M&A in Romania

A structured guide to merger and acquisition law and practice in Romania

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1. Trends and climate

What is the current state of the M&A market in your jurisdiction?

The Romanian M&A market is dominated by private deals, significantly outnumbering transactions involving listed companies. In terms of size, the small and medium-sized enterprises market segment accounts for most deals. In recent years, following the financial crisis, the value of transactions has shrunk: so-called ‘mega transactions’ on the Romanian market now have a value of between €500 million and €1 billion, compared to the period from 2000 to 2008 when larger deals exceeded €1 billion (the total value reached €7 billion in 2008). Inbound transactions account for approximately 60% of the M&A market, with financial investors representing just over one quarter of the market.

Despite a slow start in the first six months, 2016 proved to be successful for M&A deals, with a total estimated transaction volume of between €3.4 billion to €4 billion (according to a Deloitte study). Some of the reference transactions were:

- the acquisition of beer factory Ursus by Japanese group Asahi for an estimated €856 million;
- the acquisition of the majority package of KMG International by CEFC China for an estimated €595 million;
- the acquisition by Mid Europa Partners of Profi, one of Romania’s largest retail networks, for €533 million;
- the acquisition by Allianz SE of a 30% stake in E.ON Distributie Romania for an estimated €217.5 million; and
- the initial public offering (IPO) of MedLife SA, one of the largest private healthcare national networks, at an estimated value of €51 million.

Although the pace of economic growth is expected to slow down during 2017, the view of the Romanian M&A market remains optimistic for several reasons:

- The financials of many Romanian potential targets from various sectors are improving;
- Many sectors are still quite fragmented, offering opportunities for growth and consolidation and attracting interest from both strategic and financial investors; and
- The cost of financing remains relatively low around the world.

In addition to the more mature economic sectors, in which most M&A transactions have taken place, new sectors with the potential to generate M&A growth are emerging. One of the fastest-growing sectors is technology, with Romania quickly becoming one of the most attractive destinations for IT and business process outsourcing. Agriculture is another sector targeted by investors due to low costs, large areas and high-quality agricultural land. Privatisations are not expected to contribute substantially to M&A activity in Romania in the next year.

A large transaction in the real estate sector has already been announced – AEW Europe (owned by Natixis and La Banque Postale) intends to sell America House (a landmark office building located in Victoria Square, in the centre of Bucharest) for just under €100 million. Other deals are expected in the energy sector (the Hidroelectrica IPO) and the financial services sector (the sale of Banca Romaneasca, a member of the National Bank of Greece Group, and the sale of Veneto Bank).

Have any significant economic or political developments affected the M&A market in your jurisdiction over the past 12 months?

During 2016 the Romanian government was led by technocrat Dacian Ciolos (the former EU commissioner for agriculture), who had a fixed one-year term and a declared focus on the diligent spending of public funds, limiting the access of politicians to public resources and the depoliticisation of state-owned companies.
In December 2016 Romania held parliamentary elections, in which the Social Democrat Party obtained over 45% of the seats in the Chamber of Deputies and the Senate and secured a majority of votes in Parliament together with the Alliance of the Liberals and Democrats for Europe. Since January 4 2017 Romania has had a new government led by Social Democrat Prime Minister Sorin Grindeanu.

Despite being an election year, 2016 brought economic growth above expectations with a gross domestic product (GDP) growth of 4.8%, propelled by strong domestic demand and a rebound in investment. While the World Bank estimates that the growth of the Romanian economy will slow down to 3.7% in 2017 and 3.4% in 2018, the new government has designed the 2017 budget envisaging a 5.2% GDP growth, a (Maastricht) budget deficit of 2.99% and an inflation rate of 1.4%.

The new Fiscal Code entered into force on January 1 2016, making the following changes:

- Value added tax (VAT) was reduced from 24% in 2015 to 20% in 2016 and 19% in 2017.
- Foreign companies with actual management in Romania are now considered to be Romanian contributors.
- The scope of deductible expenses was broadened.
- As of January 1 2017, the tax on dividends was reduced from 16% to 5% for dividends distributed between Romanian companies.

Are any sectors experiencing significant M&A activity?

Of the estimated 136 M&A deals closed in 2016 (according to market report data), the sectors experiencing the highest number of deals were manufacturing, real estate and construction, telecoms and IT, and financial services. The transactions with the highest acquisition values were recorded in fast-moving consumer goods, oil and gas, and retail.

In 2017 the retail, healthcare, technology, real estate, energy and financial services sectors are expected to drive M&A deals, albeit of lower value than in previous years.

Are there any proposals for legal reform in your jurisdiction?

