

## Chapter 3

### Investments

#### 1. General

Private investments have been of paramount importance in Romania ever since the country started on its path to a free market economy based on fair competition and sound business practice. This has made investments accommodation and fostering one of the major goals in the legal framework drafting process.

The Romanian Constitution itself binds the State to guarantee, free trade, protection of fair competition, provision of a favorable environment wherein every factor of production can be capitalized, as well as implementation of regional development policies in accordance with the objectives of the European Union.

In addition, applicable legislation as well as numerous bilateral investment treaties ratified by Romania provide a series of investment related guarantees, including (i) equal (that is fair, equitable and non-discriminatory) treatment for Romanian and foreign investors alike, (ii) the right to invest in any field and in any legal form, (iii) guarantees against nationalization, expropriation or other equivalent measures, (iii) assistance in carrying out administrative formalities, etc.

Such rights and guarantees, and many others that serve the same purpose, aim to ensure a suitable, adequate business climate wherein investors can conduct their activity based on the principles of an open and free market economy. In addition, the Romanian state has made efforts to accommodate, in line with EU regulations regarding State aid, various forms of financial aid to investments.

#### 2. Main regulations

- Government Emergency Ordinance No. 92/1997 regarding incentives for direct investments, as amended to date (“**GEO No. 92/1997**”);
- Government Emergency Ordinance No. 85/2008 on fostering investments, as amended to date (“**GEO No. 85/2008**”);
- Law No. 346/2004, regarding small and medium enterprises, as amended to date (“**Law No. 346/2004**”);
- Foreign Currency Regulation No. 4/2005 issued by the National Bank of Romania, as further republished (“**Currency Regulation No. 4/2005**”);
- Law No. 227/2015 on the Fiscal Code, as amended to date (the “**Fiscal Code**”);
- Law No. 186/2013 regarding the establishment and operation of industrial parks (“**Law No. 186/2013**”);
- Law No. 329/2009 regarding the reorganization of certain public authorities, the rationalization of public expenditures, business support and the compliance of the framework agreements with the European Commission and the International Monetary Fund, as amended to date (“**Law No. 329/2009**”);

- Government Emergency Ordinance No. 77/2014 regarding national proceedings on state aid, as amended to date (“**GEO No. 77/2014**”);
- Government Decision No. 536/2014 regarding the organization and functioning of the Department for Foreign Investments and the Public-Private Partnership (“**GD No. 536/2014**”);
- Government Decision No. 437/2015 regarding the procedure for the approval and contents of the Memorandum indicated in article 7 of GEO No. 77/2014 (“**GD No. 437/2015**”);
- Government Decision No. 332/2014 establishing a state aid scheme supporting investments which stimulate the regional development by the creation of jobs, as amended to date (“**GD No. 332/2014**”);
- Government Decision No. 807/2014 implementing state aid schemes for stimulating investments with a major impact in the economy, as amended to date (“**GD No. 807/2014**”);
- Government Decision No. 980/2015 regarding the organization and functioning of the Ministry of Energy (“**GD No. 980/2015**”);
- Government Decision No. 957/2015 regarding the organization and functioning of the Ministry of Economy, Trade and Relationship with the Business Environment (“**GD No. 957/2015**”);
- Order No. 1056/2014 of the Ministry of European Funds approving the state aid scheme Granting support for the consolidation and development of the productive sector through investments of SME and large enterprises, as amended to date (“**Order No. 1056/2014**”);
- Order No. 117/2014 of the Ministry of European Funds approving the state aid scheme Granting support for the consolidation and development of the productive sector through investments of large enterprises (“**Order No. 117/2014**”);
- Order No. 3822/2015 of the Ministry of Education and Scientific Research approving the state aid scheme for financing research-development and innovation projects by means of the Sectoral Operational Programme “Increase of Economic Competitiveness”;
- various other enactments regulating State aid schemes.

### **3. Investment incentives**

#### **3.1. Preliminary remarks**

Following Romania’s accession to the European Union, all incentives that may qualify as State aid as per the Treaty on the Functioning of the European Union (the “**TFEU**”) are subject to both EU and local regulations.

