Romania

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1 Types of transaction

How may businesses combine?

Business combinations in Romania are usually achieved through one of the following legal forms:

Mergers

Romanian law regulates two types of merger: merger by absorption, whereby a company absorbs one or more companies that cease to exist, and merger by consolidation, whereby two or more companies, which cease to exist, establish a new company. Romanian companies are allowed to merge with EU-based companies.

Demergers

The shareholders of a company may resolve upon: a total spin-off, whereby the total assets and liabilities of a company, which ceases to exist, are split up between two or several already existing companies or start-ups, specifically set up for this purpose; or a partial spin-off, whereby only part of the assets and liabilities of a company, which continues to exist, are transferred to two or several already existing companies or start-ups.

Acquisitions of shares or assets

These business combinations are regulated mainly by the Romanian Companies Law and the Civil Code. The acquisition of shares of companies listed on the regulated markets is subject to the Capital Market Law and the regulations of each market (Stock Exchange Market or OTC Market).

Transfer of business

Shareholders may also decide to transfer an entire line of business to a designated purchaser. Entering into this type of agreement is usually accompanied by a restriction incumbent on the sellers and the company to engage in identical lines of business. Extra care should be paid to the protection of employees and to the proper scrutiny of the covenants and undertakings from a competition law perspective.

Cooperation structures deprived of legal capacity

Investors seeking tailor-made solutions for specific projects often chose to put together certain assets and create a joint-venture (JV), instead of a project company (SPV). This practice is regulated by the Romanian Commercial Code, Fiscal Code and Fiscal Procedure Code. The JV, created pursuant to a joint-venture agreement, is not a stand-alone legal entity, and one of the partners is appointed as leading partner of the JV, charged with representing all partners' interests in relation to third parties and with the JV's bookkeeping.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main deeds regulating the various aspects of business combinations in Romania include the following: the Companies Law, the Romanian Commercial Code, the Romanian Civil Code, the Capital Market Law and the related regulations issued by the National Securities Commission, the Fiscal Code and the Fiscal Procedure Code, the Competition Law and related regulations issued by the Competition Council, and the Labour Code.

3 Governing law

What law typically governs the transaction agreements?

The short-form deeds contemplating the transfer of shares, assets, lines of business, as well as the merger and demerger of Romanian companies are subject to Romanian law. However, the long-form transaction documents (which usually include specific covenants, waivers, representations and warranties) may be governed by a foreign law chosen by the parties (given the ease of enforcement of these kinds of provisions in some foreign jurisdictions as opposed to Romanian courts).

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Share and asset deals

The transfer of shares of limited liability companies is made under a private deed, signed by the seller and the purchaser; however, in order to be ostensible toward third parties, the transfer of shares must be registered with the competent Trade Register. The transfer of shares of a joint-stock company is effective once the transfer is registered in the shareholders' ledger; for opposability purposes, the transfer may be also registered with the competent Trade Register. Such registration formalities are subject to the payment of certain registration fees.

The transfer of real estate (land) is performed under a notary deed, and thus subject to specific notary fees, depending on the value of the transaction. The transfer of assets, other than land, is made under private deeds, signed by the seller and the purchaser.

Merger and demerger corporate formalities

According to the provisions of the Companies Law, the merger and demerger of companies require certain corporate procedures to be carried out within the companies involved in this kind of business combination. Specific registration fees are payable in connection with these business operations, calculated on a case-by-case basis.

In a nutshell, the process begins with a preliminary decision of the general meeting of shareholders authorising the directors to negotiate the conditions of the merger or demerger, followed by the drafting of the merger or spin-off project by the directors of the companies involved, based on the authorisation granted by the shareholders. While the project generally sets out the terms and

conditions of the envisaged operation, the provisions regarding: the assets and liabilities transmitted to the beneficiary or resulting company, and the exchange ratio of the shares (together with potential merger or demerger premiums) stand at the very core of the project, as creditors may easily challenge any irregularity or inaccuracy set out in the project, following publication of the project by the relevant Trade Register. The shareholders of the companies involved must be properly informed by the directors on the conditions and consequences of the merger or demerger, and specific documents must be prepared in view of this operation (such as specific financial statements, audit and experts' reports etc). The assessment of the merger and demerger project and the drafting of the report by independent experts appointed by the Trade Register may be waived by the vote of all the shareholders of the companies involved. Ultimately, all these formalities having been fulfilled, the implementation of the merger or the spin-off will have to be approved by the shareholders of each of the companies involved.

