

Romania

Ștefan Damian and Horia Ispas, Țuca Zbârcea & Asociații SCA



www.practicallaw.com/2-380-9390

MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year? Please distinguish between trade buyers and private equity backed deals.)

2007 was a notable year for the M&A market in Romania as a result of its accession to the EU on 1 January 2007. However, Romania is a young market economy and the legislative and the economic environments must undergo significant changes.

From a legal perspective, public M&A activity is regulated in significant detail under the general corporate and special capital markets legislation.

The Romanian capital market is equally young and is currently undergoing an upgrading process from an incipient market to a highly regulated and complex one by attempting to mirror and implement the relevant EU principles. Although from a legal perspective many of these EU principles have been enacted locally, from a practical perspective the process is still ongoing as jurisprudence and common practice are underdeveloped.

In 2007, the Romanian capital market saw 49 takeover offers, of which 46 were mandatory takeover offers and three were voluntary takeover offers.

The main takeover offers on the Romanian capital market in 2007 include:

- Campio ICM's RON3.1 million (about US\$1.2 million) voluntary takeover offer for Med Com Prod, finalised with the acquisition of 70.5% of the target's share capital.
- Ring Afaceri's RON11 million (about US\$4.4 million) voluntary takeover of Banatim SA, finalised with the acquisition of 85.3% of the target's share capital.
- Wiener Städtische Wersicherung Vienna Insurance Group Austria's RON243 million (about US\$98 million) mandatory takeover offer for Asigurarea Românească Asirom, finalised with the acquisition of 66.5% of Asirom's share capital.
- LLI Euromills's RON70 million (about US\$28 million) mandatory takeover offer for Titan SA, by acquiring 67% of the target's share capital.

- Vantas International's (a subsidiary of Cadbury Schweppes) RON23 million (about US\$9.2 million) mandatory takeover offer for Kandia Excelent SA, by acquiring 95.7% of the company's share capital.

In addition, in 2007 there have been also two fully subscribed initial public offerings:

- SNTGN Transgaz, worth RON225 million (about US\$90 million).
- Casa de Bucovina – Club de Munte, worth RON9.1 million (about US\$3.7 million).

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

All public sale offers (except those of state-owned shares within a privatisation framework) or public purchase offers regarding shares in public companies must be made through the regulated market.

In general, any direct share transfer in a public company needs to be performed on the market through a financial intermediary in compliance with the delivery versus payment mechanism (DVP). There are only a few exceptions to this requirement including:

- Inheritance.
- Separation of co-ownership.
- Transfers to company employees.
- Buyback of shares as a result of shareholders' exerting their withdrawal right.
- Merger, dissolution or liquidation.
- Privatisation.
- Certain intra-group transactions.

The takeover threshold regulated by the capital market norms is 33% of the voting rights, meaning that a public purchase offer qualifies as a takeover offer in cases where more than 33% of the voting rights are acquired. Where a threshold is reached by other share acquisitions, a mandatory takeover offer would also need to

take place. However, actual control over the target is gained in accordance with the statutory majorities for passing resolutions within the corporate bodies (for example, a shareholders' meeting).

The main takeover alternatives for public companies depend on whether there is an on-market or off-market transaction:

- **On-market transactions.** The main alternatives include:
 - voluntary or mandatory public takeover offers;
 - subscription under a public sale offer initiated by company shareholder(s) or under a share capital increase operation (where the shareholders decide that during the period that they can exert their preference right, the unsubscribed shares can be publicly offered);
 - share sale purchase on the deal market of the Bucharest Stock Exchange (BSE) (*see box, The regulatory authorities*) (a section of the regulated market in which large quantities of shares can be purchased or sold under pre-arranged transactions, by one purchase order and one sale order).
- **Off-market transactions.** The main alternatives include:
 - share capital increases;
 - mergers;
 - shareholders' agreements.

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Capital markets legislation does not use the term hostile bid, nor define the concept. However, a voluntary takeover offering is sometimes sought as a partial substitute to accomplish the same goals. A preliminary announcement on the takeover intention must be submitted to the target's board of directors (board). The board must promptly inform the employees about this (and can also consult with the shareholders) and must also reply to the National Securities Commission (NSC) (*see box, The regulatory authorities*) (within five business days) with its opinion on the opportunity of the takeover and its forecasted impact on the company (together with the grounds for the opinion and the employees' position on the matter).

However, the board's and employees' position on the takeover have no legal force on the takeover process, though it may result in practical difficulties in the time taken for the bidder to accomplish the targeted shareholding.

