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Legal updates regarding the screening mechanism for investments made in Romania. How do these recent changes impact investors?

The regime governing the examination of investments made in Romania, by foreign or EU investors, has undergone new changes. Government Emergency Ordinance No. 46/2022, which regulates the implementation of Regulation (EU) 2019/452 regarding the control of foreign direct investments in the Union ("**GEO no. 46/2022**"), has recently been amended through the adoption of Government Emergency Ordinance No. 108/2023 ("**GEO no. 108/2023**"). The amendments implemented by GEO no. 108/2023 constitute the second set of changes made to the screening mechanism for investments in Romania in sectors that could potentially pose risks to national security, the initial set being delineated in the Approval Law. Subsequently, we will outline the amendments of utmost significance introduced by GEO no. 108/2023.

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1. Significant amendments impacting investors from the European Union

In the context of recent changes regarding investment scrutiny, a series of significant adjustments are apparent, targeting both foreign and EU investments. While the initial attempt at regulation aimed to integrate EU investments into the same framework as foreign ones, the outcome, reflected in the approval law of GEO no. 46/2022, triggered intense debates within the legal sector.

GEO no. 108/2023 introduces **substantial changes** to the investment scrutiny regime and aims to impose notification requirements on EU investors under the same conditions as foreign investors. The new legislative framework doesn't currently meet its objectives either. However, GEO no. 108/2023 is set to be approved by law soon, promising additional modifications.

Thus, a clear **trend emerges toward standardizing the obligations** imposed on both EU and non-EU investors. Soon, most investments made by EU investors (including Romanians) will involve a notification obligation and, implicitly, a waiting period until authorization is obtained (standstill obligation). In the meantime, let's explore the changes already implemented and currently in effect.

The first amendment introduced by GEO no. 108/2023, involves including in the scrutiny and authorization process investments made by foreign investors that leads to the **acquisition of a minority shareholding**, while still allowing for active participation of the investor in the management despite the absence of control over a company or business. This differentiated approach represents an evolution from the initial regulation, where notification and scrutiny focused on investors gaining control.

Currently, **the only concrete obligation imposed on an EU investor**, according to the new regulatory provisions, is to notify any acquisition or change of control over a company and/or a part of a company/business, regardless of their classification as a notifiable economic concentration. This obligation is the result of the amendment to Article 3, paragraph (3) of GEO no. 46/2023.

However, according to GEO no. 108/2023, EU investments (as well as non-EU investments) are subject to **ex officio examination and authorization by CEISD**, even though there is currently no explicit obligation for the EU investor to notify (except when the EU investor gains control over a company/business, as mentioned above). Hereafter, we list several types of investments that are subject to the examination and authorization process by CEISD:

- M&A transactions,
- Increases in share capital,
- Acquisition of a minority stake allowing effective participation in management,
- Establishment of commercial companies,
- Internal reorganizations/restructurings resulting in capacity expansion,
- Shareholder-financed transactions,
- Investments related to the commencement of activities/expansion and diversification of capacity.

The content of GEO no. 108/2023 remains unclear, both concerning the sanctioning regime applicable to European Union investments and the obligation of European Union investors to refrain from implementing the investment until authorized. Therefore, the penalty of up to 10% of turnover, stipulated in Article 12 for foreign investors, doesn't apply to EU investors.

Another significant change introduced through GEO no. 108/2023 is represented by the incorporation of the **option to annul investments** made by EU investors, if investments impact the security or public order of Romania or have the potential to influence projects or programs of interest to the European Union.

In addition to the aforementioned points, an additional set of changes has been introduced through the new piece of legislation:

- **Authorization Fee** - referred to as "examination fee," amounts to 10,000 euros, regardless of the investment value, and payable at the time of submitting the authorization request. The good news is that this fee is refundable if CEISD determines that the notified investment does not fall under the scope of Emergency Ordinance No. 46/2023.

- **Reduced Response Time for the Authorization of EU Investments** - The Competition Council will issue a notice if a foreign investment receives CEISD's approval, notifying the EU investor within 10 days. Therefore, for the authorization of EU investments, the examination, issuance, and communication of authorization have been reduced from 90 days to 40 days.

2. Amendments to Competition Law

A particularly noteworthy aspect is that GEO no. 108/2023 introduces significant changes to Competition Law. These modifications, briefly outlined below, will be the subject of a detailed analysis in future editions of our legal bulletin:

- Implementation of an exception to individual liability principles by assessing fines relative to the global turnover of the entire corporate group.
- Broadening the investigative authority of the Competition Council.
- Restriction of legal privilege in attorney-client relationships.
- Granting enforceable status to the minutes issued by the Competition Council.
- Ensuring the alignment of authorities and public institutions with competition regulations.

3. Final remarks

In conclusion, our advice for investors planning investments in Romania in the near future is to approach the new procedure with resilience. However, given that the enactment of these changes, including those expected through the approval law, could potentially impact transaction timelines significantly, we recommend a proactive stance. Undertaking a preliminary assessment to ascertain whether the contemplated investment necessitates authorization is imperative. This proactive measure facilitates the efficient management of all procedures involved in obtaining approval, thereby saving valuable time.

For further questions regarding the aspects mentioned in this alert, please contact us.



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