GETTING THE DEAL THROUGH

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Romania

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1 Form

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.

Demergers

Romanian law regulates a demerger by splitting up the shareholding of a company, which ceases to exist, between companies already established or which are established for such purpose. It is also possible to transfer only part of the shareholding of one company, which continues to exist, to companies already established or which are established for such purpose.

Acquisitions of shares or assets

These business combinations are regulated mainly by the Romanian Companies Law and the Civil Code as per the sale of assets. 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).

Cooperation structures without legal personality

A common practice in Romania is the conclusion of joint ventures, by putting together certain assets in order to perform a lucrative activity, which practice is regulated by the Romanian Commercial Code. This form of doing business in Romania does not create a legal entity and, generally, one party is in charge of the book-keeping of the joint venture.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main normative acts 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 private acquisition of shares or assets of a company is realised through a sale and purchase agreement, which is usually subject to Romanian law. The merger and demerger between or of Romanian companies are also subject to Romanian law, as lex societatis.

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 realised through a private deed; however, in order to produce legal effects toward third parties, it must be registered with the competent Trade Registry. The transfer of shares of a joint stock company is effective once the transfer is mentioned in the shareholders' register. Such formalities are subject to the payment of certain registration fees. The transfer of real estate is performed though a notarial deed, and thus subject to notary fees, which amount to approximately 0.5 per cent of the transaction value.

Merger and demerger corporate formalities

According to the Companies Law, the merger or demerger of companies implies certain corporate procedures within the companies involved in the business combination. Thus, the process begins with a preliminary decision of the general meeting of shareholders mandating the directors to negotiate the conditions of the merger or demerger, followed by the drafting of the merger or division project by the directors of the companies involved, based on the mandate granted by the shareholders. The project stipulates the conditions of the business combination, the most important being the patrimonial elements transmitted to the beneficiary company and the exchange ratio of the shares, with the eventual merger of demerger premiums. The project is submitted for approval with the Register of Commerce and is published in the Romanian Official Journal in order to allow the creditors of the companies to oppose it.

The shareholders must be informed by the directors on the conditions and consequences of the merger or demerger, by providing the shareholders with the merger or demerger project, the financial situations before merger or demerger, the report of the financial auditors, the report of experts appointed by the judge delegated to the Register of Commerce on the correctness of the exchange ratio of shares. Romania has recently implemented Directive 2007/63/CE regarding the requirement of an independent expert's report in case of mergers and demergers. According to the implementing law, the

analysis of the merger and demerger project and the drafting of the report by independent experts appointed by the Register of Commerce may be waived by the vote of all the shareholders of the companies involved.

The final step is the approval of the merger or division by the shareholders of each of the companies involved.

Merger control by the Competition Council

The merger of undertakings having an accumulated turnover of the Romanian equivalent of €10 million, of which at least two undertakings have a turnover of at least the Romanian equivalent of €4 million obtained on Romanian territory, is subject to the notification and control of the Romanian Competition Council. The participants to the merger are obligated to notify the Competition Council within 30 days from the date the merger agreement is executed, in the case of mergers, the date on which control is obtained, in cases of an operation acquiring control of a company, or the date on which the parties involved become aware of the concentration, in the remaining cases.

The approval procedure by the Competition Council suspends the merger procedure. The Competition Council shall issue within 30 days from the date the notification is completed a decision of non-intervention, if the notified merger is exempted from the application of the law, or 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 Competition Council may also decide in this term to initiate an investigation, if there are any doubts regarding the compatibility of the merger with a normal competition environment. If an investigation is initiated, the Competition Council must issue a decision of rejection, approval or conditional approval of the merger within five months from the initiation of the investigation.

The tax for the authorisation of the merger is 0.1 per cent of the cumulated turnover of the parties involved in the merger, where turnover is realised on the relevant market on which the merger is performed.

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 the control of the companies listed are some of the activities that must be revealed to the CNVM and the regulated market. Furthermore, the public offers for the purchase of shares of listed companies are subject to certain filings to the CNVM. Thus, a bidder who wishes to make a public purchase offer must submit to the CNVM an application for the approval of the offer document. The CNVM then decides whether to approve the application within ten working days from the registration of the request. A public purchase carried out without the approval of the CNVM or without complying with the approved conditions 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 effect on the price of the shares, as a result of the effect of such events on the financial situation of the companies in question or on the companies' activity in general. Apart from the registration formalities mentioned in question 4, the unlisted companies do not have other 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 obligated to inform within three days of such operation the company, the CNVM and the regulated market on which the respective securities are traded. The target company also has the obligation to inform the public on such operation within three days of receiving 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 also, 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 the appropriate diligence and prudence. Controlling shareholders do not have similar fiduciary duties.

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). 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 registered capital.