As such, this method is rarely used due to privileged information constraints regarding due diligence in the absence of a pre-agreement between sellers and buyers. Even where such agreements exist, the parties prefer to accomplish the takeover in two steps:

- First by purchasing the minority shareholding allowing access to information on the target.
- Subsequently making a takeover offer.

4. How are public takeovers and mergers regulated and by whom?

Given that Romania joined the European Union on 1 January 2007, Directive 2004/25/EC on takeover bids has been broadly implemented. No significant changes are expected in the Romanian capital market legislation in respect of takeover bids in the near future.

The main Romanian regulations on takeovers and mergers are as follows:

- Company Law no. 31/1990 (Company Law), sets out the general legal framework for company incorporation, operation and merger, and winding up.
- Capital Market Law no. 297/2004 (Capital Market Law), sets out a single and integrated regulatory framework for issuers, financial investment services providers and capital markets, providing for special rules regarding shareholding transfers and acquisitions and merger formalities.
- NSC Regulation no. 1/2006 on issues and securities (NSC Regulation 1/2006), regulates public offers procedures, issuers' operation and conduct, including special reporting and disclosure obligations, and also market abuse and insider trading.
- NSC Regulation no. 31/2006 for the amendment of NSC regulations for the implementation of certain provisions of the European directives (NSC Regulation 31/2006), transposing into Romanian legislation:
 - Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities;
 - Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading;
 - Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (implemented by Directive 2003/124/EC);
 - Directive 2004/25/EC on takeover bids; and
 - Directive 2004/39/EC on markets in financial instruments.

The main regulatory bodies are as follows:

- **NSC.** The NSC regulates and supervises capital market operations and players as well as the appropriate implementation of all capital markets regulations (Romanian and EU). These are namely the Capital Market Law, the subsequent regulations and instructions issued by the NSC (and the NBR) and the EU Directives and Regulations (referred to collectively in this chapter as the capital market regulations).
- **Regulated market.** This system, which ensure the trading of financial instruments, are based on regulations and

procedures endorsed by the NSC (for example, for admission to trade, company de-listing, trading of shares and public offers). They observe the reporting and transparency requirements in order to protect investors. The regulated market also has certain supervisory and sanctioning powers in connection with the operations performed through its systems. Currently, the BSE is the only regulated market that is operational in Romania for the exchange of shares and units or shares in undertakings for collective investments. It has a secondary tier, the Rasdaq Electronic Exchange.

- **Competition Council.** The Competition Council regulates the competition issues that might arise in M&A deals, including merger and anti-trust control (*see box, The regulatory authorities*).

PRE-BID

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Due diligence

Although conducting a due diligence process is not prohibited, given the current practices of the NSC, a transaction performed following a classic due diligence exercise is likely to fall under the scope of insider trading prohibitions.

Therefore, the bidder either:

- Discloses to the regulated market all information obtained during the due diligence and then initiates the takeover.
- Acquires a minority stake, allowing it to obtain relevant information available only to a shareholder of the target, and subsequently launches the takeover.

Public domain

The main information publicly available on a target public company is:

- General corporate information including the updated articles of association (articles) and all details of directors, issued share capital and (significant) shareholders, which can be requested from the Trade Register against payment (either by personal request at the Trade Register Office, or on its website, www.recom.ro, where certain detailed information is available on subscription). The interested party can obtain information regarding the trade reports of the target's shares and also company's reports on the NSC and BSE websites (*see box, The regulatory authorities*).
- General financial information including yearly, half-yearly and quarterly financial statements, together with any directors' and auditors' reports, for at least the past five years can be found at the Trade Register (only yearly financial statements and ancillary reports) and on the websites of the NSC and the BSE (quarterly, half yearly and yearly reports, as well as reports on events with significant impact on a company's financial status).

- Any prospectuses or documents of past offer can be found on the appropriate company's website (if relevant) or on the website of the NSC.
- Any NSC and/or regulated market filings or reports. This is mainly financial data for the reporting period (yearly, half-yearly and quarterly) or concerning certain special events (for example, convening notices and/or resolutions of the general meeting of shareholders, merger or spin-off plans) or major business events, acquisitions, disposals, intra-group contracts exceeding EUR50,000 (about US\$74,272), loans and related collaterals. This information can be found on the websites of the NSC and the BSE. Merger or spin-off plans are also submitted to the Trade Register and available on request. Loan securities are registered either with the Electronic Archive for Secured Transactions (for movable assets) (www.mj.romarhiva.ro/webarchive/index.htm) or with the relevant land book (for immovable assets) (information is only available at the headquarters of the relevant real estate register).
- Information on qualified positions, that is, the level at which shareholders reach or lose certain positions (5%, 10%, 20%, 33%, 51%, 75% or 90% of the voting rights within the company) can be found on the relevant company's website (if relevant) or on the websites of the NSC and the BSE.

