romanian *Comisia pentru Examinarea Investițiilor Străine Directe*, abbreviated *CEISD*), which is a separate body of a more politically oriented composition. This is primarily because the Commission is comprised of representatives of the Government, ministries, intelligence agencies, and the Romanian Agency for Investments and Foreign Trade (the latter sitting as permanent visitors), in addition to representatives from the Competition Council.

On the second limb, the screening test refers to effects on national security, public order or projects or programmes of interest for the EU. CEISD will factor in the criteria set out by art. 4 of the FDI Regulation (EU) 2019/452<sup>5</sup> when conducting the substantive assessment or screening of the investment, to determine potential effects on any of the above.

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<sup>3</sup> Whereby any of two parties (e.g., the acquirer of sole control and the target) generated a Romanian turnover exceeding EUR 4 million and all parties generated a combined total turnover exceeding EUR 10 million in the financial year preceding the transaction.

<sup>4</sup> George Anglițoiu, (December 2021) Applying Securitisation Theory to EU Competition Policy, the Romanian Journal of European Affairs, Vol. 21, No. 2, page 79.

<sup>5</sup> A full list is provided in Article 4 of the EU FDI Regulation:

<https://eur-lex.europa.eu/eli/reg/2019/452/oj>

The concepts of security or public order include the critical infrastructure, critical technologies, supply of critical inputs like energy, raw materials or food, access to sensitive information as well as the freedom and pluralism of the media.

## 2. Overview of the Screening Mechanism in Romania

### 2.1. Sensitive sectors

CEISD has the power to review investments in alleged sensitive sectors, of major importance for national security.

These sectors are very broadly defined and consist of (a) the security of citizens and communities, (b) border security, (c) energy security, (d) transport security, (e) the security of supply systems with vital resources, (f) critical infrastructure security, (g) security of IT and communications systems, (h) the security of financial, fiscal, banking and insurance activity, (i) the security of the production and circulation of weapons, ammunition, explosives, toxic substances, (j) industrial security, (k) protection against disasters, (l) protection of agriculture and the environment, (m) protection of the privatization of undertakings with state capital or their management.

Investments that occur in an alleged sensitive sector, even if not likely *per se* to affect security, public order or an EU project or programme in the investors' own view and assessment, would need to be automatically notified if the investment value is also met.

### 2.2. Types of investments in scope

Broadly, a "foreign direct investment" concerns any investments above EUR 2 million, made by EU (including Romanian) and/or non-EU investors, that lead to lasting and direct links between an investor and an undertaking, pursuant to which the investor makes available funds to carry out a business in Romania, including those investments that allow an effective participation in the management or control of an undertaking that carries out a business. The definition of the "foreign direct investment" has been reshuffled in December 2023, to reflect a broader concept, not limited to gaining control over an undertaking (as regulated under the previous iteration of the FDI Act) but also effectively participating in the management of the same. Arguably, since the FDI Act does not include specific instances of the latter, this could very well include, for example, the appointment of management board members by minority shareholders, which do not exercise actual control over the company's management, within the meaning of merger control regulations.

Internal restructurings are also covered, notably when there is a non-EU shareholder inserted anywhere in the ownership chain of a foreign investor. Nexus is typically triggered by at least one local subsidiary (arguably also including branches and rep offices) of the foreign investor

subject to the restructuring. The FDI Act refers to the possibility of the newly inserted shareholder to exercise direct or indirect *control*, while specifically regulating a change in the *ownership* (not change in the structure or quality of control) as the trigger for the filing obligation, therefore internal restructurings typically require a case-by-case assessment.

The FDI regime also covers "new investments" or greenfields, which concern investments in tangible or intangible assets, related to:

- starting the activity of a new undertaking, respectively setting up a new location for carrying out the activity for which funding is requested, technologically independent from other existing units;
- expanding the capacity of an existing undertaking to obtain a higher production capacity in an existing location due to unsatisfied demand;
- diversifying the production of an undertaking through products that were not previously manufactured; or
- a fundamental change in the general production process of an existing undertaking.

Although the regime primarily covers Romanian-based entities (local subsidiaries, branches, offices, etc.), an asset-based screening can be conducted if these entities own critical real estate assets, specific infrastructure assets, specific patents, etc., which may be caught by the wide scope of the sensitive sectors.