The Social Democrat Party announced in its government strategy the intention to develop the Economic Code, which is a unitary legal package including all economic laws (eg, the Fiscal Code, the Fiscal Procedure Code, the Company Law (31/1900) and the Law on Tax Evasion), intended to provide a coherent legislative regime and eliminate all existing contrary provisions and overlapping legislation. So far, no steps towards compiling the Economic Code have been taken.

2. Legal framework

2.1 Legislation

What legislation governs M&A in your jurisdiction?

M&A is mainly governed by the Civil Code, the Company Law (31/1990), the Capital Market Law (297/2004) and Regulation 1/2006 on Issuers and Securities Operations. Other legal provisions relevant for M&A transactions are included in the Fiscal Code (on taxation in relation to M&A transactions), the Competition Law (21/1996) (eg, conditions for merger control clearance) and the Labour Code (eg, the protection of employees in case of a transfer of enterprise or business).
2.2 Regulation

How is the M&A market regulated?

The M&A market is primarily regulated and supervised by the Competition Council, which protects, maintains and stimulates a sound competitive environment. The council grants competition clearances for M&A transactions.

Depending on the type of companies and industries involved in an M&A transaction, the following authorities also have regulatory and supervision competences (eg, prior approval for the M&A transaction and specific authorisations):

- the Financial Supervisory Authority (FSA) for public companies and companies operating in insurance or private pensions sectors;
- the National Bank of Romania for banks and financial institutions;
- the National Authority for Administration and Regulation in Communications for telecoms companies; and
- the National Agency for Mineral Resources and National Energy Regulatory Authority for companies operating in the oil, gas or electricity sectors.

Are there specific rules for particular sectors?

Yes – for example, the acquisition of stakes exceeding certain thresholds requires prior approval from the industry-specific regulatory authorities – the National Bank of Romania when the target is a financial institution and the FSA when the target is an insurance company.

Specific to the Romanian M&A market, the Supreme Council of National Defence analyses takeovers of companies and assets, as well as economic concentrations which may affect national safety, in fields such as the security of critical infrastructure, financial, fiscal, banking and insurance activities, and transport.

2.3 Types of acquisition

What are the different ways to acquire a company in your jurisdiction?

Public M&A transactions can be carried out in different ways:

- the acquisition of a controlling interest followed by a mandatory takeover bid;
- a voluntary takeover bid; or
- a merger.

Most private transactions are implemented through share deals, but asset deals in the form of transfer of a business as a going concern are also quite common. Mergers as a means of acquiring a company are rare. Structuring M&A deals through a capital increase in the target company (by itself or in combination with the acquisition of a shares package from existing shareholders) is also fairly common, in particular when the target requires capitalisation.
3. **Preparation**

3.1 **Due diligence requirements**

*What due diligence is necessary for buyers?*

Due diligence exercises are a critical part of most corporate transactions. Usually, the most important objectives of the buyer when conducting a due diligence are to:

- gain a deeper understanding about the target;
- value the target;
- determine whether the seller has good title to the shares in the target or to the assets being sold;
- uncover potential liabilities or areas of the business which are insufficiently protected;
- negotiate price and other terms with the seller;
- determine any consents that may be required for the transaction; and
- plan post-closing integration.

Legal, tax and financial due diligence is standard for any acquisition, but the scope may vary enormously taking into account various factors, including:

- deal complexity and size;
- the industry and market where the target operates;
- the buyer’s knowledge and plans for the business;
- the structure of the sale process; and
- the timetable.

Depending on the particularities of the target and its business, technical, commercial or environmental due diligence may also be carried out.

Legal due diligence will cover aspects such as corporate matters, financings, real estate, regulatory, environment, contractual relations, litigation, employment, intellectual property, competition, data protection and insurance.

3.2 **Information**

*What information is available to buyers?*

Buyers may have access to information regarding the target from either publicly available sources or documents made available by the seller or the target. Usually a first source of information is the teaser and information memorandum prepared by the seller and its advisers, outlining the key features of the target and its business.

A virtual data room is set up in most cases, containing various documents and information concerning the target, such as:

- corporate records (eg, statutory documents, shareholder decisions, shareholders’ agreements and a group chart);
- property titles (eg, ownership, use rights, superficies rights over assets or shares);
- financing agreements;
- business-related agreements;
- information on clients and suppliers;
- court files;
- authorisations and associated terms and conditions;
- past studies, appraisals or audits in connection with the target or the target’s assets;
- past due diligence reports;
- disclosure of third-party interests;
- disclosure of breaches or investigations; and
- known liabilities.