Merger and demerger control by the Romanian Competition Council

The merger or demerger of undertakings, and generally the performance of an economic concentration, whereby the undertakings involved in the operation (together with their respective group companies) have a worldwide aggregate turnover amounting to at least €10 million (or equivalent in Romanian currency), and at least two of the involved undertakings (together with their respective group companies) reach an aggregate turnover in Romania of at least €4 million (or equivalent in Romanian currency), is subject to notification with the Romanian Competition Council (RCC). The parties bound to notify the RCC (either the participants to the merger or demerger, or the acquirer(s) of sole or joint control rights over a target, as the case may be) will file all necessary documents with the RCC within 30 days of the execution of the relevant binding agreement contemplating the merger, demerger or acquisition of control.

Following perusal of documents and assessment of the consequences of the envisaged operation, the RCC may either issue: a decision of non-intervention, if the notified merger is exempted from the application of the law, or a decision of non-objection, if the merger is not exempted from the application of the law, but is considered to be compatible with a competitive business environment. The RCC may also decide to initiate an investigation if there are any doubts regarding the compatibility of the envisaged operation with a normal competition environment. If an investigation is initiated, the RCC will issue a decision of rejection, approval or conditional approval of the operation. The tax for filing the notification and for authorisation of the envisaged operation is calculated as a percentage of the turnover of the parties involved in the operation, in accordance with the RCC rules and regulations.

Concentration operations falling under the provisions of the EC Merger Regulation will be assessed in accordance with the provisions of the rules set out at European level, and notification thereof will be filed with the European Commission.

Listed companies

According to the Romanian Capital Market Law, public companies are required to send regular reports on their activity to the National Securities Commission (CNVM) and the regulated market on which they are traded. The decisions of the general meeting of shareholders, the merger project and the change of control of the listed companies are among the activities that must be disclosed to CNVM and the regulated market. More specifically, the public offers for the purchase of shares of listed companies are subject to certain filings with the CNVM and the bidder wishing to make a public purchase offer must file an application for the approval of the offer document with CNVM. A public purchase carried out without the approval of the CNVM or without complying with the conditions approved by the same shall be void.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Public companies must inform the public with regard to any events occurring in the companies' activity that may have an impact on the price of the shares. Apart from the registration formalities (generally aimed at ensuring opposability towards third parties, as briefly set out under question 4), the unlisted companies do not have other specific obligations of public disclosure regarding their business combinations.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In case of acquisition or sale of securities issued by a company listed on a regulated market, following which the voting rights of a person reach, exceed or fall under the thresholds of 5, 10, 20, 33, 50, 75 or 90 per cent of the total voting rights, the respective person is bound to inform the company, the CNVM and the regulated market on which the respective securities are traded within three days. The target company also has an obligation to inform the public of such operation within three days of having received the information. These obligations exist irrespective of any business combination that the company is involved in.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Romanian law does not provide for any specific duties of directors and managers to the shareholders of the company in relation to business combinations, except for those duties mentioned in question 4, related to the merger and demerger process. However, the general duties of directors apply in such cases, such as the duty to abstain from voting on any transaction in which the director holds an interest contrary to the company's interest; the duty to enforce the decisions of the general meeting of shareholders and to perform all their activities according to the best interest of the company with appropriate diligence and prudence. Controlling shareholders do not have similar fiduciary duties. Specific restrictions may be incumbent on the shareholders' voting rights; for instance, a shareholder of a limited liability company cannot vote in general meetings aimed at approving an in-kind contribution by that shareholder to the company's share capital or a transaction between the company and that respective shareholder.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

The most common forms of companies in Romania are the limited liability company (SRL) and the joint-stock company (SA).

Transfer of shares

The limited liability company is conceived as a closely held company, in which the sale of shares to persons outside the company is subject to the approval of at least three-quarters of the company's registered capital. The transfer of shares in joint-stock companies is not subject to the approval of the general meeting of shareholders. The shares of joint-stock companies are transferred according to the type of shares:

- the ownership right over the bearer shares is transmitted by simply handing over the shares;
- the ownership right over nominative shares issued in material form (as share certificate) is transmitted by a specific statement made in the shareholders' ledger and by mention of such transfer on the share certificate itself, signed by the assignor and assignee; and
- the ownership right of nominative shares issued in dematerialised form is transferred by statement made in the shareholders' ledger, signed by the assignor and assignee.

Other business combinations

The entry into other business combinations is subject to the specific restrictions set out under the by-laws and more generally under the provisions of the Companies Law. For instance, the approval of the merger or demerger by the shareholders follows the same rules as applicable in case of amendment of the company's by-laws. Thus, for a limited liability company, the by-laws may be modified by the shareholders representing 100 per cent of the company's registered capital, save as otherwise specifically provided under the by-laws. The merger or spin-off of a joint-stock company must be approved by the extraordinary general meeting of the shareholders with the following quorums and majority of votes being required:

- at the first convened meeting, the attendance of shareholders representing at least 25 per cent of the registered capital is required, and the decisions are validly taken by a majority of at least two-thirds of the voting rights of the shareholders attending or represented at the meeting; and
- at the following convened meeting, the attendance of shareholders representing at least 20 per cent of the registered capital is required, and the decisions are validly taken by a majority of at least two-thirds of the voting rights of the shareholders attending or represented at the meeting.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile transactions are not common in Romania. Measures for resisting hostile takeovers are not expressly provided by Romanian law. However, the shareholders may agree upon specific protection mechanisms to be inserted in the company's by-laws (rights of first refusal, drag and tag-along rights, etc), which, even if they are not enforceable per se under Romanian law, create a certain degree of comfort (especially to minority shareholders). Specific anti-takeover measures may be taken provided they comply with the provisions of the Companies Law (eg, purchase by the target company of its own shares).

