

RES LEGAL UPDATES: FDI SCREENING PROCEDURE

On 18th of July 2024, Law No. 231/2024 approving the Government Emergency Ordinance No. 108/2023 for the amendment and completion of the Competition Law No. 21/1996, as well as other legal acts, was published in the Official Gazette Part I, No. 699 (the “**Law No. 231/2024**”).

The Law No. 231/2024 shall enter into force starting 21 July 2024.

The scope of Law 231/2024 is to approve the Government Emergency Ordinance No. 108/2023 for amending and supplementing the Competition Law No. 21/1996, as well as other legislative acts (the “**GEO No. 108/2023**”), which extended the FDI screening obligations provided by Governmental 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 examining foreign direct investment in the Union and amending and supplementing Competition Act No. 21/1996, published in the Official Gazette, Part I No. 379 of 18 April 2022, as subsequently amended (the “**GEO No. 46/2022**”) to include EU investors.

It is worth mentioning that as per the Applicable Law, the term “*EU investor*” may refer to one of the following natural or legal entities who intend to initiate an investment in Romania:

- a) any natural or legal person whose citizenship or registered office is of a Member State of the European Union (“**EU Member State**”);
- b) any legal person whose registered office is located in a Member State of the European Union (“**EU Member State**”), in which control is exercised directly or indirectly by a person as described at point a) above or another legal entity, without legal personality, organised under the laws of an EU Member State¹;
- c) a trustee of an entity without legal personality, whose citizenship or registered office belongs to an EU Member State or a person in a similar position, if this person has a citizenship or registered office of an EU Member State;

hereinafter collectively referred to as “**EU Investors**”.

However, upon the moment of entrance into force of the GEO No. 108/2023, a concrete sanctioning framework applicable to this category was not expressly regulated.

The amendments brought by Law No. 231/2024 are mostly focusing on the sanctions extended to the EU investments which have been initially regulated by the provisions of GEO No. 46/2022 towards foreign investments but nonetheless introducing a new high importance sanction.

¹ In accordance with the Competition Law, control derives from rights, agreements or any other factors which separately or collectively and having all the legal and factual aspects into consideration, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) rights of ownership or of use over all or part of an undertaking’s assets; (b) rights or contracts which confer a determining influence on the structure of an undertaking, on voting or on the decisions of the governing bodies of an undertaking. Such control shall be acquired by the persons or undertakings who: (a) are the holders of rights or beneficiaries of the agreements; or (b) are not holders of the rights or beneficiaries of the agreements but have the power to exercise decisive influence under them.

A. THE FINE WAS EXTENDED TO EU INVESTORS

By means of Law No. 231/2024, the sanctioning framework provided by previous legislation has been extended to include investors from the European Union.

As a result of Law No. 231/2024, **the fine of up to a maximum of 10% of the worldwide turnover** for the financial year preceding the sanction, or the latest recorded turnover of the enterprise in cases where the enterprise did not generate turnover or when it cannot be determined for the financial year preceding the sanction or the previous year, is also applicable to investors from the European Union.

In the case of newly established enterprises as a result of direct foreign investment, new investments, or, as applicable, investments from the European Union that did not generate turnover in the year preceding the sanction, they will be penalized with a fine ranging between 10,000,000 lei and 50,000,000 lei.

Therefore, according to Article 12 (1), it constitutes a contravention, if the act does not constitute a crime, and is sanctioned, by derogation from the provisions of Article 8, paragraph (2), letter a) of Government Ordinance No. 2/2001 regarding the legal regime of contraventions, approved with amendments and completions by Law No. 180/2002, with subsequent amendments and completions, with a fine that cannot exceed 10% of the total worldwide turnover from the financial year preceding the sanction, for the following actions of the foreign investor and the European Union investor:

“a) intentionally or negligently providing inaccurate, incomplete, or misleading information in an application for the authorization of a direct foreign investment, new investment, or, as applicable, an investment from the European Union;

b) implementing a direct foreign investment, new investment, or, as applicable, an investment from the European Union without it being authorized under the conditions of this emergency ordinance, committed intentionally or negligently;

c) implementing the direct foreign investment, new investment, or, as applicable, investment from the European Union with non-compliance or violation of the commitments assumed through the conditional authorization decision provided in Article 9, paragraph (2), letter b), committed intentionally or negligently;

d) failing to communicate the necessary information for examining and approving the direct foreign investment within the legal deadlines and in a complete and correct manner.”

B. NEW SANCTION: NULLITY

As per the latest amendments brought by Law No. 231/2024, a new sanction applicable to both foreign investments and EU investments has been introduced, namely absolute nullity, which operates *de jure* with respect to the commitments, agreements, or contractual clauses through which a direct foreign investment, an investment from the European Union, or a new investment is realized, when such investment has not been authorized under the conditions of the law, according to Article 12, paragraph (3¹).

„(3¹) The commitments, agreements, or contractual clauses through which a direct foreign investment, an investment from the European Union, or a new investment is realized are null by law when such investment has not been authorized under the conditions of this emergency ordinance and under the conditions 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.”

The nullity is absolute, resulting in the cancelation of all deeds with retroactive effects, which can have a high impact on investments, especially in cases where the documentation affected by nullity was the basis for permitting documentation for which the final approval was obtained, considering that the entire procedure will have to be restarted in such a situation.

C. MISCELLANEOUS

C.1. THE CASES CONSIDERED CONTRAVENTIONS WERE EXTENDED

The contraventions regulated by Government Emergency Ordinance No. 46/2022, that attract the application of fines up to 10% of the total worldwide turnover for the financial year preceding the sanction, have been redefined and supplemented with „*The failure to communicate the information necessary for the examination and approval of direct foreign investment within the legal deadlines and in a complete and correct manner*”. Additionally, the method of committing all acts previously regulated under Article 12, paragraph (1) of Government Emergency Ordinance No. 46/2022 through negligence has been added, which is a new aspect compared to the previous regulation.

C.2. THE COMPETITION COUNCIL’S DECISION MUST BE BASED ON THE CONCLUSIONS AND ANALYSIS CARRIED OUT BY CEISD

The authority empowered by law to identify contraventions and apply the sanctions indicated in Article 12(1) of GEO no. 46/2022 is the Competition Council. The method by which it identifies and applies the sanction is provided for in Article 12(9) of GEO No. 46/2022, as amended by the new law, states:

"The contraventions provided for in paragraph (1) are identified and sanctioned by the Competition Council through a decision, based on the conclusions and analysis carried out by CEISD, which can be challenged in the Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, within 15 days of communication."

D. RECCOMENDATIONS FOR INVESTORS

Considering the recent legislative changes, the severity of the sanctions, and the fact that investments related to critical sectors, such as energy, are explicitly listed in the applicable legislation, we recommend following the procedure provided by the current legislation for authorization and complying with the legislation in force.

Further assistance at:



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