6. Are there any rules as to maintaining secrecy until the bid is made?

An offer can be made public only after all related public announcements (even preliminary) documents and advertising materials regarding the offer have been approved by the NSC. Until approval is given, the offer must be kept secret.

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

The regulations do not explicitly address pre-takeover memoranda of understanding entered into with key shareholders. However, it is normal for investors to enter into such agreements with the controlling shareholder(s) in order to agree the main terms of the takeover.

Currently any share trade must be conducted through the market, so in concluding a pre-takeover memorandum there is always the risk that any off-market price adjustments would be deemed as infringing the market rules regarding price making. Therefore, this area always requires special attention and proper legal advice.

If under the respective memorandum of understanding, the key shareholders undertake to ensure, as a precondition of the transaction, that the company meets certain targets, in the absence of public disclosure of such terms there is a risk that a takeover based on such an agreement would qualify as insider trading. It is therefore advisable at least to disclose to the NSC and BSE the existence of such an agreement and the key terms that could influence the company's activity.

However, given the vague standards and broad wording of insider trading provisions, and taking into account that local case law and legal doctrine on insider trading is rather scarce, there is no clear right or wrong. The risk assessment is made on a case-by-case basis, though disclosure of the executed pre-sale agreements is recommended.

8. If the bidder decides to build a stake in the target before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there any circumstances in which shareholdings of associates could be aggregated for these purposes?

The success of a public takeover offer can depend on the bidder's shareholding before announcing the takeover offer, which could be acquired by building in advance a significant stake. No restrictions or timetables apply in relation to stake-building, provided that the investor does not exceed 33% of the voting rights in the target by these means. Where an investor exceeds 33% of the voting rights it must launch a mandatory takeover offer (see *Question 16*) within two months and until then it is prohibited from purchasing additional shares in the target. Its voting rights exceeding the 33% threshold are also suspended.

Such acquisitions can result in disclosure obligations where certain thresholds are met. Any shareholder that has reached (or lost) a qualified position (5%, 10%, 20%, 33%, 51%, 75% or 90%) must inform the target, the NSC and the market operator about the transaction within three business days. Within three days of being informed, the company must itself inform the public, the NSC and the market operator.

The thresholds are also reached by combining the voting rights:

- Held by controlled entities or entities that act together with such shareholders.
- Transferred to other persons or attached to shares whose use was granted to another person.
- Held by persons that have agreed to adopt a similar policy towards the company.

In determining the held voting rights in order to assess consequences under capital market regulations, suspended voting rights (for example, voting rights in excess of the 33% threshold before conducting the mandatory takeover offer and voting rights attached to shares held by the company) are normally included.

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

With voluntary takeover bids, the board's position on the takeover has to be formally sought. Although its position on the takeover is not binding within the takeover process, it can result in practical difficulties in the time taken for the bidder to acquire the targeted shareholding (for example, some shareholders may be reluctant to sell their stake).

Such agreements are not common practice, although they are in principle allowed under Romanian law. Although a board may conclude such an agreement, it would need to obtain a special mandate from the general meeting of shareholders in advance, which makes the entire scenario even more unlikely given Romanian company law.

10. Is it common on a recommended bid for the target to agree a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.

Romanian law does not regulate the existence or the possibility of break fees.

11. Is committed funding required before announcing an offer?

Generally, irrespective of the type and value of consideration to be paid within the public takeover or purchase offer, before, and in order to obtain NSC approval of the offer document, the bidder must submit to the NSC proof of creating a guarantee proportional to the aggregate targeted value of the offer. Proof of this guarantee can be either:

- An account statement, showing the existence of a cash deposit created by the bidder for a value of at least 30% of the total targeted value of the offer in an intermediary's bank account.
- An original bank letter of guarantee covering the entire value of the offer, issued in favour of the intermediary.

Where the offer guarantee is a cash deposit into the intermediary's bank account, the amount is blocked for the entire duration of the offer.