Private investors may therefore be granted such incentives only if (i) *ex ante* approved by the European Commission further to individual aid notifications filed therewith by the aid supplier, or (ii) they fall under the scope of the European Commission regulations exempting certain categories of State aid from the obligation to file such notifications; such exemptions concern, as well as others, State aid schemes enacted at national level under certain conditions.

In line with the above, GEO No. 85/2008 provides the general framework for schemes aimed at supporting Romania's sustainable development through promotion of certain categories of investments, in compliance with principles such as (i) equal treatment concerning the criteria and means for granting incentives, (ii) transparency, (iii) efficiency in the use of incentives, (iv) confidentiality and (v) eligibility.

According to GEO No. 85/2008, various incentives such as non-refundable grants for purchasing fixed and non-fixed assets, financial aid in connection with newly created jobs, interest incentives linked to credit commitments, etc. may be granted based on State aid schemes and with due observance of EU rules concerning State aid.

All State aid schemes, including the orders of the competent minister for their application, are published in the Official Gazette of Romania and on the official websites of the relevant State aid provider and of the Department for Foreign Investments and Public-Private Partnership.

GEO No. 85/2008 further details the eligibility conditions to be met by investments and investors and the steps to be followed in order to access the underlying incentives. The eligibility conditions require, *inter alia*, that the investor has no debt to the Romanian state budget, or outstanding loans with sovereign guarantees, and is not subject to insolvency, compulsory execution, dissolution or State aid recovery proceedings, etc.

The granting of any incentive is conditional upon the prior approval of the national supervising authority, which, in any case, must precede the commencement of the investment. As mentioned above, in case of an individual State aid falling outside of an approved State aid scheme, European Commission authorization is also needed.

The Department for Foreign Investments and Public-Private Partnership is the public body under the subordination of the Government, which is responsible for the coordination, monitoring and enforcement of national government policy in promoting, marketing, attracting and implementing foreign direct investment. This body has powers in matters of public-private partnerships, mediates the contract between investors and public authorities and provides investors, upon request, with technical assistance and guidance on the available State aid schemes.

The sections below provide a brief presentation of the main investments incentives set forth under Romanian legislation.

### **3.2. General schemes of regional aid**

A number of State aid schemes exist to foster regional development and concern the granting of financial aid to:

- (i) large enterprises (a) making investments in the following fields: extraction and manufacturing industries, water distribution, sanitation, waste collection, decontamination, constructions and (b) incurring eligible costs of more than EUR 50 million in connection with such investments;
- (ii) undertakings making investments in excess of EUR 10 million (in RON equivalent) and which are capable of proving their economic efficiency and viability over the investment period and 5 years afterwards, generating contributions to regional development and a quantifiable multiplying effect in the economy;

- (iii) small, medium and large enterprises (a) making initial investments in the following fields: extraction and manufacturing industries, water distribution, sanitation, waste collection and decontamination; and (b) the initial investment is dedicated to the acquisition of new technologies and equipment, license and know-how and, respectively, to the innovation of productions processes and products;
- (iv) undertakings carrying out investments projects, which must be qualified as initial investments or, respectively, initial investments in favour of a new economic activity (in case of large enterprises located in Bucharest-Ilfov development region) and resulting in the creation of at least 10 jobs for each location pertaining to the investment, of which at least three jobs should concern underprivileged workers.

Undertakings acting in the following sectors do not fall under the scope of the above mentioned schemes: (i) activities related to primary production of the agricultural products listed in Annex 1 to the TFEU, (ii) fishing, (iii) coal industry, iron and steel industry, (iv) the transportation sector, (v) naval ship construction, (vi) synthetic fibers, as well as (vii) certain export related activities and activities favoring the use of domestic products to the detriment of imported products.

State aid schemes are developed in accordance with the European Commission's Guidelines on regional State aid for 2014-2020.

### **3.3. Industrial parks**

#### **3.3.1. Concept**

Law No. 186/2013 defines industrial parks as special areas where business activities, scientific research, industrial production and services are performed under a special incentives regime.

