



## Foreign Direct Investments in Romania, by Georgiana Badescu. Article published in Bucharest Lawyer, January 2007

The globalization and the continuous search for new markets with large consume potential, as well as the relocation of the manufacturing capacities towards other destinations in order to have costs significantly decreased, have determined a tough competition amongst Eastern and Central European countries as concerns the pooling of foreign investments. Romania is the second largest market in Eastern and Central Europe (after Poland) and enjoys a high level of qualification among the employees, and not too high manufacture costs, therefore has been a quite attractive market for foreign investors after the 1990s.

### Legal Regime of Foreign Investments in Romania

The legal regime of foreign investments in Romania undertook a series of changes as the time went by, nonetheless it has remained unrestricted, setting forth commonly recognized principles such as: free access to the market and to all fields of business; equal treatment of foreign and domestic investors, residents and non-residents; the right of the foreign investors to repatriate the income earned in Romania, net of all taxes and levies; protection of investments by specific warranties against nationalization, expropriation and other equivalent measures etc.. The legal regime of direct investments is regulated by the provisions of Government Emergency Ordinance no. 92/1997 regarding the incentive of direct investments, as approved by Law no. 241/1998, with further amendments. The facilities provided for by this normative act were however suspended in 2000.

Several enactments, most of them abrogated, were providing for facilities granted to investors in certain fields upon the fulfillment of specific conditions. Government Emergency Ordinance no. 24/1998 regarding the regime of disfavored areas, republished, as subsequently amended, created the legal background as to allow certain geographical areas to be deemed as disfavored areas. Investments made into these designated disfavored areas might benefit, under this normative act, from a number of facilities, provided that they met certain specific conditions.

In June 2001 the Romanian Parliament adopted Law no. 332/2001 regarding the support of direct investments that have a significant impact on the economy (“**Law no. 332/2001**”), the purpose of which is to set forth incentives for investments made with liquid capital or exchangeable hard currency, which was further subject to several amendments. Pursuant to this abovementioned Law, foreign investors may benefit from a series of facilities granted under the coordination of the Romanian Agency for Foreign Investments (in Romanian “**ARIS**”).

### Which Investments represent Direct Investments under Romanian Law?

We should begin by saying that there are a series of principles and warranties governing the general background for direct investments, as herein below listed:

- (i) The possibility to perform investments in any field and under any of the forms prescribed by the law;
- (ii) Equal, just, equitable, unbiased treatment for Romanian or foreign investors;

- (iii) Guarantees against nationalization, expropriation or other measures with an equivalent effect, except when such measure is imposed by public interest, when the expropriation is carried out under the conditions set forth under the law with the payment of prior, proper and effective compensation;
- (iv) The possibility for non-resident investors to set up commercial companies over the Romanian territory and to fully subscribe the share capital of the same; and
- (v) The companies that are resident or non-resident legal entities may acquire any real rights over real estates, to the extent necessary for the performance of the activities, according to their purpose, subject to the legal provisions regarding the acquisition of the right of private ownership over lands by foreign citizens and stateless persons, and by foreign legal entities.

Moreover, non-resident investors are entitled to transfer the following categories of revenues abroad, with no restrictions whatsoever, after the payment of the legal taxes and fees, in exchangeable currency:

- (i) The dividend or the benefit obtained by a Romanian legal entity, in the event that they are shareholders or associates;
- (ii) The revenue obtained in the case of a partnership, as well as the revenues obtained from the sale of the shares or the social parts;
- (iii) The amounts obtained pursuant to the liquidation of a company, under the law;
- (iv) The amounts obtained as compensation, pursuant to an expropriation or to the implementing of another measure with an equivalent effect;
- (v) Other revenues according to the form of the investment.

But what investments may be classified as foreign “direct” investments? Direct investments are those materialized either in the incorporation or extension of a company, in any of the legal forms prescribed under the law, or in the acquisition of a company’s shares, including the setting-up or extension of a branch in Romania, except for those investments made in securities on regulated or organized capital markets (which represent “portfolio investments”). A special regime of the “foreign investments” has been contemplated by the national law-makers almost ten years ago, but mainly providing national treatment to foreign investors who could benefit from special privileges under special conditions.