With competing bids, the bidder that offered the highest price must submit to the NSC proof of the increase of the guarantee within 24 hours from the termination of the auction between the competing bids. If the bidder does not comply with this obligation it is disqualified and the auction must be re-started with the remaining bidders.

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements) and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

Announcement of the offer

Before a voluntary takeover offer, the bidder must publish and submit a preliminary announcement regarding the offer to the target, following approval by the NSC. After publishing the offer announcement, the bidder must submit the takeover offer documentation for the NSC's endorsement within the mandatory

deadlines. The main offer announcement together with the entire offer documentation is subject to the NSC's approval before any publicity formalities, as detailed below.

Offer timetable

Under capital market regulations, the takeover offer process is a strictly regulated process, with mandatory actions and deadlines for the parties. The minimum estimated duration of a takeover bid is 2.5 months. A mandatory offer needs to be launched within two months of the date that the shareholder exceeded 33% of the share capital. The lifecycle of a voluntary takeover offer (a mandatory takeover offer follows the same schedule) is as follows:

- **Pre-offer steps: preliminary announcement.** The timetable of a takeover bid begins on the day that the NSC's approval of the preliminary takeover is announced (announcement date). Within five business days of the announcement date the preliminary announcement is sent to the target and BSE. The preliminary announcement is published in central and local newspapers. The board of the target notifies the trade union of the takeover. Within five business days of the preliminary announcement, the board of the target sends its position on the takeover opportunity to the NSC (it can also convene the shareholders' meeting for this purpose if it gives five calendar days' notice).
- **Obtaining NSC approval on the takeover offer.** Within 30 calendar days of the announcement date the bidder submits the takeover offer documents to the NSC for approval. Within ten business days of this, the NSC approves the takeover offer documents and the bidder notifies the BSE of the takeover approved offer document.
- **Offer announcement and documents.** Within ten business days of obtaining NSC approval on the takeover offer, the offer announcement must be published in two central newspapers. The offer documents must be made available on the bidder's and intermediary's websites or at their headquarters. The board of the target sends the offer document to the trade union.
- **Conducting the public takeover offer.** Three business days after publishing the announcement offer, there is the initiation of the takeover offer. Between 15 to 50 business days after this, the takeover offer is developed.
- **Closing formalities.** After seven business days from conducting the public takeover offer the bidder notifies the NSC and BSE on the results of the offer.
- **Shares' transfer and payment price.** The offer's settlement is performed by the BSE. Three business days after this there is delivery, payment and registration of the new shareholding structure.

Timetable variations

The following events could affect the timetable of a takeover offer:

- **Offer suspension by the NSC.** The NSC can order the suspension of offer procedures (including publicity) for a maximum of ten business days (for each such suspension), if there is proof that the legal provisions regulating the offer have been breached.
- **Offer extension by the NSC.** After the NSC's approval of an amendment to the offer terms (such as on the bidder's choice or following an event or data that may affect the investing decision) in respect of the offer price or any other matters (except for the closing date), the NSC has the right to extend the duration of the offer, so that at least five business days are left between the publication of the offer addendum and the offer closing.
- **Offer extension or earlier closing on bidder's initiative.** Should the approved offer document provide such a possibility, the bidder can extend or reduce the duration of the offer (within the legal deadlines of a minimum 15 business days and maximum 50 business days).
- **Announcing competing bids.** Within ten business days of the announcement of the purchase or takeover offer, any person can launch a competing offer targeting the same shares as the initial one, provided that the bidder's price is 5% higher than the initial offer. The NSC suspends the offer(s) and sets a common closing date for all competing offers as well as a deadline for submission of the price increase of the competing offers. On this date, the bidders meet the NSC auction commission and auction rounds take place, where the bidders can increase the price by up to 5% per round. The auction is closed once one bidder does not offer a higher price, and thereafter the suspension is cancelled and the takeover offer continues its normal path, as described above for voluntary takeover offers.

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

The key requirements for takeover offers are:

- The takeover offer must be conducted on the regulated market, through a financial intermediary.
- The takeover offer must address all shareholders of the target, for all their holdings in view of obtaining more than 33% of the voting rights in the target.
- The bidder must grant all of the target's shareholders equal treatment and the possibility to receive and assess the offer.
- The offer document must be endorsed in advance by the NSC (within ten business days) and be made available to all shareholders for the duration of the offer.
- The offer is irrevocable after publication of the takeover announcement.
- The offer cannot be advertised without the prior approval of the NSC.
- The application to the NSC for approving the offer must include various documents covering the identity of the bidder and those it acts in concert with (for example, the incorpo-

ration certificate and articles). If the bidder is a legal entity, the list of the bidder's shareholders (up to 1% holdings in the case of listed bidders) and a bidder's statement on the persons it acts in concert with in relation to the company.