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

The break-up fees to be paid by the contracting parties to a share sale and purchase agreement are legal and binding under Romanian law, since they represent the potential damages contractually pre-assessed by the parties at the time of the execution of the binding agreement. The target company may not be obliged to pay such a break-up fee. In practice, break-up fees are generally included in heads of terms or term sheets, in consideration of the due diligence process to be undertaken by the prospective purchaser and its financial efforts in relation thereto. Reverse break-up fees – to be paid by the acquirers if they do not close the deal – are more difficult to enforce, as they usually become due only in the event that the purchaser unreasonably refuses to close the deal (the purchaser usually reserves several possibilities not to go through with the deal, in case the results of the due diligence process are not satisfactory for the purchaser, etc).

As regards financial assistance, according to the provisions of the Companies Law, a company may not grant advance payments or loans in order for a third party to subscribe or acquire the company's shares.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The prospectuses or offer documents of all public offers regarding the shares of companies traded on the regulated markets must be approved by the CNVM before being initiated. Apart from the Competition Council, the CNVM and other institutions that are competent in specific industries (eg, banking and insurance), no other government agencies can influence or restrict the completion of business combinations. In principle, according to the Romanian Constitution, the exercise of rights may be limited by law if it interferes with national security. However, currently, no government agencies may restrict business combinations for reasons of national security.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The Capital Market Law does not provide for the possibility of a tender offer to be conditional upon certain events. According to this law, at the time the prospectus for the tender is made public, the offer is mandatory on the terms provided. The offeror may subsequently modify the terms of the prospectus or offer document provided that the CNVM approves such modification and that the conditions offered to the investors are not less favourable than in the original prospectus.

In other types of business combinations, it is customary to include certain conditions precedent to the closing of the deal.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents?

The attainment of the required financing by the purchaser may be inserted as a condition precedent to closing the deal. However, given the current economic climate, seeking and obtaining the required financing may prove to be quite a challenge; therefore, sellers are proving rather reluctant to accept this kind of wording in the transaction documents and are requiring a representation from the purchaser that it has (or will seek and secure) the required funds to finance the transaction. This is naturally a matter of negotiation and the outcome very much depends on the strength of the parties involved in the negotiation.

There are specific industries (such as insurance) where the law specifically requires the share deal to be financed by the purchaser by using its own funds (or borrowed from the purchaser's mother company).

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Following a public purchase offer addressed to all the shareholders of a company traded on a regulated market, the offeror has the right to request that the shareholders that did not subscribe to the offer sell their shares at a fair price, if the offeror is in one of the following situations:

- holds shares representing more than 95 per cent of the registered capital; or

- has acquired through the public purchase offer more than 90 per cent of the shares targeted by the offer.

The offeror shall transmit to the CNVM for approval an announcement regarding the initiation of the procedure. Upon approval by the CNVM, the shares of the respective company are suspended from trading. The announcement is made public by the regulated market on which the company is traded, through publication in the CNVM bulletin and in two nationwide financial newspapers, within three business days from its approval.

It is presumed that the price offered in a voluntary public purchase offer in which the offeror acquired more than 90 per cent of the targeted shares and the price from a mandatory public purchase offer is a fair price. Such presumption is, however, only applicable within three months from the end of said public purchase offer. Otherwise, the price shall be determined by an independent expert, according to international appraisal standards. The costs for such appraisal are borne by the offeror.

The minority shareholders are obligated to sell their shares to the above-mentioned offeror and must inform the intermediary which handles the procedure of the modality chosen for the payment of their shares within 12 days from the publication of the announcement of the offeror. If they do not inform such intermediary of their option regarding payment, the intermediary shall proceed to the payment of the shares by postal order within five days from the expiry of the term mentioned above.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The European cross-border merger Directive has been transposed in Romanian legislation, thus regulating the merger of Romanian companies with companies headquartered or having their central management or main office in other member states. The regulation is not applicable to collective investment undertakings and closed investment funds, or any other undertakings that collectively invest resources gathered from the public. The procedural steps of the European cross-border merger are similar to those described above for the merger between Romanian companies. The Romanian Trade Register has the competence to verify the legality of the merger from the procedural point of view for Romanian companies or European companies headquartered in Romania and involved in the merger. One particularity of the European merger compared with the Romanian merger is the involvement of employees in the activity of the companies participating in the merger, involvement which was reserved to European companies headquartered in Romania before the enactment of this regulation. The right of employees to be involved in the activity of the company is thus recognised for European companies headquartered in Romania; for companies of other member states where such an involvement was in place before the merger; and also for Romanian companies resulting from the merger, if such a mechanism existed prior to the merger in one of the foreign participating companies.

