

## INVESTING IN ROMANIA



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## LEGAL BACKGROUND

One of the main objectives for the economic reform and development process, which was launched in Romania in 1990, was the privatization of companies in which the state was a sole or majority shareholder.

The legal framework for the privatization process has been modified and/or supplemented on various occasions, in view of achieving adequate solutions for completing the privatization process, by means of implementing clear and accessible procedures, diminishing bureaucracy, as well as increasing the attractiveness of the companies offered for sale.

The privatization process is governed by Emergency Ordinance no. 88/1997 regarding the privatization of companies, approved by Law no. 44/1998, with its subsequent amendments and additions ("Ordinance 88/1997").

The acceleration of the process of privatization of companies is to be achieved on the basis of the following principles:

- Securing transparency for the privatization process;
- Ensuring equality of treatment between buyers;
- Sale at market price resulting from the demand / offer proportion, taking into consideration all elements that make up the purchasing offer;
- Implementing restructuring programs prior to the privatization, with a focus on outsourcing certain activities and/or assets, especially assets of a social nature;
- Rescheduling the debts of the companies in order to increase the attractiveness of the

privatization offer; and

- Implementing a special management during the privatization period.

## SUBJECTS OF THE PRIVATIZATION PROCESS

## What is sold?

The provisions of the main normative acts regulating privatization apply to companies in which the state or an authority of the local public administration is a shareholder, as well as to the *regies autonomes*. It is of paramount importance that said normative acts set forth that the subsidiaries in which companies with majority state capital are shareholders are to be privatized as well.

## Buyer

Any individual or legal entity, either Romanian or foreign, can be buyer in a privatization process. The following entities may not acquire shares in companies undergoing privatization:

(a) Legal entities of public law or companies in which the Romanian State or an authority of the local public administration holds more than 33% of the total number of votes given by shares in the general meetings of the shareholders;

(b) Individuals or legal entities, Romanian or foreign, who/which concluded a share sale-purchase contract with any of the involved public institutions, which contract was terminated pursuant to the buyer's default, by a court or arbitration resolution that was deemed final and irrevocable; and

(c) Persons having outstanding budgetary debts.

## Involved public institutions

The public institutions with duties in the field of privatization of state-owned companies are the



<sup>1</sup>In 2007, Ordinance no. 88/1997 was modified by Emergency Ordinance no. 50/2007, the above amendments being declined after five (5) months by Law no. 305/2007. Therefore, the provisions of Ordinance no. 88/1997 have now the same form as prior Emergency Ordinance no. 50/2007 entering into force. In view of accelerating the privatization process, Law no. 137/2002 was also adopted, that modified and supplemented the provisions of Government Emergency Ordinance no. 88/1997.

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Authority for the Capitalization of State Assets (AVAS), the relevant ministries (in the suborder of which the company of the regie autonome to undergo privatization carry out their activity) or, as the case may be, the authorities of the local public institutions who have duties of privatization of a company.

AVAS is an institution of the central public administration, which has legal personality, functions as a subordinate of the Government, and which takes over the rights, obligations and duties of the Authority for Privatization and the Administration of State Participations ("APAPS"), set out under normative acts in force in the field of privatization, post-privatization, under international agreements or other deeds concluded by the same under the law.

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**Privatization agents**

Privatization agents are such legal entities, either Romanian or foreign, specialized in financial investments, mergers and acquisitions, such as banks, investment banks, investment companies and investment funds, financial companies, companies that perform accounting and financial audit services, companies of consulting and brokerage on the securities' market, as well as law offices and/or professional law companies. Foreign legal entities may associate with a Romanian legal entity or firm included in order to establish the above-mentioned entities.

In order to accelerate the privatization process,

the involved public institutions may delegate to the aforementioned companies the exercise of certain duties, based upon a mandate. The mandate may be granted either with respect to the privatization, restructuring or even the liquidation of a company or group of companies, or for the purpose of the assignment of the shares that the state holds in such companies or even of the assets of the same.

Privatization agents have the opportunity to act in the name and on behalf of the public institutions involved in the privatization with respect to the rights related to the shares held

by the same in the companies subject to privatization, including the exercise of the powers granted to the involved public institutions under the relevant law, save for the right to dividends or the right of preference.

## PRIVATIZATION METHODS

**Sale of shares**

Public institutions are authorized to sell the shares of the companies that are subject to privatization, through one of the following methods:

- (a) Public offer;
- (b) Sale methods specific to the capital market;
- (c) Negotiation;
- (d) Public auction or auction by envelope-included offer;
- (e) Deposit certificates issued by investment banks on the international capital market; or
- (f) Any combination of the methods listed above.

Pursuant to Government Ordinance 31/2003, APAPS was mandated to conclude addenda to the share sale-purchase contracts that include the clause of keeping certain registered control shares in the ownership of the state, with the purpose of converting such shares into ordinary shares, to be sold to the signatory of the privatization contract for a price equal to the nominal value of such share. In consideration of the amendments brought by Ordinance 23/2004, AVAS took over the duties of APAPS. According to Law 185/2005, registered control shares owned by the state – which allowed the state to appoint 1 or 2 administrators to the respective companies' board of administration, as well as to oppose certain decisions of the shareholders' meeting or the meeting of the board of administration, if such decisions were likely to affect the consumers' protection, the company's activity by means of favoring a third party, the protection of competition, or in the





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event that they were likely to prejudice national interests – were rightfully transformed into ordinary shares.