The data room is organised according to a structure determined by the seller (as is usually the case in auction sales) or based on a due diligence request list sent by the buyer. The buyer may make enquiries on the documents reviewed and request copies of further relevant documents.

In Romania, buyers can obtain publicly available information on companies from various sources:

- corporate information from the Trade Registry;
- information on bankruptcy status from the Insolvency Bulletin;
- shareholders’ resolutions published in the Official Gazette;
- reports submitted to the stock exchange and the Financial Supervisory Authority;
- financial and corporate information from the Ministry of Finance website;
- information on mortgages from the Electronic Archive for Movable Securities and the Land Book Register; and
- brief information on litigation from the portal of the Romanian court files.

What information can and cannot be disclosed when dealing with a public company?

Information regarding public companies can be disclosed to bidders, subject to the rules preventing insider dealing. Disclosure of information is also governed by the principle of equal treatment of shareholders and equal treatment of investors – meaning that the same information should be made available to all shareholders and investors.

In case of a pre-bid due diligence, the target may include in the data room only information which has already been disclosed on the market or is already available to the public. In fact, according to Romanian case law, a public company data room should be "merely a place where the public information is put together in a structured way".

No inside information can be made available to potential investors or buyers, and trading based on inside information is a criminal offence. If non-public information concerning the target is intended to be disclosed, the target should first disclose it to the entire market.

3.3 Stakebuilding

How is stakebuilding regulated?

Stakebuilding is not prohibited by Romanian capital markets regulations, but it should be carried out subject to the regulations on insider trading and market abuse, disclosure obligations and, in case of certain regulated activities such as banking and insurance, notification and approval requirements.

In practice, the effectiveness of a stakebuilding strategy is significantly limited by several factors, such as:
the mandatory shareholding disclosure requirements, which would make the market aware of any attempt of stakebuilding and may lead to a price increase;

- if certain shareholding quotas are achieved, the obligation to launch a mandatory takeover bid where the price cannot be lower than the highest price paid by the bidder within the last 12 months; and

- low market liquidity.

It is common for a bidder to buy the shares of a majority shareholder and then launch the mandatory takeover bid. hat due diligence is necessary for buyers?

4. Documentation

4.1 Preliminary agreements

What preliminary agreements are commonly drafted?

Confidentiality agreement

Confidentiality agreements are standard and form part of most negotiated deals. They are entered into before any exchange of sensitive information and cover not only the deal itself and the terms of the envisaged transaction, but also information made available in the data room, information memorandum, teaser, management presentations and other non-public information related to the parties and their business. Breach of confidentiality has rarely been enforced in Romania since it may be difficult to prove – the burden of proof lies with the party claiming damages for the breach of confidentiality.

Exclusivity agreement

Exclusivity is requested by the interested buyer in order to bind the seller to deal exclusively with the buyer for a certain period of time. Exclusivity diminishes the seller’s leverage in negotiation and a seller will always seek only short exclusivity periods. Such provisions are included in either a letter of intent or a confidentiality agreement, or a separate exclusivity agreement. A breach of the exclusivity agreement does not invalidate the transaction concluded with the third party, but rather entitles the damaged party to obtain compensation.

Letter of intent, memorandum of understanding and heads of terms

Letters of intent are also quite common in most M&A transactions, typically covering the main terms of the transaction and outlining the envisaged process and timeline. Most provisions are usually non-binding; only exclusivity, confidentiality, non-solicitation, governing law and dispute resolution are of binding nature.

4.2 Principal documentation

What documents are required?

Documentation differs depending on the structure of the transaction.

In a share deal, the main document is the share purchase agreement, tailored to the specifics of the transaction and taking into account the outcome of the due diligence. If less than 100% of the shares are purchased, a shareholder agreement may also have to be put in place. In an asset deal, parties enter into an asset purchase agreement. Transitional services agreements may be necessary if the seller or the seller’s group continues to provide certain services to the target for a limited period of time after closing (eg, payroll or IT-related services). Parties may also conclude an escrow agreement if part of the purchase price is held back in an escrow account.

In case of mergers or demergers, the main transaction document is the merger or demerger project.

Corporate approvals, disclosure letters or other ancillary documentation may be required, depending on the particularities of the deal.
Which side normally prepares the first drafts?

Market practice is that buyers prepare the first drafts for the acquisition agreement. In case of sales organised as informal auctions, the first drafts are prepared by the sellers and interested bidders are invited to submit mark-ups together with their financial offers.

What are the substantive clauses that comprise an acquisition agreement?