- Strict compliance with the offer conditions endorsed by NSC must be observed under the sanction of the offer's invalidation.

Romanian law does not expressly address the issue of conditional bids. Given the general principles of the market, any imposed condition must not breach the general rules such as:

- Granting the investors equal treatment, for example equal information on the offer and equal rights to subscribe within the offer.
- The rules regarding market manipulation, for example by inserting into the offer document conditions that would create unfair trading conditions.

For withdrawals of public offers, the Capital Market Law expressly provides that public offers (takeover offers included) are irrevocable for their entire duration (as mentioned within the offer documents and the public announcement), from the publication of the offer announcement. Therefore, the bidders can only choose not to launch the offer after the offer materials have been endorsed by the NSC, by notifying the NSC.

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

The documents received by the shareholders during a takeover bid are the same, irrespective of the type of offer (either voluntary or mandatory).

The main documents in connection with a takeover bid that must be made available to the shareholders of the target are:

- The offer announcement and advertising materials in respect of the takeover, as approved by the NSC.
- The offer document as approved by the NSC, which must include:
 - the terms and conditions of the offer;
 - extensive information on the bidder and its business plans relating to the target;
 - the board's position on the takeover; and
 - if the consideration for the offer is in securities, information on these securities and who issued them.
- Any addenda to the offer document, as approved by the NSC.
- The offer acceptance form, which is a standard form used by the shareholders to accept the offer.

- The revocation form, which is a standard form used by the shareholders to revoke their acceptance of the offer in accordance with the legal requirements.

These documents must observe the highest accuracy standards and detailed minimum content requirements. The documents submitted to the NSC must be accompanied by a statement of the bidder's management confirming that the information is real, exact, accurate and complete, and that the bidder is fully liable for any omission materially affecting the content of the offer document.

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

In the case of a voluntary takeover offer, the target's board (or if relevant the bidder's board) must:

- After publication of the NSC approved preliminary offer announcement on the takeover, promptly inform the employees or the trade union of the matter and seek its opinion on the takeover and on the position of the board in this respect. The employees' or trade union's opinion on the matter must be included in the target board's reply to the NSC, if provided in due time.
- Once the offer document is made available to the public, give this to the employees or trade union.

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

The threshold that triggers the application of the mandatory takeover rules is 33% plus one of the voting rights into the target.

The mandatory takeover offer must be initiated by a shareholder that has acquired alone, or together with persons it acts in concert with, more than 33% of the voting rights in the target. Such an offer must be addressed to all shareholders for all their holdings and has to be initiated no later than two months from the moment the threshold was reached. Until conducting the offer, the voting rights exceeding the 33% threshold are suspended and no additional acquisitions of shares in the target can be made.

The Capital Market Law provides for certain exceptions from the obligation to make a mandatory takeover offer, which apply mainly to acquisitions:

- Within the privatisation process.
- From the Ministry of Public Finance or any other authorised entities within the foreclosure of budgetary receivables.
- Between affiliates or members of the same group of companies.
- Under voluntary takeovers or purchase offers addressed to all shareholders, for all their shareholdings.

Any shareholder who exceeds the 33% threshold by an acquisition performed under the above conditions is not compelled to

perform a mandatory takeover offer. Nevertheless, the respective shareholder can conduct a further purchase offer for the remaining shares.

Where the 33% threshold is exceeded by unintentional operations (such as the buyback of shares followed by their cancellation by the company exerting the preference right in subscribing new shares within share capital increase operations, merger, spin-off or inheritance), the shareholder can choose between conducting the mandatory takeover offer or selling the shares in excess to the 33% threshold within three months.

However, after exceeding the 33% threshold and conducting the mandatory takeover offer, there are no restrictions on acquiring subsequent shares by the respective shareholder in the target.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

The typical consideration for public takeover offers is money.

However, the price can also be established in securities or a combination of money and securities. Nevertheless, shareholders must always be explicitly given the option of receiving money as alternative consideration. Where the price is established in securities or shares in another listed company, detailed information on the issuer has to be provided within the offer documents.

18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

The capital market regulations provide for minimum value of the offer price for each type of offer.