The establishment of an industrial park may be initiated by local public authorities, private legal persons or individuals (Romanian or foreign) acting jointly or separately. Such founders set up a company that will manage the industrial park after being issued the industrial park title by the Ministry of Regional Development and Public Administration (MRDPA).

#### **3.3.2. Classification as industrial park**

MRDPA grants the classification of "*industrial park*" where both the company managing the park and the land where the park will be built meet certain conditions as follows.

The company:

- (i) must be duly registered with the trade registry as a Romanian or foreign legal person;
- (ii) must not be subject to insolvency proceedings or procedures aimed at preventing insolvency (*e.g.*, preventive concordat, or ad-hoc mandate); and
- (iii) must have no debts to the state budget that are outstanding and for which a writ of execution has been issued.

Also, the land of the industrial park:

- (i) is owned, held in concession/administration/use by the company that will manage the industrial park, by its founders or by the residents of the industrial park;
- (ii) has access to a European road and/or national road and/or county road and/or ring road;
- (iii) has a compact area of minimum 5 hectares, with exception of the areas crossed by transport routes;
- (iv) is not subject to any registered encumbrance, dismemberment of the ownership right, mortgage, precautionary measure or enforcement procedure, except for any easement for passing, as well as for any mortgages set up in favour of credit institutions from European Union member states, for the purpose of securing the reimbursement of bank loans entered into by the company managing the industrial park aimed at financing the maintenance and/or development and/or refurbishment investments for the industrial park's infrastructure.

Classification as “*industrial park*” may be granted for up to 10 years and may be further extended. Classification ceases:

- (i) upon request of the manager of the industrial park;
- (ii) upon expiry of the term set forth in the MRDPA's order;
- (iii) if a final court decision declaring the manager of the industrial park bankrupt is issued;
- (iv) in case of split/spin off of the manager of the industrial park; or
- (v) if a final court decision ruling the dissolution of the manager of the industrial park is issued.

Furthermore, classification as “*industrial park*” may be revoked by the MRDPA where material deficiencies regarding the park are not remedied by its manager within 90 days after a request of the MRDPA.

### **3.3.3. Management**

The company managing the industrial park has, amongst others, as its main tasks:

- (i) selection of the undertakings that will join the industrial park;
- (ii) performance of services and supply of utilities as required for the benefit of the activities carried out by the undertakings established within the park;
- (iii) ensuring such undertakings' right to use the industrial park infrastructure and utilities on a non-discriminatory basis;
- (iv) repairing, maintaining, improving and developing, as the case may be, such infrastructure and utilities;
- (v) management of the areas and buildings within the industrial parks;
- (vi) liaising with the local and central public authorities; and
- (vii) drawing up the functioning and development strategy for the industrial park.

Industrial parks are operated based on management and related services agreements concluded between the management company and the undertakings established within such parks.

### 3.3.4. Incentives

According to Law No. 186/2013, investments in industrial parks may benefit from the following incentives:

- (i) exemption from taxes applicable for the change of land use or for the removal of land from the agricultural domain;
- (ii) exemption from the land tax and from the building tax, for the land pertaining to the industrial park and, respectively, for the buildings which are part of the industrial park's infrastructure;
- (iii) subject to approval by the local public administration, exemptions from any taxes due to the local budgets for the issuance of any zoning certificates, building permits and/or dismantlement permits for the land and buildings included in the industrial park;
- (iv) other incentives that may be granted, under the law, by the local public administration.

The incentives mentioned above may be granted only if and to the extent allowed under EU State aid rules as well as with due observance of the specific procedures required by said rules.

To this end, the MRDPA passed Order No. 2980/2013 approving the *de minimis* aid scheme for investments in industrial parks (the “*De Minimis* Aid Scheme”) and the regional State aid scheme for supporting initial investments carried out in industrial parks (the “Regional State Aid Scheme”).