The acquisition agreement typically comprises the following substantive clauses:

- the object of the transaction (shares or assets);
- the purchase price, adjustment mechanism and payment terms (including deferred payment, instalments, earn-outs and escrow provisions);
- the transaction mechanism;
- signing and closing;
- conditions precedent;
- the conduct of business between signing and closing;
- warranties and indemnities;
- legal remedies and limitation of liability;
- non-compete and non-solicitation clauses;
- other covenants of the parties;
- the governing law and jurisdiction; and
- boilerplate clauses (e.g., notices, confidentiality, severability, assignment, taxes and costs, and the entire agreement).

What provisions are made for deal protection?

Deal protection provisions include exclusivity and confidentiality, break fees and non-solicitation. The Civil Code also requires negotiation in good faith. Break fees usually cover the costs incurred by the party through using consultants and actions undertaken in view of preparing the transaction. In practice, the extent of damages and the fault of the party ceasing the negotiation may be quite difficult to prove.

4.3 Closing documentation

What documents are normally executed at signing and closing?

At signing, the parties execute the share or asset purchase agreement and the escrow agreement (if applicable).

Between signing and closing, any documents related to the fulfilment of conditions precedent (e.g., the termination of related party transactions, directors’ resignation letters and approvals from third parties) must be executed or procured and delivered either before or at closing.

At closing, the parties typically:

- record the transfer of ownership in the shareholder registry;
- execute the shareholder agreement (if not already signed) and the transitional services agreement (if applicable);
- hold a shareholder meeting for the target to approve the transaction, the change of directors, amendment of the articles of association and other corporate aspects of interest to the buyer; and
execute closing minutes confirming that all conditions precedent have been fulfilled or waived by the parties entitled to benefit from them, and confirming that all actions for closing have taken place.

Are there formalities for the execution of documents by foreign companies?

Romanian law does not require specific formalities for the execution of documents by foreign companies – rather, they benefit from equal treatment with domestic companies.

If a transaction document must be executed in notarised form, the special power of attorney issued by a foreign company would also have to be notarised and, as the case may be, legalised or apostilled pursuant to the Hague Convention 1961.

Are digital signatures binding and enforceable?

Digital signatures are binding and enforceable subject to the conditions of Law 455/2001 on Digital Signatures.

5. Foreign law and ownership

5.1 Foreign law

Can agreements provide for a foreign governing law?

In principle, the parties may freely choose a foreign law to govern cross-border transactions. However, the Romanian mandatory legal provisions governing the transfer of title to the shares in a Romanian target would still apply.

5.2 Foreign ownership

What provisions and/or restrictions are there for foreign ownership?

There are no restrictions on the foreign ownership of shares in a Romanian company. In fact, the foreign investment legal regime is based on a set of principles, including:

- foreign investment allowed in all sectors of economy;
- equal treatment for foreign investors, residents and non-residents;
- full repatriation of capital and profits;
- protection of investments by specific warranties against nationalisation;
- expropriation; and
- other equivalent measures.

Some restrictions are provided by Law 312/2005 on Ownership of Land – citizens and companies from non-EU member states can directly acquire and have ownership rights over land plots only in accordance with international treaties, based on reciprocity. Indirect ownership (through a Romanian special purpose vehicle held by the foreign investor) is permitted.

Shares or other assets may be owned by foreign investors with no limitations and benefit from the same protection and treatment as domestic investors.
6. Valuation and consideration

6.1 Valuation

*How are companies valued?*

The following valuation methods are commonly used in acquisitions in Romania:

- the net assets (or asset-based) method, under which the value of the target is determined by deducting the market value of its liabilities from the market value of its assets, and which is applied whenever the buyer is interested in the target for its assets rather than the business itself;

- a comparison or multiples analysis, under which value is determined by multiplying the target’s earnings before interest, tax, depreciation and amortisation by a multiple which varies depending on the target’s industry; and

- the discounted cash-flow method, under which the net present value of future income is calculated and which reduces the risk of manipulation of the profit by the seller or the target to obtain a higher valuation.

While issues such as synergy opportunities, growth potential, dormant assets and resources are taken into account by a buyer in its decision to purchase the company, these are not included in the valuation of the target and rarely lead to an increase in the purchase price offered.

6.2 Consideration

*What types of consideration can be offered?*

Cash is the most common type of consideration offered, but consideration may also consist of shares or a combination of cash and shares.

7. Strategy

7.1 General tips

*What issues must be considered when preparing a company for sale?*

The real motivation for selling should be identified. Sometimes, business owners do not want to sell, but they consider selling for various reasons, such as a lack of funds, the need to expand business, difficulty in seeing growth potential or the need for partnership. A better alternative to sale (eg, bank loans, mezzanine finance or restructuring the business) might nevertheless be available and professional advisers should present these options early on.