Mandatory takeover offers

The price has to be at least equal to the highest price paid by the bidder, or by those acting in concert with the bidder, during the past 12 months for shares in the target. If no such share purchase took place, the offer price has to be at least equal to the highest of the following (as determined by an independent valuer):

- The average weighted trading price for the past 12 months.
- The value of the company's net assets, divided by the number of shares in issue, as per the latest financial statements.
- The value of the shares resulting from an expert assessment complying with the international evaluation standards.

Voluntary takeover offers

The price has to be at least equal to the highest of:

- The highest price paid by the bidder, or by those acting in concert with the bidder, during the past 12 months.

- The average weighted trading price for the past 12 months.
- The price resulting from dividing the value of the company's net assets by the number of shares in issue, as per the latest financial statements of the company.

Purchase offers

The price must at least equal the higher of:

- The highest price paid by the bidder, or by those acting in concert with the bidder, during the past 12 months.
- The weighted average trading price of the past 12 months.

Where none of the above alternatives apply, the price under the purchase offers must be the net assets per share, as per the last financial statements of the target.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

There are no restrictions or requirements as to the consideration that a foreign bidder can offer to shareholders of a Romanian target.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

Under certain conditions, the majority shareholder can squeeze out minority shareholders (*Capital Market Law*). After conducting a takeover or purchase offer addressed to all shareholders for all their holdings, the majority shareholder can compel the minority shareholders to sell their shares against a fair price where the majority shareholder either has:

- Exceeded 95% of the share capital and voting rights in the target.
- Acquired within the takeover or purchase offer more than 90% of the targeted shares and voting rights.

The price is that of a voluntary takeover offer, following which the majority shareholder has acquired more than 90% of the envisaged shares, if such an offer is conducted three months before the squeeze-out procedure. Where this is not applicable, the price is determined by an independent expert.

This squeeze-out right of the majority shareholder is mirrored by the right to sell-out of the minority shareholders, applicable if after conducting a takeover or purchase offer addressed to all shareholders for all their holdings, the majority shareholder has exceeded 95% of the share capital and voting rights in the target. The minority shareholders can in this case compel the majority shareholder to purchase their shares against a fair price (to be determined in the same way as in a squeeze-out).

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

The bidder and those acting in concert with the bidder can only announce another takeover offer for the same target after one year has elapsed since the first offer was closed. No time limit is provided for regular purchase offers.

22. What action is required to de-list a company?

The companies admitted to trading on a regulated market may be de-listed (withdrawn from trading) in the following cases:

- Following the squeeze-out or sell-out procedure.
- Following the resolution of an extraordinary general meeting of shareholders where, within the last 12 months before the publication of the convening notice for such a meeting, no more than 50 transactions (except for intra-group transactions) and no more than 1% of the total number of company's shares have been traded on the regulated market. The shareholders dissenting with the de-listing decision have the right to request withdrawal from the company and receive the counter value of their shares as valued by an expert.
- Following a company merger or spin-off that would result in the shareholders' receipt of shares in a company not admitted to public trading (that is, integration by merger of the listed company into a non-listed company, and so total spin-off of the listed company into two non-listed companies). Here, the minority shareholders that dissent to the shareholders' meeting decision on the merger or spin-off process have the right to withdraw from the company and receive the counter value of their shares as valued by an expert.
- On the initiative of the BSE, as a sanction for various breaches of market rules including those of certain reporting obligations and of the engagement entered with the BSE, the BSE deems that an orderly market for the respective shares can no longer be maintained.
- Following an NSC decision where it deems that due to special circumstances the market in the respective shares can no longer be orderly maintained.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Romanian law does not provide for any defence alternatives to hostile bids. Practice and doctrine on this matter are also rather scarce. Since the Romanian capital markets legislation is similar to the EU one, presumably all tactics allowed under EU legislation would also apply to the Romanian capital market.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

Capital gain tax (CGT)

CGT must be paid on a share transfer by the person transferring the shares.

Where the seller is a foreign entity, besides the requirements of the Fiscal Code, the provisions of the relevant double taxation treaty (if any) should also be considered to determine the place of taxation, the taxable base and the tax rate.

Where the place of taxation is in Romania, the shareholders (local or foreign) of companies incorporated in Romania must pay tax on the gain received on the sale of their shares as follows:

- The taxable base is the positive difference between the sale price and the acquisition price, less related costs.
- The tax rate for individuals is CGT of 1% for a shareholding of more than 365 days and 16% for a shareholding of less than 365 days.
- The tax rate for legal entities is profit tax of 16% applicable to the aggregate yearly profit.