The shares of joint-stock companies are transferred according to the type of shares: nominative or bearer shares. The ownership over the bearer shares is transmitted through the simple handing over of the shares. The ownership right over nominative shares issued in material form is transmitted by a declaration made in the register of the shareholders and by mention of such transfer on the share itself, signed by the assigner and assignee. The ownership right of nominative shares issued in dematerialised form is transferred by declaration made in the register of the shareholders, signed by the assigner or assignee.

The approval of the merger or division by the shareholders follows the same rules applicable in case of modification of the by-laws of the company. Thus, in case of a limited liability company, the by-laws may be modified by the shareholders representing 100 per cent of the registered capital of the company, if the by-laws or the

law do not provide otherwise. The merger or division of a joint-stock company must be approved by the extraordinary meeting of the shareholders with the following quorums and majority of votes required:

- at the first convocation, the presence of the shareholders representing at least one fourth of the registered capital, and the decisions are validly taken by a majority of at least two-thirds of the voting rights of the shareholders present or represented; and
- at the following convocations, the presence of shareholders representing at least one fifth of the registered capital and the decisions are validly taken by a majority of at least two-thirds of the voting rights of the shareholders present or represented.

9 Hostile transactions

What are the special considerations for unsolicited (hostile) transactions?

Hostile transactions are not common in Romania. Measures for resisting hostile takeovers are not expressly provided by Romanian law. However, such anti-takeover measures may be taken provided they comply with the general provisions of the Companies Law (eg, setting a maximum percentage of shares to be held by a shareholder, 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?

Break-up fees may be included in sale-purchase agreements between the acquirers and the sellers of a company's shares, for breaking the negotiations before closing the deal. At present, such break-up fees are more frequently used. Reverse break-up fees – to be paid by the acquirers in case they do not close the deal – are also increasingly common. The break-up fees to be paid by the contracting parties to a share agreement are legal and binding under Romanian law, since they represent the eventual damages that are contractually pre-assessed by the parties at the time of the execution of the share sale-purchase agreement. The target company may not be obliged to pay such a break-up fee.

As regards financial assistance, according to 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 (antitrust) 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 such 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 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 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 the shareholders that did not subscribe to the offer to 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.

14 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 recently transposed in Romanian legislation, thus regulating the merger of Romanian companies with companies headquartered or having the central management or main office in other member states. The regulation is not applicable to collective investment undertakings and closed

Update and trends

2008 was the best year in terms of M&A value in Romania, with transactions totalling almost €10 billion, the highest value in the history of M&A in Romania. The main transactions were in the energy field, financial services, real estate, and food industry. In the last quarter of 2008 and the first quarter of 2009, the number of transactions dropped dramatically, and many of the announced transactions, especially in the real estate sector, were postponed for an undetermined period. It is expected however that the M&A market shall be more active in the near future, where large investors shall take advantage of the current lack of cash on the market in order to strengthen their positions and investors targeting companies in financial difficulty. The most attractive sectors for future transactions are considered to be companies in the retail and fast moving consumer goods markets.

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 Register of Commerce has the competence to verify the legality of the merger from the procedural point of view for the Romanian companies or the European companies headquartered in Romania and involved in the merger. One particularity of the European merger compared to the Romanian merger is the involvement of employees in the activity of the companies participating to the merger, involvement which was reserved to European companies headquartered in Romania before the enacting of this regulation. The right of employees to be involved in the activity of the company is thus recognized for European companies with their headquarters 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 reciprocity basis. Given Romania's recent accession to the European Union, citizens of member states of the EU who are resident in Romania may now purchase land in Romania.

15 Waiting or notification periods

Other than competition laws, what are the relevant waiting or notification periods for completing business combinations? Are companies in specific industries subject to additional regulations and statutes?

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' preference rights, there are no other waiting or notification periods for completing the deal. As mentioned in question 4, the mergers and demergers must follow 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 oppose it within 30 days of the publication.

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.

16 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 (at 19 per cent) and income tax on the profit that the company obtains from selling the asset. The income tax is currently 16 per cent. The sale of shares is subject to income tax for both natural or legal persons transferring their shares. In case of merger or divisions, the patrimony of the original company is transmitted to the new or existing company and its rights and obligations are taken over by such company.

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17 Labour and employee benefits

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

The rights of the employees in case of 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.

The employees' protection in cases of transfer of business is regulated by the Law No. 67/2006 regarding the protection of employees' rights in case of transfer of a company, which incorporates the provisions of Directive 2001/23/EC. This regulation applies, in the case of a 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 secondary 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 constitute a reason to terminate the employment agreements by the assigner or assignee. The assigner and assignee have the obligation to inform and consult the union or the 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 the 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 2002/14/EC. Thus, the employer has the obligation to consult its employees on any envisaged measure that may affect their employment and to grant them the possibility to negotiate an agreement with the employer regarding such measures.

18 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, mentioned above, 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 the insolvency, after the opening of the insolvency procedure the shares of listed companies shall be suspended from trading 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 judicial administrator may decide to issue new shares, to participate in mergers or to sell assets of the debtor to third parties.

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