When selling a businesses, the seller’s goal is often to capture the highest value possible. Advance preparation is key to the successful sale of a company.

A first step – and key consideration – for the success of a sale is a realistic valuation of the target by the seller and its advisers. Often a distorted view of the seller with respect to the actual value of its business is cause for failure.

Apart from valuation, a complete self-review is essential in order to have a clear picture of the company’s status and business to address potential issues (eg, financial, legal, contractual, regulatory, technical, operational, employees and litigation) in a future sale by eliminating or minimising their impact and identifying what can be improved to make the target as attractive as possible for potential buyers and maximise the selling price – for example:

- cleaning up the target’s financials;
- obtaining better terms or longer durations for key business contracts;
applying for new licences or extending expiring ones;
settling litigation;
identifying key contracts with change-of-control clauses and obtaining approvals;
reviewing all shareholder agreements; and
being aware of third-party rights and identifying all related party transactions.

A vendor due diligence places the seller in a better position to anticipate potential disruptions to the sale process and questions from the buyer, and to prepare appropriate responses and courses of action.

The self-review can also enable the seller to:

- understand which buyers might be interested;
- tailor the sale story to the buyer’s profile; and
- decide on the best sale strategy and structure to obtain as much negotiation leverage as possible.

The seller and its advisers should identify the window of opportunity in which to sell the business at the desired price, depending on the circumstances of the company and the business, market conditions and possible synergies with potential buyers.

A buyer conducts a due diligence investigation with respect to the target and its business, and preparing the data room may be a time-consuming and complex process, so should be commenced as early as possible.

A sale process may be overwhelming, in particular for business owners going through it for the first time, but it is vital not to neglect day-to-day business operations and to continue running it successfully, retain clients, suppliers and employees.

Assembling the right team – both internally and by hiring professional advisers – can help to make the process smoother and more successful.

**What tips would you give when negotiating a deal?**

Professional advice should be sought in the early stages of preparing and negotiating a transaction – experienced consultants can spot potential hurdles and help to structure the transaction.

Understanding the motivation of the other party, its business and culture is also key – why is the other party interested in the transaction, what is it hoping to achieve and what are its concerns, envisaged timeframe and negotiation style? Answering these questions will offer valuable insight and advantages during the negotiation process.

The following are key for a successful negotiation and to avoid delay:

- set up a clear sale process and a realistic timeline;
- enlist the most appropriate team and assign their responsibilities;
- organise the communication streams from the beginning; and
- prepare checklists of what must be done in order to close a transaction, including the responsible party and deadlines.

A party should not commence negotiations from the position that it wants to achieve, but it should be prepared to make some compromises. To that end, limits to the negotiations should be clearly established with the negotiation team – each member should understand the deal breakers, the acceptable fall-back position, available alternatives and the decision factor for each party.
An honest exchange of information between the parties builds trust and facilitates the process. Each party should be prepared to be innovative and come up with solutions and alternatives, but also be prepared for a possible failure of the negotiation process.

8. **Hostile takeovers**

*Are hostile takeovers permitted and what are the possible strategies for the target?*

Hostile takeovers are permitted in Romania, although they are rare in practice. Few unsolicited attempts to take over public companies have taken place and, to our knowledge, none have been successful. Ownership in Romanian public companies is usually concentrated in the hands of a majority shareholder or a few larger shareholders, which makes a hostile takeover difficult to implement.

A small number of defensive measures against hostile unsolicited takeover offers are available to public companies in Romania, which can be taken before or after a bid is launched. A few examples of poison pills are:

- establishing higher decision-making thresholds in the company’s articles of association;
- granting certain benefits to the company’s management, including so-called ‘golden parachutes’ in their management contracts; and
- using authorised capital to carry out a share capital increase or share buy-back programmes.

After the launch of the takeover offer, the management could seek another investor to launch a competing offer (a ‘white knight’ strategy).

In any event, the management continues to be bound by its fiduciary duties, which prevents it from taking actions for the sole purpose of frustrating a possible takeover bid. All actions must be in the interest of the company, therefore methods such as the transfer of assets or restructuring the target would not be possible.

9. **Warranties and indemnities**

9.1 **Scope of warranties**

*What do warranties and indemnities typically cover and how should they be negotiated?*

In a share deal, warranties are a must, as Romanian legislation provides insufficient protection for the buyer as to the nature of the assets and liabilities in the target. Warranties will also elicit information about the target during the disclosure process. They usually address matters that are of concern for the buyer, but things such as the nature and size of the transaction, and the buyer’s knowledge of the target, the market and the industry, have a bearing on the scope and extent of the warranties given by a seller.