### 3. Overview of the relevant framework

#### 3.1. Legal framework

Emergency Government Ordinance no. 46/2022 (the FDI Act) sets out the framework for the screening of FDI in Romania. It entered into force on 18 April 2022 and was further amended and supplemented in June 2023 and December 2023, to specifically include all EU-based (including Romanian) investors.

The list of sensitive sectors is regulated by the Decision of the National Defence Council no. 73/2012.

Government Decision no. 1326/2022 is the act for formal approval of the Regulation for the organisation and functioning of CEISD.

There are also certain relevant provisions in the Competition Law, which mainly deal with the interplay between notified economic concentrations and national security review. In such

instances, the Competition Council is able to refer (ex officio) a notified economic concentration for national security screening. However, as a rule, the merger control process and the FDI screening must run in parallel.

### 3.2. Administrative process

FDI filings are submitted to the Competition Council, which engages in a *prima facie* review, rather for completeness. Filings are then referred to CEISD for the substantial review respectively screening.

At the end of the screening process, CEISD may issue a notice (in Romanian *aviz*) deciding, as the case may be:

- to clear the investment;
- to issue a conditional clearance, subject to behavioural or structural remedies or measures. In this instance, the investment can be made or can continue exclusively within the limits and according to the provisions and conditions specified in the conditional clearance;
- to prohibit the investment.

It is expressly stated that CEISD will issue the same decisions as per the above when also screening investments *ex post* (not only *ex ante*).

To the extent CEISD ascertains that an investment was implemented in breach of the EU and national FDI legislation and affects security, public order or is likely to affect projects or programs of interest for the European Union, CEISD will issue a notice proposing the annulment of the investment, subject to a final and binding decision by the Government. Likewise, to the extent CEISD ascertains that an investment was implemented in breach of the terms of a conditional clearance, the Government may then impose via a decision any appropriate measure to restore the pre-existing status.

If an investment is likely to affect projects or programmes of interest for the EU, CEISD will factor in the opinion of the European Commission, issued in accordance with art. 8 of FDI Regulation (EU) 2019/452. From the language of this legal provision, it is apparent that CEISD likely feeds all investments (irrespective of the nationality of the investor) into the EU Cooperation Mechanism. It appears however that the screening process is not necessarily suspended pending receipt of feedback within the EU Mechanism, but the investment will not be cleared until receipt of the Commission's opinion. Similarly, opinions expressed by other



Member States are likely to be factored in during the review process, although there is no express provision to this effect or to the weigh given to the same in the context of a national screening.

The investor has a stand-still obligation until the relevant public bodies revert with their decision. If the investor proceeds to implementing the investment before clearance, it may become liable to pay a fine of up to 10% of its total worldwide turnover, in addition to complementary sanctions such as cancelation of the investment or potential costs to restore the pre-existing *status quo*.

### 3.3. Overview of Timing: Procedural Milestones

The total duration of the Romanian FDI end-to-end process may vary based on the specific circumstances of each investment, specifically if it involves a Phase I analysis, without CEISD calling in the National Defence Council for an opinion, or a Phase II, if the National Defence Council is called in based on preliminary concerns of CEISD.

A Phase II process is expected to be typically triggered by specific and complex circumstances of the investment or because of its impact on security, public order or projects and programs of interest for the EU. In this case, CEISD will refer the investment to the National Defence Council for an opinion, which should be communicated within 90 days.

Additionally, it is apparent from the language of the restated FDI Act that at least investments likely to affect EU projects or programmes will be fed into the EU Cooperation Mechanism, which may add some delays to the end-to-end process. The national screening process does not appear to be stayed pending receipt of feedback from the Cooperation Mechanism though.

CEISD will issue its notice within 60 calendar days since the filing is deemed complete and all required peer-to-peer notices and opinions are secured.

CEISD sends its notice on a peer-to-peer basis to the Competition Council, which will issue a clearance decision within 30 calendar days (for non-EU investors) and a clearance letter within 10 calendar days (for EU investors).

A Phase I analysis usually takes up to 2 – 2.5 months for EU investors and up to 3 – 4 months for non-EU investors.

If a Phase II is triggered, the process becomes a black box, as deadlines become rather unclear and uncertain.