NSC and BSE fees

In the case of shares' trading, in addition to the shares' price, certain NSC and BSE trading fees are payable.

The fee payable by the bidder to the NSC under the takeover offer is up to 2% of the offer's value.

The simple purchase offer is also subject to a similar tax, representing up to 1.5% of the offer value, payable by the bidder.

Tax avoidance

The payment of CGT or of the NSC fee cannot be avoided under the current legal framework. In the case of CGT, the payable amount can be reduced only under a relevant double taxation treaty.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

Merger control

Under Romanian Competition Law no. 21/1990, any acquisitions of shares, either performed in Romania or abroad but having effects on the Romanian market, need the prior clearance of the

THE REGULATORY AUTHORITIES

National Securities Commission (NSC)

Head. Gabriela-Victoria Anghelache (President)

Address. 2 Foisorului Street
3rd District
Bucharest
Romania
T +40 21 326 68 74
F +40 21 326 68 48/49
E cnvm@cnvmr.ro
relatii publice@cnvmr.ro
W www.cnvmr.ro

Main area of responsibility. The NSC regulates and supervises capital market operations and players and implements all capital market regulations (Romanian and EU). In connection with takeover operations, the NSC:

- Approves the preliminary offer announcements, the offer document and the advertising materials.
- Supervises the compliance of shareholders and investors with the takeover regulations, endorses certain types of operations that are otherwise restricted (such as the direct transfer of shares outside the DVP mechanism).
- Can issue formal opinions on the interpretation and implementation of capital markets' laws and regulations.
- In a merger, ensures the reporting obligations are observed in relation to the merger plan and related corporate resolutions.

Obtaining information. By phone or by e-mail, to the above contact details. Under law, a response must be given within 30 days. Certain official requests may be subject to fees.

Bucharest Stock Exchange

Head. Stere Farmache (Chairman, General Manager)

Address. 34 - 36 Carol I Boulevard 020922
14th Floor
Bucharest 2
Romania
T +40 21 307 95 00
F +40 21 307 95 19
E bvb@bvb.ro
W www.bvb.ro

Main area of responsibility. Regulation and supervision of the regulated market is managed by the Bucharest Stock Exchange.

Obtaining information. Preferably by e-mail, to the above contact details.

Competition Council

Head. Gheorghe Oprescu (Chairman) and Alexe Gavrilă (Vice-chairman)

Address. 1 Piata Presei Libere, corp D1
013701
Bucharest 1
OP 33
Romania
T +40 800 800 267/+40 21 405 44 29
F +40 405 44 02
E presa@consiliulconcurrentei.ro
W www.competition.ro

Main area of responsibility. The Competition Council regulates and supervises competition on the Romanian market.

Obtaining information. Preferably by phone to the above contact details.

Romanian Competition Council to the extent that the transaction does not have a European Community dimension, subject to certain turnover thresholds being met.

In order for such a transaction to get clearance from the Romanian competition authority, the following conditions must be cumulatively met for the fiscal year before the transaction:

- The parties' combined worldwide turnover must exceed EUR10 million (about US\$15 million).
- At least two parties involved in the transaction must have each achieved a Romanian turnover exceeding EUR4 million (about US\$6 million).

For the purpose of the threshold test, the Romanian turnover must be calculated by considering all sales in Romania (irrespective of the relevant product market on which the concentration takes place), after deducting exports value and excises due to

the state budget (if any), achieved by each party involved in the transaction and the group of companies it belongs to.

Regulated entities

If the target is an entity subject to special regulation and/or supervision requirements, such as credit institutions, financial non-banking institutions, investment services companies and insurance companies, the changes in the shareholding structure (mainly for participations exceeding 10%) is subject to prior approval or notification of the relevant regulatory or supervisory entity (for example, the National Bank of Romania, the NSC and the Insurance Supervisory Commission). In this case, the transaction can only continue when the prior approval of the regulatory body is obtained, in certain cases (respectively), if the regulatory entity does not object to the transaction within a certain prescribed term after the submission of the required notification.

Timetable changes

Until the Competition Council makes a decision on the transaction (either unconditionally or conditionally approving the operation or refusing it) the acquirer is expressly prohibited from implementing the transaction. Consequently, the acquirer can only take those measures that are not irreversible and do not decisively change the market structure and the business policy of the acquired company. Despite the above, the development of a public offer must not be hindered by the prior clearance of the Competition Council, to the extent that the acquirer must not exercise the voting rights obtained following the successful bid, especially to appoint the members of the board and management bodies or to supervise and control the acquired company in order to directly or indirectly influence the target's behaviour on the market, but only to safeguard the value of its investment.