Warranties typically cover:

- the organisation and status of the target;
- shares (eg, title to shares, no encumbrances and interests in other companies);
- the accounting and financial situation;
- taxes;
- the title to and status of the target’s assets;
- ownership or rent of real estate;
- IP rights and data privacy;
- employment;
- licensing and other regulatory matters;
- environmental matters;
- material contracts; and
- litigation.

In addition to warranties, the buyer will try to negotiate indemnities for particular matters which have come to light during due diligence or out of the disclosure exercise, as disclosure of the matter in question will have taken it outside the scope of the warranties. This could typically be a prospective dispute with a major customer or other outstanding litigation, or perhaps potential clean-up costs in respect of a past environmental problem.

Warranties and indemnities are extensively negotiated by parties. A seller will argue that a buyer which has been given the opportunity to carry out due diligence knows all material facts about the target and needs few warranties, but the buyer may argue that a due diligence investigation does not remove the need for warranty protection, as an investigation of the target cannot hope to discover conclusively all matters of concern, especially where they may involve third parties. In practice, the level of warranty protection to be obtained and the level of access to suitable information for due diligence are both related to the relative bargaining strengths of the parties and their desire to do the deal.

9.2 Limitations and remedies

Are there limitations on warranties?

Similar to the warranties section, the seller’s liability is negotiated at length. Certain limitations are included in the warranties themselves (eg, qualifiers regarding seller’s knowledge, materiality and time), while others are included in a specific section dealing with limitation of liability. Sellers want to exclude liability for anything that has been disclosed (during the due diligence process, in the disclosure letter or in schedules containing exceptions from warranties), while buyers will at least include a restrictive definition of what is deemed disclosed. Even if the buyer tries to exclude from the definition of ‘disclosed’ certain aspects which have been brought to its knowledge by the seller during the due diligence or otherwise (eg, the buyer may try to deem disclosed only those matters reflected in a disclosure letter delivered by the seller at signing, not the documentation made available in the data room for the due diligence exercise), it is questionable whether such clause would be effective as, according to the Civil Code, information disclosed to or known by the buyer is considered generally to exonerate the seller from warranty liability.

It is also standard practice for sellers to limit their liability in relation to:

- de minimis for individual claims (ie, the purchaser cannot bring claims in respect of a breach of a particular warranty unless that claim exceeds a certain figure);
- a basket, which may be combined with a deductible (the aggregate threshold of damage to be suffered before the buyer can make any claims, with the buyer being entitled to recover either only the amount exceeding such threshold or the entire amount of the damage); and
- a maximum liability or overall cap (ie, a percentage of the total consideration received by the seller).

Other provisions limiting the seller’s liability refer to recovery from third parties, loss mitigation, tax benefits, insurance and definition of losses.

What are the remedies for a breach of warranty?

In case of a breach of warranties, the buyer seeks indemnification from the seller. Termination of the share purchase agreement may also be an option depending on the breach, but typically parties expressly exclude the right to terminate the agreement after closing for breach of warranties. Termination is available only between signing and closing, but even in such case the seller usually resists a termination for breach of warranty, agreeing
only to termination in case of material adverse change (in the form of a condition precedent which may be waived by the buyer).

Depending on the creditworthiness of the seller, the buyer may seek to retain a percentage of the purchase price in escrow for a period equal to the validity of the warranties (or, in case of a warranty claim, until settlement of the claim). The amount of the retention invariably gives rise to conflicting views, as the seller is aiming to minimise this amount so that it does not go beyond its purpose of providing the buyer with reasonable security against specific liabilities ascertained during the due diligence exercise.

Warranty insurance is not yet available on the Romanian market.

*Are there time limits or restrictions for bringing claims under warranties?*

The standard position for ordinary warranty claims in share purchase agreements is that they expire a short period after two full audits of the target following closing. The buyer often seeks three audits, but will usually compromise at two unless there are exceptional circumstances. One full audit is typically the minimum that a buyer will accept, again unless there are exceptional circumstances. Longer warranty survival periods are provided for tax warranties (between five and six years, which roughly corresponds to the period for which the fiscal authorities can go back and claim unpaid tax), property and environmental warranties. No limitation is included for warranties regarding title to shares.

The general statute of limitation under Romanian law for bringing contractual claims is three years.