### Increase of the share capital by private capital contribution

The involved public institutions may decide upon the privatization of companies by increasing the share capital of the same. To this effect, in the general meeting of the proposed privatized company's shareholders, the public institution may propose to decrease state participations in such company by launching a public offer for the increase of the share capital in the respective company.

The increase of the capital is made by either cash or in-kind contributions with highly developed, top-of-the-line technological tools according to the provisions of the feasibility study especially drafted for this purpose. Should the increase of the share capital be approved, the existing private shareholders shall have a preference right upon the subscribing of the new shares, which right must

be exercised within 10 days following the offer launch date. Any of the interested investors, individuals or legal entities with majority private capital may acquire the shares/social parts by the public institution involved in the privatization, as well as the shares representing the quota held by the shareholders who do not exercise their preference right.

### Capitalizing on the companies' assets and free transfer or sale of the social assets

Companies in which the state or an authority of the public administration is a majority shareholder may decide to assign certain social assets, free of any charges and gratuitously, with priority to the authorities of the local public administration, as well as to other public institutions or to any interested individual or legal entity, with the exception of such social assets that were claimed in accordance with Law 10/2001 regarding the legal regime of certain real estate properties abusively taken over during March 6, 1945 and December 22,

1989, with its subsequent amendments. Also, the sale, leasing, partnership, contribution to the share capital of a company, real estate leasing and the establishment of usufruct the object of which is represented by the assets of the company, including those of a strategic interest, shall be approved by the general meeting of the shareholders on the basis of the mandate granted by the involved institution.

### SPECIAL MEASURES IN THE PRIVATIZATION PROCESS

In order to properly manage and administer a company in which the state or a public authority holds the majority package of shares, during the privatization period of the same, the special management procedure is implemented. The special management implies the administration of the company by an administrator on the basis of a special mandate granted by the public institution involved in the privatization. During the special management period the involved public institution will also implement a financial supervision procedure. Also, during this period, a number of exceptional measures shall apply, which measures are intended to increase the attractiveness of the companies in view of privatization.

### ATTRACTING PRIVATE CAPITAL IN THE FIELD OF UTILITIES

Another concern of the Romanian Government has been to make utilities efficient and profitable. To this effect, pursuant to successive amendments of the privatization legislation the possibility for the company subject to privatization to initiate public-private partnerships in view of attracting private capital for investments or for the completion of existing investments, has been implemented, which would consequently result in the establishment of certain profitable economic objectives.

It is expected that, during the year 2010, as a measure to increase the revenues to the Romanian state budget over the following period, that the State shall sell, on the stock exchange, shares in companies that are listed,

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such as Petrom and Transelectrica, or that are to be listed, including Romgaz, subsidiaries of Enel and E.ON, and shall exercise its option to sell the equity interests held in privatized energy companies.

### GUARANTEES AND COMPENSATIONS THAT MAY BE GRANTED TO THE BUYERS

The involved public institution may grant to the investors who signed share sale-purchase contracts compensation for the following:

- Any damage suffered as a result of settling certain liabilities due to environment pollution in the company's charge, which facts were not disclosed to the buyer by the involved public institution or by the competent environment authority ("historical pollution");
  - Company obligations that were neither disclosed nor could have been known by the buyer as a result of its performance of its own auditing procedure on the company, and the cause of which existed on the date of conclusion of the contract, which are prejudicial to the investor; and
  - Prejudices caused by the enforcement of court resolutions that force the return of certain goods of the company, in kind, to their former owners.
- The compensations granted for one or all of the aforementioned cases may not exceed 50% of the price that was paid by the investor and for which the State guaranteed.

### POST-PRIVATIZATION MEASURES

The companies that were privatized under share sale-purchase contracts are subject to post-privatization control, during the performance of the contract. The control is to be carried out by AVAS, and its main objectives are the monitoring of the buyer's compliance with its obligations under the contract, the company's economic and financial development.

The legal representatives of the company must provide AVAS, within 30 days following the due date of each obligation under the privatization contract, a report regarding the accurate fulfillment of such obligations, as well as the company's financial indicators.

The investment is considered completed if the buyer presents a certificate issued for this purpose by an auditing company, unless the privatization contract provides for another method.

The conclusion of additional acts by AVAS with respect to amendment of the investment agreements and/or the agreements for the payment of the share price is conditioned upon the establishment, in favor of AVAS, of a security covering the entire value of the unaccomplished investment and/or the unpaid price.

Should the contract be terminated by conventional resolution or by court settlement, AVAS will retain all the amounts paid by the buyer on account of the contract. Should the contract be terminated for prejudice caused to AVAS, the buyer shall also pay damages.

Whereas the privatization agreements were subject to secrecy, at the end of 2006 several of the largest

privatization agreements up to date were disclosed (as a reference only, the privatization agreements of SNP Petrom, BCR, Sidex and others were made public).

The sole events of the year 2008 involving AVAS, in its capacity as seller, consisted in the execution of three agreements relating to a number of two companies and one research institute, for which the buyer had been already selected in 2007. Thus, SPID Targu-Mures has been taken over by Auto Tudor TS, Unita Turism Holding has been taken over by Olimp Estival 2002 and Master research institute has been bought by its employees and by Radacini SRL.