However, the core elements of foreign direct investments having a significant impact on the economy have been set forth by Law no. 332/2001. Direct investments with a significant impact on the economy are defined by the law as being such investments the value of which exceeds the equivalent of USD 1 million and which contribute to the development and modernizing of Romania’s economic infrastructure, thus resulting in a positive effect on the economy and the creation of new workplaces. Only direct, new investments made by liquid capital in Romanian currency or exchangeable currency, performed within a maximum of 30 months following the date of statistical registration with the Ministry of Development and Prognosis (today the Ministry of Economy and Commerce) may benefit from the provisions of Law 332/2001. Such investments may be made in any field of activity, except for the financial, banking, insurance-reinsurance fields, as well as the fields regulated under special laws. A series of fiscal facilities might be granted to this kind of investments, under the applicable provisions of the Romanian Fiscal Code (most of them applicable until the long stop date of 30 December 2006).

### Prospective Developments after the Accession to the EU

In the nowadays European context, Greenfield and Brownfield investments are most feasible to be performed in Romania and cross-border and/ or international mergers & acquisitions are predicted to emerge in the nearest future.

Having in view the above, in order to acclimatize to the new requirements, the Romanian Government has initiated a draft-law on investments (“**Draft-law**”), not yet endorsed by the competent authorities, but made available for public debates, which is meant to clarify, amongst others, the type of facilities to be granted to investors and the mechanism for proper monitoring and implementation of the investment project as well as to set forth a distinction between the types of incentives, depending upon the regional development, stimulation of new jobs creation, research-innovation and environment activities.

The great merit of this Draft-law is that it provides for a general framework of facilities to be granted to investors, benefiting from a non-discriminatory treatment so that any investor will have the chance to enjoy the facilities provided under this Draft-law, subject to a sum of principles, such as: free access, mutual acknowledgment, transparency and monitoring, equal treatment, efficiency in using funds, confidentiality.

For the enforcement of the Draft-law, government decisions (“**GD**”) shall be most probably issued in order to regulate state aid schemes for each and every objective provided thereunder. These GD shall have to enact the purpose, objective, duration, budget, beneficiaries, state aid forms, the eligibility criteria specific for the objective for which the state aid shall be granted, the beneficiaries selection criteria, the competent authorities for granting such state aid, and also the responsible authority responsible for the implementation and the application of the state aid scheme. The GD shall have to be issued following the Competition Council’s approval or the European Commission authorization, where applicable.

The Draft-law sets up a new definition of investments, and abolishes all distinctions between “direct” or “portfolio” investments, “foreign” or “domestic” ones: thus, investment shall be the capital used for acquisition of tangible and intangible assets, with regard to setting up a new unit, expanding an existent unit, inception or development of an activity implying a change in the product or the manufacturing process of an existent unit, thus aiming to reach diversity, modernization and increase the economic efficiency; and the investor shall be any economic operator making investments according to the provisions therein. The investments are classified in three valorem categories:

- (i) 1<sup>st</sup> category investments (whose value exceeds the equivalent in RON of EUR 75 million);
- (ii) 2<sup>nd</sup> category investments (whose amount is the equivalent value in RON of EUR 25 million up to the equivalent value in RON of EUR 75 million); and
- (iii) 3<sup>rd</sup> category investments (whose amount is the equivalent value in RON of EUR 1 million up to the equivalent value in RON of EUR 25 million).

In order to benefit from the facilities provided under the Draft-law, potential investors have to submit applications with the responsible authorities, if fulfilling specific conditions, and the investments shall have to be maintained for variable periods of time ranging between 5 to 15 years from the completion of the investment, depending upon the category investments.

For enumerative purposes, the following facilities may be granted to investors:

- (i) Grant of loans with preferential interest;
- (ii) Security covering not more than 80% of medium-term or long-term loans;
- (iii) Free connection to utilities networks;
- (iv) Right of use over immovable assets belonging to the private domain of the state or local authorities;
- (v) Grant of subsidies for the acquisition of tangible and intangible assets;
- (vi) Other tax facilities regulated by the fiscal legislation.

The Draft-law may indisputably be subject to some changes prior to its enforcement, but its adoption seems vital in nowadays context, when most of the facilities granted under Law no. 332/2001 and the Fiscal Code have ceased or will soon cease to be of effect.