## 10. Tax and fees

### 10.1 Considerations and rates

*What are the tax considerations (including any applicable rates)?*

Often the choice of a transaction structure is dictated by tax considerations. Taxes and their rates payable in connection with M&A transactions may vary depending on several factors:

- the type of deal;
- whether the seller is an individual or a company;
- the domicile or headquarters of the parties; and
- the existence of double taxation treaties.

### 10.2 Share deals

No stamp duty or other transfer tax is payable on share transfers.

Capital gains earned by a Romanian resident legal entity are included in its ordinary profits and are taxed at 16%. Capital gains obtained by non-residents from the sale of shares held in a Romanian company are also taxable in Romania. However, more favourable tax treatment may apply to non-residents if a double tax treaty has been concluded between Romania and the country of residence of the non-resident seller. Capital gains derived by a Romanian legal entity of at least 10% participation for a minimum period of one year in a company established in Romania or in a state with which Romania has a double tax treaty may qualify as non-taxable revenues.

Capital gains earned by a Romanian individual from the transfer of shares are taxed at 16% and must be declared and payed to the tax authority by the seller.
10.3 Asset deals
The sale of assets by a company is subject to 16% corporate income tax and 19% value added tax (VAT) (unless certain exemptions apply). If the asset deal qualifies as a good-faith transfer of business as a going concern, VAT does not apply.

10.4 Exemptions and mitigation
Are any tax exemptions or reliefs available?
Please see the answer above.
What are the common methods used to mitigate tax liability?
Methods for mitigation of tax liability depend on the particular circumstances of each transaction. Representations and warranties regarding tax matters are generally included in the transaction documents. In addition, tax due diligence on the target is commonly carried out by the buyer and its tax advisers.

10.5 Fees
What fees are likely to be involved?
Fees relate to investment banker services, legal, tax, financial and other advisers, notary charges (in case of transfer of real estate), trade registry costs, costs with filings and approvals from relevant authorities. In case of public transactions, there are also fees for the agent (authorised by the Financial Services Authority) who facilitates the preparation and implementation of the transaction.

11. Management and directors
11.1 Management buy-outs
What are the rules on management buy-outs?
There are no specific rules on management buy-outs under Romanian legislation, but directors must comply with their duties to:
- act in the best interest of the company;
- abstain from decision making in case of conflict of interest; and
- observe the principle of equal treatment of shareholders.
Relevant approvals from the shareholders should be obtained before preparing a management buy-out transaction.
In the case of public companies, the management must observe the rules on inside information.

11.2 Directors’ duties
What duties do directors have in relation to M&A?
The duties of directors of the target in relation to M&A vary based on the type and circumstances of the transaction, as well as on whether the target is a private or a public company. As a general principle, directors:
- owe a duty of care;
- owe a duty of loyalty towards the company;
- have confidentiality obligations; and
- must act in the best interest of the company.
In case of mergers or demergers, the directors of the companies involved in the transaction must prepare a merger or demerger plan and a special report covering the major steps of the process. These documents are made available to the shareholders, who decide whether to approve the transaction.

In case of share deals, the target’s shareholders will generally negotiate the sale of their shares directly with the prospective buyers. The directors’ involvement is typically limited to setting up the data room for the due diligence exercise, and to decide on what information should be disclosed.

In case of asset deals, the directors decide on the sale of assets by the company (usually with the consent of the shareholders, especially if major assets are affected) and may be involved in identifying prospective buyers and negotiating the transaction documents on behalf of the seller.

In case of public takeovers, the board of the target must issue an opinion on the takeover, for the use of the Financial Services Authority, the bidder and the stock exchange where the shares of the target are listed. The board may also convene the shareholder meeting to present to the shareholders its opinion on the takeover.

12. Employees

12.1 Consultation and transfer

How are employees involved in the process?

Romanian legislation sets out certain employee-related information and consultation requirements in the context of M&A transactions, but only if the proposed share deal will have a significant impact on working conditions.

Even if the law provides that consultation should be carried out in good faith and with a view to negotiating agreement over decisions which will significantly affect employees, there is no express obligation to accept the employees’ proposals and to sign an agreement. Failure to comply with the information and consultation requirements may be punished by fines.

In case of a voluntary takeover of a public company, the target’s board must inform the employees of the terms of the takeover and the position of the board on the attempted takeover, as set out in Financial Services Authority Regulation 1/2006. The target’s employees may issue a written opinion on the matter, to be provided to the bidder, the shareholders and the market.

In case of an asset deal, the rules governing transfer of employees (see below) apply.

What rules govern the transfer of employees to a buyer?

The rules governing the transfer of employees to a buyer in case of an asset deal are set out by Law 67/2006 on Safeguarding Employees’ Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses (the ‘TUPE Law’), which transposes EU Directive 2001/23/EC.

