

12 June 2023

Legal Bulletin



Competition Law

1. Law No. 164/2023 approving Government Emergency Ordinance No. 46/2022 on measures implementing 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, and amending and supplementing Competition Law No. 21/1996

Amendments to the investment screening regime from a national security perspective

The Law approving Government Emergency Ordinance No. 46/2022 (“GEO 46/2022”) on measures implementing 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 (“Law 146/2023” or the “Law”) was published in Official Gazette No. 495 of 7 June 2023. Previously, GEO 46/2022 established a framework for the screening by the Commission for the Examination of Foreign Direct Investments (*in Romanian*, “Comisia pentru Examinarea Investițiilor Străine Directe” or “CEISD”) of certain transactions targeting key sectors of the economy (such as energy, agriculture, finance and insurance, etc.) from the perspective of national security defence principles.

The most relevant amendments introduced by the new enactment are as follows:

1. Defining the concept of European Union (EU) investor

Prior to the amendment, the legislation provided an express definition only for non-EU investors. As a result of the legislative amendment, the concept of EU investor (which includes investors from Romania, as a Member State) is defined as follows:

- A natural person who is a citizen of a Member State of the European Union and who has made or intends to make an investment in Romania;
- A legal person having its registered office in a Member State of the European Union and which has made or intends to make an investment in

Romania, in which control is exercised directly or indirectly by: (i) a natural person who is a national of a Member State of the European Union, (ii) a legal person having its registered office in a Member State of the European Union, or (iii) another legal entity, without legal personality, organised under the laws of a State which is a Member State of the European Union;

- The trustee of an entity without legal personality which has made or intends to make an investment in Romania or a person in a similar position, if it is a citizen of the European Union, in the case of a natural person, or if it has its registered office in a Member State of the European Union, in the case of a legal person, or if such entity is incorporated under the laws of a State which is a Member State of the European Union.

The long-awaited law, which clarifies the nature of the transactions subject to CEISD's screening, expressly extends the scope established by GEO 46/2022 to include transactions by EU investors that meet the other criteria established by GEO 46/2022 and fall under the provisions of Article 47(1) of Competition Law No. 21/1996¹. This expressly includes transactions that would not be subject to clearance under the rules on economic concentrations.

At the same time, the Competition Council is obliged to inform CEISD of any transaction notified to the competition authority that may be subject to screening under GEO 46/2022.

The wording of the law is still not clear enough to determine the exact intention of the legislator regarding the need to screen transactions involving EU investors. Although it seems that the scope of interest in the case of EU investors would be limited to cases covered by Article 47(1) of Competition Law No. 21/1996, ever since the entry into force of GEO 46/2022 the authority has encouraged the notification to CEISD of all investments that may fall within the scope of GEO 46/2022 from a business object perspective, including investments by EU investors. Therefore, at least for the next period, caution should be exercised in interpreting the wording by taking the most comprehensive approach possible from the perspective of notifying EU investors' transactions to CEISD.

It should be recalled that during the period in which CEISD is screening the transactions with a view to issuing an opinion, such transactions cannot be implemented.

¹ According to Article 47(1) of Competition Law No. 21/1996, *within 30 days of receiving a complete notification of an economic concentration, the Competition Council shall issue a written reply, under the form of a letter, if it concludes that the economic concentration does not fall within the scope of this law.*

2. Possibility to cancel the investment

The Law now provides for the possibility of cancelling an investment implemented in violation of GEO 46/2022 or Regulation (EU) 2019/452 if it has a negative impact on the security or public order of Romania or is likely to have a negative impact on projects or programmes of interest to the European Union. In such a case, CEISD issues an opinion proposing the cancellation of the direct investment. However, the Law does not provide details on the actual cancellation procedure. In principle, the opinion is submitted to the Government and the cancellation of the investment is to be ordered by means of a Government Decision which would specify the conditions for cancellation. In any case, CEISD's opinion is only advisory.

3. Other amendments

Other amendments concern administrative/organisational issues relating to CEISD.

At the same time, the Competition Council is expected to issue guidelines on how to set the quantitative threshold for determining the value of investments subject to CEISD's screening, which is one of the key criteria triggering the obligation to notify an investment to CEISD.

Editors

The attorneys of Țuca Zbârcea & Asociații specialized in **Competition** provide legal assistance and consultancy services on the applicable regulations in the competition field, including in relation to aspects such as antitrust, domestic and cross-border transactions (mergers, acquisitions, joint ventures, etc.), and state aid. Our attorneys represent the interests of our clients before the national authorities in the competition field, and in disputes before the courts of law in relation to a wide range of specific matters, including unlawful competition.

Moreover, Țuca Zbârcea & Asociații developed a department for compliance with the regulations in the competition field (i.e. preliminary assessment of potential exposure, training programs) to help clients avoid the sanctions applicable as a result of breaching the competition laws. The activity in this field is appreciated by international legal directories as one of the best on the market, and the firm ranks first in the tables of Chambers Europe or other legal publications.



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