The *De Minimis* Aid Scheme covers incentives listed at points (i)-(iv) of this section and the aid available in accordance with such scheme is granted to a maximum of the RON equivalent of EUR 200,000 for each beneficiary (EUR 100,000 for road transport companies) for 3 consecutive fiscal years. The *de minimis* aid as a tax exemption will be granted once per fiscal year. The estimated number of companies that may benefit from the *de minimis* aid is 450.

Any company is eligible for such aid, except for those falling within the restrictions in Article 1 of Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid, e.g.:

- (i) undertakings active in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000;
- (ii) undertakings active in the primary production of agricultural products as listed in Annex I to the TFEU;
- (iii) undertakings active in the processing and marketing of agricultural products as listed in Annex I to the TFEU, when:
  - the amount of aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned or
  - the aid is conditional on being partly or entirely passed on to primary producers.

The initial investments eligible under the Regional State Aid Scheme must cumulatively observe the following conditions:

- (i) it consists in tangible and/or intangible assets pertaining to the establishment of a new unit, the extension of an existing unit, the diversification of a unit's production through the

- delivery of new, supplementary products or to the fundamental change of the general production process of an existing unit;
- (ii) the viability of the investment project and the economic efficiency of the business may be proved based on a feasibility study or in the business plan;
  - (iii) it has been proved the investment may contribute to the regional development.

The Regional State Aid Scheme only applies to initial investments not exceeding EUR 50 million in eligible costs. The investment must be maintained for a period of at least five years (three years for SMEs) after completion.

The schemes were extended in accordance with the EU rules pertaining to the period 2014-2020.

### **3.4. Small and medium enterprises**

#### **3.4.1. Concept**

Law No. 346/2004, enacted with a view to regulate certain measures aimed at creating a favourable environment for the establishment and development of small and medium enterprises (“SME”), defines SMEs as any undertaking<sup>1</sup> which meets the following cumulative conditions:

- (i) has less than 250 employees on an annual average;
- (ii) has an annual net turnover not exceeding the RON equivalent of EUR 50 million or assets whose total value does not exceed the RON equivalent of EUR 43 million, based on the last approved financial statement.

Where at least 25% of an undertaking’s share capital or voting rights are directly or indirectly controlled, either individually or jointly, by one or several public bodies or organizations, the undertaking in question may not qualify as an SME.

#### **3.4.2. Special measures supporting SMEs**

The Government is to approve, on an annual basis, programmes encouraging and fostering the setting up and development of SMEs; including by promoting foreign investment. Such programmes are drawn up by the Ministry of Economy, Trade and Relationship with the Business Environment. This is the public authority in charge of coordinating the SMEs related public policies through its Department for SMEs, Business Environment and Tourism, upon consultation of the associations representing the SMEs’ interests.

In addition, public authorities and chambers of commerce and industry are to draw up policies and take actions pertaining to protection of SMEs in their relations with the State, especially by simplifying administrative procedures and preventing unjustified increases of costs incurred by SMEs for law compliance purposes.

Amongst other measures aimed at supporting SMEs, Law No. 346/2004 also provides the following:

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<sup>1</sup> The concept of “undertaking” is defined by Law No. 346/2004 as any form of organization of a business that is authorized as per the applicable laws to carry out production, commercial or supply of services activities with the purpose of obtaining revenues under competition conditions, namely companies, cooperative partnerships, free lancers, individual enterprises and family associations, foundation, associations, agricultural cooperatives and companies which carry out commercial activities.



- (i) subject to not distorting free competition on the market, public authorities are to take concrete measures facilitating SMEs' access to public utilities networks and services as necessary for the latter to carry out their activities;
- (ii) SMEs benefit from 50% reductions on the turnover criterion, participation bonds and good performance guarantee during public procurement procedures;
- (iii) SMEs have the following special rights in relation to available assets held by State owned companies and *regies autonomes*:
  - (a) priority access to taking such assets on lease or concession;
  - (b) the right to purchase, upon request, the available assets they had previously been taken on lease or concession, at a negotiated price set as per a valuation report drawn up by expert agreed by the parties;
  - (c) preferential rights in purchasing available assets located in the immediate vicinity of their properties;
  - (d) priority rights in purchasing available assets, which means that the relevant public auctions shall be organized, at the first stage, only for SMEs.