Under the TUPE Law, in order to ensure the protection of employees, every time a transfer of undertaking (or part thereof) occurs, the employees operating such undertaking (or part thereof) are also transferred by operation of law (no consent is required from the transferor, the transferee or the concerned employees, and all rights and obligations under existing employment agreements are also transferred), and no cherrypicking is allowed. The transfer of undertaking may not in itself constitute grounds for dismissal of any employees by the transferor or transferee.

Share deals generally have no impact on employment relations at the target, as the identity of the employer remains unchanged.
12.2 Pensions

What are the rules in relation to company pension rights in the event of an acquisition?

Generally, in case of a share deal, the target remains liable for all pension obligations in relation to its employees; in case of an asset deal, the buyer will take over all pension obligations in relation to the employees transferred.

The Romanian pension scheme comprises:

- the statutory provision as part of the social insurance (first pillar);
- a mandatory private tier (second pillar); and
- voluntary private pension provision (third and fourth pillars).

13. Other relevant considerations

13.1 Competition

What legislation governs competition issues relating to M&A?

In addition to EU competition regulations, the Competition Law and secondary legislation apply. If a transaction involving a Romanian target or business does not meet the merger control thresholds set in EU regulations, it may still be subject to merger control in Romania if:

- the combined aggregate worldwide turnover in the preceding year of all parties concerned exceeds €10 million; and
- the aggregate turnover in the preceding year in Romania of at least two of the parties concerned exceeds €4 million.

Clearance from the Competition Council must be obtained before the implementation of the transaction – typically the parties include merger control clearance as condition precedent to closing.

Similar to EU law, the merger control procedure before the Competition Council may include two phases. At the end of the first enquiry phase (i.e., within 45 days of receipt of a complete notification) the Competition Council may issue:

- an unconditional clearance decision;
- a conditional decision (whereby the parties make certain commitments aimed at limiting possible distortive effects of the transaction on competition); or
- a decision whereby the second enquiry phase is initiated by the opening of an investigation.

At the end of the second enquiry phase, the Competition Council may issue either an unconditional or a conditional clearance decision, or a prohibition decision. The second-phase inquiry, which should not take more than five months from receipt of complete notification, is a complex procedure involving several steps. It is initiated in those cases where the notified transaction raises serious concerns as to its compatibility with a normal competitive environment. In its assessment, the Competition Council looks at various factors, the most important being the market share of the parties concerned. It usually follows the lead of the European Commission in this respect in considering that above a threshold of 40% market share there is a strong likelihood of existence of a dominant position. In practice, second-phase inquiries are rarely opened.
13.2 Anti-bribery

Are any anti-bribery provisions in force?

Under Romanian law, active and passive bribery are considered criminal offences punished with imprisonment. In broad terms, ‘active bribery’ refers to the promise, offering or giving of money or other benefits, directly or indirectly, to a person for the purpose of performing, not performing, expediting or delaying the performance of an act that is part of that person’s duties or is related to the performance of an act which is contrary to such duties. ‘Passive bribery’ is the act of a person who, directly or indirectly, claims or receives money or other benefits that do not pertain to him or her or who accepts the promise of such benefits in view of the same actions as those mentioned for active bribery.

In recent years it has become market practice to insert anti-bribery contractual provisions into M&A transaction documents, usually as representation and warranties that the target and the sellers have not been involved in any bribery-related actions.

13.3 Receivership/bankruptcy

What happens if the company being bought is in receivership or bankrupt?

Under the Insolvency Code (Law 85/2014), an insolvent company should follow one of two insolvency procedures:

- reorganisation – aimed at rescuing the insolvent company while also ensuring at least partial payment of debts towards creditors, based on a reorganisation plan; or
- bankruptcy and liquidation – aimed at liquidating all of the assets of the insolvent debtor and distributing the proceeds to its creditors, followed by the dissolution of the insolvent company.

The acquisition of an insolvent company may occur during its insolvency. While share deals are hardly ever encountered in practice, asset deals with and business transfers from insolvent companies are often seen – in some cases, the acquisition of assets is even structured as an acquisition of receivables secured by the relevant assets.

As the general principle in insolvency is that any and all transactions should maximise the recovery of the creditors of the insolvent company, the acquisition of the business or assets of an insolvent company should follow the procedures set out under the Insolvency Code. In practice, the acquisition of assets of an insolvent company is usually done following a tender, but the transfer of business of an insolvent company (undergoing reorganisation) to an interested buyer is commonly done on the basis of a court-approved reorganisation plan.

14. Law stated date

Correct as of March 20 2017.

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