As regards the regulatory or legal framework for cross-border acquisitions of shares or assets (except for land), the same legal regime applicable to national transactions is applicable in such cases as well. The acquisition of shares or assets in Romanian companies may be freely undertaken by foreign investors on the same conditions as Romanian investors, and such acquisitions are generally governed by Romanian law.

As regards real estate cross-border transactions, according to Romanian law, foreigners may purchase land in Romania only under conditions resulting from the integration of Romania into the European Union and other international treaties to which Romania is a party, on a mutually recognised basis.

Update and trends

M&A activity significantly decreased over the last year; however, 2010 appears to have resuscitated the market to some extent. There are several good opportunities on the market for private investors to pursue and sellers appear to have adjusted their expectations to the economic context; therefore, a number of rather significant M&A transactions have been successfully concluded in the first quarter of 2010.

No important regulatory changes that could affect business combinations have occurred so far. Rather, the market seems to self-regulate in response to the global financial crisis. There were several discussions on amending the current tax regime and increasing the VAT level for the purpose of sustaining the state budget, but no measure has been implemented or adopted in this respect.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In a share deal, apart from the waiting periods related to the registration of the transfer in the appropriate registry and eventually those connected to an existing shareholders' pre-emption right, there are no other waiting or notification periods for completing the deal. As mentioned in question 4, the mergers and demergers undergo a corporate procedure, implying some waiting periods. As part of that corporate procedure in case of mergers and demergers, the preliminary decision of the general meeting of shareholders must be published, so that the creditors whose interests are affected by the proposed merger or demerger may challenge it within 30 days of its publication.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The merger and demerger of banking institutions, insurance companies and financial services institutions are regulated by the special laws applicable to the activities in question and are subject to the prior authorisation or approval of the monitoring authorities.

18 Tax issues

What are the basic tax issues involved in business combinations?

The sale of an asset by a company is, as a rule, subject to VAT (currently 19 per cent) and income tax (currently 16 per cent) on the profit that the company obtains from selling the asset. The sale of shares is subject to income tax for both natural or legal persons transferring their shares. In the case of a merger or spin-offs, the assets and liabilities of the original company are lawfully transmitted to the new or existing companies in principle, without any tax implication.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The rights of employees in a share deal, whether public or private, shall not be affected and shall continue to produce the same legal effects, since the employees will continue to be employed by the same legal entity.

Employees' protection in cases of transfer of business is regulated by Law No. 67/2006 regarding the protection of employees' rights in the transfer of a company, which incorporates the provisions of Directive No. 2001/23/EC. This regulation applies to the transfer of a company, business unit or part thereof to another owner, as a result of a transfer of business as a going concern or merger. Transfer means a change of ownership with the intent to continue the main or second-

ary business activity of the transferred unit.

According to this legislation, the employment contracts of the employees of the transferred unit shall also be transferred to the new owner. The transfer of a company, business unit or part thereof may not represent a reason to terminate the employment agreements by the assignor or assignee. The assignor and assignee have an obligation to inform and consult the union or representatives of the employees at least 30 days before the transfer with regard to the legal, economic and social implications of such transfer for the employees. The assignee also has an obligation to comply with the collective bargaining agreement in force at the time of the transfer, until its expiry or termination.

The employers also have obligations deriving from Law No. 467/2006 regarding the general framework of informing and consulting employees, which implements Directive No. 2002/14/EC. Thus, the employer has an obligation to consult its employees on any envisaged measure that may affect their employment and to grant them the possibility of negotiating an agreement with the employer regarding such measures.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

According to the Companies Law, companies in the liquidation procedure may be merged or divided, only if the distribution of the proceeds from the liquidation to the shareholders has not been initiated. Law No. 67/2006 stipulates that the obligations of the target company regarding its employees do not have to be taken over by the new owner if the target is in a bankruptcy or reorganisation procedure.

Furthermore, according to Law No. 85/2006 regarding insolvency, after the opening of the insolvency procedure the shares of listed companies shall be suspended from being traded and the shares of private companies may not be transferred to any third parties. However, it is possible that such share deals be performed with the approval of the syndic judge. As part of the reorganisation plan, the appointed receiver may decide to issue new shares, to participate in mergers or to sell assets of the debtor to third parties.

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