Available assets are defined as production units, subunits, department, accommodation areas or similar assets which meet either of the following conditions: (i) have not been used by their respective owners for a period of at least three months; (ii) have been under conservation for more than a year; (iii) have been operationally shut down. Notwithstanding, the law provides for several assets that are exempted from the application of the above mentioned rights<sup>2</sup>. State owned companies and regies autonomes are to draw up lists of available assets and update such lists on a monthly basis. As per the law, such lists are to be finally conveyed to the county chambers of commerce and industry and to the chamber of commerce and industry of the Bucharest Municipality, as well as to business owners associations and professional associations.

### 3.4.3. Micro enterprises

SMEs which (i) have up to 9 employees and (ii) an annual net turnover or assets not exceeding EUR 2 million in total qualify as micro enterprises within the meaning of Law No. 346/2004 and the enactments pertaining to the policies and measures referred to in said law, including relevant State aid schemes.

On the other hand, for taxation purposes a company shall be deemed as a microenterprise in case it cumulatively meets the following conditions set forth by the Fiscal Code:

- (i) its revenues are not generated from:
- (ii) banking activities;
- (iii) insurance, reinsurance and capital markets activities, except for legal persons acting as brokers for such areas of practice;
- (iv) activities in the gambling sector;
- (v) exploration/development/exploitation of petroleum/natural gas;
- (vi) the income derived from consulting and management services accounts for less than 20% of total income;

<sup>2</sup> Assets mentioned at item (iii) are deemed as available only for the purpose the priority rights referred to letter (d) above, whilst assets held by State education institutions and national Research & Development institutes may only be subject to the rights referred to letter (a). Assets pertaining to airports, railway stations, harbors and those held by the National Company for Motorways and National Roads may not be deemed as available.



- (vii) has generated during the previous calendar year revenues not exceeding the RON equivalent of EUR 100,000;
- (viii) its share capital is owned by persons, other than the State and local authorities;
- (ix) has not undergone dissolution followed by liquidation procedure, that has been duly registered with the trade registry or the courts.

The companies that qualify as micro enterprises, as per the Fiscal Code, are subject to a tax amounting up to 3% of the value of their incomes and depends on the number of employees as follows:

- 1% micro enterprises income tax if it has at least 2 employees;
- 2% micro enterprises income tax if it has 1 employee;
- 3% micro enterprises income tax if it has no employees.

*De minimis* schemes are available pursuant the reform of the Commission Regulation No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty Establishing the European Economic Community (now Article 107 and 108 of the TFEU) to *de minimis* aid and the enactment of Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the TFEU on *de minimis* aid.

## **4. Foreign investments**

### **4.1. General**

In line with the Romanian Constitution, GEO No. 92/1997 ensures equality of treatment between Romanian and foreign investors. This is guaranteed as regards investments made in Romania. Hence, foreign investors benefit from the same rights as Romanian nationals in respect of their investments on Romanian territory. In addition, foreign investors enjoy various specific rights, most notable of which are referred to below, as well as special taxation rules (see Chapter 6).

### **4.2. Specific currency and financial rules**

Foreign investors benefit from the currency and financial rights set forth by the Currency Regulation No. 4/2005 in respect of non-residents<sup>3</sup>, as follows:

- (i) the right to acquire, hold and use financial assets expressed in foreign currency and national currency (RON);
- (ii) the right to convert on the foreign exchange markets the amounts held in national currency and foreign quoted currency;
- (iii) the right to open and maintain with credit institutions foreign currency accounts and national currency accounts;
- (iv) the right to repatriate and transfer their financial assets.

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<sup>3</sup> According to Currency Regulation No. 4/2005, the following are deemed as non-residents: (a) natural persons – Romanian citizens, foreign and stateless persons, residing abroad; (b) legal persons and any other entities, with their head office abroad, as well as natural persons, Romanian citizens, foreign and stateless persons domiciled abroad, authorized and/or registered to perform economic activities abroad, independently, under the conditions of the legal provisions in force; (c) subsidiaries, agencies, agents, offices of Romanian legal persons, as well as of other Romanian entities, registered and/or authorized to operate abroad; and (d) embassies, consulates and other permanent representatives and missions of other states in Romania, as well as international organizations and representatives of such organizations operating in Romania.

