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National competition authorities and FDI screening: the case of Romania

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EU FDI Screening Regulation: separating security from competition

The Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union (EU FDI Screening Regulation) was adopted on 19 March 2019 and became fully operational on 11 October 2020. Its adoption was prompted by the concerns of various stakeholders alleging the existence of the regulatory gap in the current EU merger control regime under the Regulation 139/2004 (EUMR), which does not include public interest considerations such as competitiveness of the EU companies on the global markets, the creation of "European champions" or taking into account state subsidies received by the foreign acquirers. Unwilling to expose the EU merger control to "politicization" and non-competition considerations, the European Commission tabled a legislative proposal for the EU FDI Screening Regulation, which suggested the Member States to use FDI screening legislation for filtering foreign investments on the grounds of security and public order. In its subsequent Guidance to the Member States, the Commission recommended the adoption of the extensive national FDI screening legislation. Given the short timeframe between the adoption and operation of the EU FDI Screening Regulation and the inherent connection between the FDI and economic concentrations, several Member States have included their national competition authorities (NCAs) in the process of the FDI screening. The present brief analyses the Romanian FDI screening mechanism with the focus on the role of its NCA.

Existing investment screening regime in Romania

The current involvement of the Romanian NCA, the Romanian Competition Council (RCC), in the investment screening framework was introduced by the 2011 amendments of the Competition Act, which required the RCC to forward the notified economic concentrations that may present national security risks to the Supreme Council for State Defense (SCSD), a collegiate institution chaired by the President of Romania. It should be noted that the Romanian investment screening regime applies not only to foreign but also to Romanian and European investors. For example, in 2013, the SCSD has advised the government on the conditions for privatization of CFR Marf?, the state owned railway cargo operator, which was expected to maintain its transport operations necessary for the national defense.

In 2012, the SCSD has clarified which sectors are considered strategic and where the security review may be warranted: (a) security of citizens and communities; (b) border security; (c) energy security; (d) transport security; (e) supply of vital resources; (f) critical infrastructure; (g) IT and communications systems; (h) financial, fiscal, banking and insurance activities; (i) production and trade in arms, munitions, explosives, toxic substances; (j) industrial security; (k) disaster management; (l) protection of agriculture and environment; (m) privatization or management of companies with capital owned by the state.

The RCC is expected to notify to the SCSD any economic concentration notified to the RCC that falls into one of the above mentioned domains, even when such concentration would not require the approval of the RCC when it does not reach the requisite turnover thresholds (EUR 10 million globally for all undertakings involved and EUR 4 million in Romania by at least two undertakings involved). If, according to the Secretariat of the SCSD, the notified transaction may present risks for national security and will undergo the review by the SCSD, the RCC informs the parties involved about the suspension of the merger assessment procedure. The latter will resume if the SCSD finds no risks to national security and will be terminated if the SCSD recommends to the Government the prohibition of the notified FDI on the national security grounds. As a result, the RCC effectively serves as an intermediary between the notifying person and the SCSD by communicating information and documents to the SCSD and other public authorities involved in the security screening and informing the notifying person about the decisions taken by the SCSD. Throughout the years, the RCC has routinely forwarded notifications of economic concentrations to the SCSD. For example, in 2014 there were seven and in 2013 there were eight cases where the SCSD examined such concentrations, which primarily concerned the fields of energy security and information systems. None of these cases warranted the opposition of the SCSD.

Proposed amendments

While the newly adopted EU FDI Screening Regulation was to be applied in parallel with the EUMR, several Member States have engaged their NCAs in the process of FDI screening along with their existing competences in the field of merger control. In Romania, the proposed amendments to the current FDI screening regime attribute an important role to the RCC, which was designated as a point of contact under Article 11 of the EU FDI Screening Regulation. The newly established Commission for the Screening of the Foreign Direct Investments (CSFDI) will include representatives from various state authorities, including the RCC. The RCC will serve as a secretariat of the CSFDI without having a right to vote at the SCFDI meetings. It will forward to the SCFDI all notifications concerning FDI in the strategic sectors as defined by the SCSD provided the value of the FDI reached EUR 2 million. Thus, while the RCC will be involved in all stages of the FDI screening process, formally it will have no influence on the decision of SCFDI concerning the clearance/prohibition of the FDI on public security grounds. The RCC will be also authorized to apply penalties in the amount of 1-5% of the annual turnover for the failure to notify the FDI or for the supply of incomplete or erroneous information.

Outlook

Currently, the example of Romania concerning the NCA’s involvement in the FDI screening on the

basis of public security remains a rare example as only half of the Member States have notified their national FDI screening regimes under the EU FDI Screening Regulation. Another notable example is Poland, where the NCA is now authorized to administer the whole process of the FDI screening in parallel with the merger control proceedings. The engagement of the NCAs in the process of the FDI screening could have unintended consequences, especially if no adequate procedural safeguards are in place to ensure clear separation between merger control and FDI screening functions exercised by the NCAs. In Romania, the institutional separation will be ensured by the fact that the RCC will be involved exclusively in the procedural activities of FDI screening without participating in the substantive decision-making that has been reserved for the SCFDI and the SCSD. While the FDI screening could be used as a legitimate regulatory framework for the protection of public security and other public interests, these considerations should be institutionally and procedurally separated from the competitive assessment under the merger control regime in order to avoid the unintended "politicization" of the merger control, one of the objectives that the Commission attempted to achieve with the adoption of the EU FDI Screening Regulation.

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