### 3.4. Sanctioning regime

The following breaches may be sanctioned under the FDI regime:

- intentional submission of inaccurate, incomplete or misleading information,
- gun-jumping / implementation of the FDI before clearance, either intentionally or by negligence,
- implementation of the FDI in breach of remedies or measures imposed through a conditional clearance, either intentionally or by negligence.

The main sanction for any of the above breaches is a fine up to 10% of the total worldwide turnover of the investor in the financial year preceding the sanction.<sup>6</sup> Secondary legislation on the calculation and setting of fines has not been yet passed or proposed.

Complementary sanctions, such as cancellation of the investment or imposing measures aimed to restore the *status quo* pre-existing the investment, may be equally imposed. No personal liability of individuals is regulated by the current regime.

There is no public information or other records showcasing any enforcement activity of FDI authorities up to date.

To the extent CEISD receives indicia that an investment was cleared based on inaccurate, incomplete or misleading information, it will reinitiate the screening process, with an option to reach any of the three possible conclusions indicated in Section 3.2.

The limitation period during which sanctions can be applied is (i) two years for the submission of inaccurate, incomplete or misleading information and (ii) three years for other deeds. Decisions are subject to judicial review, before the Bucharest Court of Appeal.

## 4. Developments to follow

While the Romanian FDI regime is still rather new, with no enforcement so far, it is more likely than that that it will become even more far-reaching. One formal step was taken in this direction, by the Romanian authorities formally extending the scope of the regime to all investors, irrespective of their nationality.

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<sup>6</sup> If the undertaking did not generate any turnover during the last financial year, the prior year will be considered or the latest registered turnover, as available. In case of newly established companies as a result of an FDI, which did not generate a turnover in the prior year, a fine between RON 10 million (approx. EUR 2 million) to RON 50 million (approx. EUR 10 million) will be applied.

The list of sectors remains very broad, with no changes from 2012 to date, and signals sent by authorities appear to indicate that it will purposely remain unchanged for some time.

Therefore, investors should be prepared to adjust the timeline of transactions to reflect a potentially time-consuming process and to anticipate risks and consider solutions to mitigate potential concerns well in advance of signing a new transaction or committing for a new investment in Romania.

### Annex 1: Relevant laws, ordinances, regulatory guidelines

- 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
- Competition Law no. 21/1996, republished in the Official Gazette of Romania, Part I no. 153 of 26 February 2016, as further amended and supplemented
- Emergency Government Ordinance no. 46/2022 regarding the implementation measures of 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, as well as for amending and supplementing the Competition Law no. 21/1996
- Emergency Government Ordinance no. 108/2023 regarding the amendment and update of Competition Law no. 21/1996, and other legal acts
- Decision of the National Defence Council no. 73/2012 on the application of Article 46 para. (9)<sup>7</sup> of the Competition Law no. 21/1996, republished, as further amended and supplemented
- Government Decision no. 1326/2022 on the approval of the Regulation for the organization and functioning of the Commission for the Examination of Foreign Direct Investments

### Annex 2: Relevant administrative and court cases

There have been no relevant administrative and court cases in Romania.

### Annex 3: Relevant literature

- The National Bank of Romania, (September 20, 2023) Foreign Direct Investment in Romania in 2022; <https://bnro.ro/PublicationDocuments.aspx?icid=14364>.
- The National Defence Strategy of Romania for 2020-2024, published in the Official Gazette of Romania, Part I no. 574 of 1 July 2020 [https://www.presidency.ro/files/userfiles/Documente/Strategia\\_Nationala\\_de\\_Aparare\\_a\\_Tarii\\_2020\\_2024.pdf](https://www.presidency.ro/files/userfiles/Documente/Strategia_Nationala_de_Aparare_a_Tarii_2020_2024.pdf).

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<sup>7</sup> Now renumbered as Article 47 para. (9) of the Competition Law no. 21/1996, republished, as further amended and supplemented.

- George Anglițoiu, Applying Securitisation Theory to EU Competition Policy, The Romanian Journal of European Affairs, Vol. 21, No. 2; [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3991868](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3991868).

### About the CELIS Institute

The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. More about the Institute's activities under [www.celis.institute](http://www.celis.institute).

### About the CELIS Country Report(er)s Project

CELIS Country Reports (hereafter "Report") are produced by leading experts for any European and select non-European jurisdiction following an elaborate model, allowing for comparison and evaluation across jurisdictions. The project's aim is to identify and suggest best practice and to propose a common European (model) law on investment screening.

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