According to GEO No. 92/1997, repatriation may take place without any restrictions subject to payment of relevant taxes and settlement of other obligations provided by Romanian law and may concern amongst others: dividends, profit generated by companies, revenues obtained as a result of an unincorporated joint-venture, capital gains, proceeds from voluntary liquidation or bankruptcy procedures as well as amounts obtained as compensation for expropriation or other measures with equivalent effect. All such transfers may be made in any convertible foreign exchange currency.

The National Bank of Romania, under certain extreme circumstances, may take temporary safeguard measures with respect to capital currency operations, such as:

- (i) the obligation to notify the National Bank of Romania 10 days in advance of the intention to carry out short-time capital currency operations;
- (ii) setting ceilings and other limits for short-time capital currency operations which generate residents and non-residents capital entries/exits;
- (iii) retaining for a determined period of time part of the amounts in foreign/national currencies which result from short-term capital currency operations and generate residents and non-residents capital entries/exits;
- (iv) setting maturity date restrictions with respect to certain short-time currency capital operations;
- (v) setting restrictions on the commencement of new short-time capital currency operations.

Such measures should, as a matter of principle, not exceed a six-month period. Upon specific request of the European Commission, the National Bank of Romania is to modify, replace or repeal the relevant safeguard measures.

### **4.3. Foreign investments litigations**

#### **4.3.1. Bilateral investment treaties**

To date, Romania has concluded over 80 bilateral investment treaties (“BITs”) with states such as the U.S.A, Canada, Australia, Israel, European Union member states, neighboring countries, some of the states of the former Soviet Union and other former socialist countries, as well as certain Asian and African countries.

Pursuant to the BITs, Romania has undertaken various obligations such as:

- (i) to promote in its territory investments made by natural or legal persons which are nationals of the counterparty State or are controlled thereby, and admit such investments in accordance with Romanian legislation;
- (ii) to ensure fair and equitable treatment as concerns such investments and not to impair them through unreasonable or discriminatory measures;
- (iii) to award such investments no less favourable treatment than required by international law;
- (iv) to award such investments treatment that is no less favourable than that accorded to investments made by its own investors or by investors of third States, whichever is more favourable to the investor;
- (v) not to expropriate such investments unless in public interest, on a non-discriminatory basis and with prompt, adequate and effective compensation.

Should BITs include provisions more favorable to investors, such provisions will, as a rule, override Romanian legislation.

Where the State does not meet its obligations under the relevant BIT, investors have direct resort to arbitration against the State in order to recover damages incurred as a result of the State's misconduct.

Such arbitrations may be held either under the jurisdiction of the International Centre for the Settlement of Investment Disputes based in Washington (ICSID)<sup>4</sup>, or by ad-hoc arbitral tribunals constituted in accordance with UNCITRAL<sup>5</sup> Rules of Arbitration, at the concerned investor's choice.

As a matter of principle, BITs do not preclude investors from referring their investment related claims against the State and bodies thereof to the customary courts of law, based on infringements to Romanian enactments or, as the case may be, to contractual obligations undertaken by the State.

#### **4.3.2. Infringement of investment principles regulated under Romanian law**

Pursuant to GEO No. 92/1997, the ligations between foreign investors and the Romanian State, relative to rights and obligations set forth by said enactment, may be addressed, at the investor's choice, to any of the following: (i) Romanian courts of law, based on Law No. 554/2004 on administrative disputes, (ii) ICSID, or (iii) ad-hoc arbitral tribunals constituted in accordance with UNCITRAL Rules of Arbitration.

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<sup>4</sup> ICSID has been established by the Washington Treaty on the Settlement of Investment Disputes between States and Nationals of Other States, of 18 March 1965, ratified by Romania through Decree No. 62/1975.

<sup>5</sup> United Nations Commission on International Trade Law.