Obtaining clearance from the Competition Council before implementation of a public offer can result in significant delays of the bidding process, usually between eight and ten weeks, to consider the specifics of each case, or up to approximately six months if an in-depth investigation is opened by the Competition Council.

With specially regulated entities, if the requirement of prior endorsement or notification of the change in shareholding applies, the takeover procedure would also be delayed for the duration of obtaining the prior endorsement, or until the applicable time-frame within which (in certain cases) the regulatory entity can oppose the transaction after the notification has elapsed.

26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

No restrictions are provided in respect of foreign shareholding in Romanian public companies. However, if the relevant company is a specially regulated entity (see *Question 25*), there are certain mandatory requirements that must be observed by the foreign shareholders; in particular regarding the financial status and the information to be provided to the competent supervision authorities.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

Under Romanian law, there are no foreign exchange requirements affecting or limiting the repatriation of profits obtained in Romania.

Limitations to capital operations, such as on the use of current and deposit accounts (opened by non-residents in Romania or by Romanian residents abroad) and on the physical import and export of payment instruments or securities can only be imposed by the National Bank of Romania. The limitations must be a safeguarding measure, where there is significant instability on the foreign

exchange market causing severe concerns for monetary policy and foreign exchange rates, resulting in material variations of internal liquidity and material distortions of the balance of payments.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

Securities issued by the bidder or the seller(s)

There are no special disclosure requirements or restrictions on the trade of securities of the parties in the takeover bid (or their associates).

Target shares

The following requirements are applicable to any transaction involving the shares of the target after the announcement of the takeover offer:

- The bidder, the persons acting in concert with the bidder, and the intermediary of the takeover offer cannot perform any operations on the capital market in connection with the targeted shares during the period between the submission of the offer documentation and the date the takeover offer is initiated.
- If the bidder or any of the parties acting in concert with it nevertheless acquire on the market, during the offer and outside it, shares in the target at a price higher than the offer price, the latter must be subsequently amended to increase it at least to the level of the price paid outside the offer. This price amendment is subject to the NSC's approval, just like any other amendment to the offer document.
- In the case of competing offers, the NSC suspends from trading the shares of the target between the competing offers' auction date and the publication date of the announcement of the winning offer (the one who bids the highest price). Share trade therefore cannot be performed during this period.

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

The capital market legislation is undergoing a complex process of alignment with the relevant community law and practice. Even though the implementation deadline was 15 December 2007, Directive 2005/56/EC on cross-border mergers of limited liability companies has not yet been implemented into Romanian law.

Our Extensive Expertise in Mergers & Acquisitions

Țuca Zbârcea & Asociații advises companies on making acquisitions, merging, being acquired, or fending off hostile takeovers, using a variety of transaction formats – leveraged buyouts, management buyouts, recapitalizations, minority investments, divisional spin-offs – and covering issues related to bid and tender preparation and mergers and acquisition finance. Our lawyers' expertise in corporate, finance, competition and tax practices brings depth and breadth to every merger, acquisition and joint venture transaction.

The process of turning Romania's centralized economy from the communist era into a free market economy involved the privatization of thousands of companies owned by the state as well as an infusion of private foreign and – to a lesser extent – domestic capital in important fields of activities. Our lawyers have participated in the privatization of major national companies by advising and representing international and local investors, as well as the privatization authorities in the preparation, negotiation and finalization of the privatization process. The clients advised by our lawyers were part of strategic international alliances or consortia, working either in cooperation with bankers, financial institutions, accountants, and international lawyers, or sometimes independently.

Scope of Practice

Privatization: preparing Presentation Files and Tender Books on behalf of the vendor; conducting extensive due diligence surveys on behalf of the investor; negotiating agreements in both share and asset sale-purchase agreements involving a complex range of matters, from conditions precedent to investment undertakings and fiscal incentives; assisting in pre-closing and post-privatization issues, including participating in the drafting and amendment of various individual or regulatory enactments implementing measures related to privatization; performing extensive due diligence process; drafting and negotiating all transactional documentation, including shareholders-related agreements; advising on post-privatization issues.

Mergers & Acquisitions: assisting in structuring complex merger and acquisition transactions; preparation of preliminary and final offers and related documentation; assisting during bidding procedures and/or direct negotiations; providing legal services, including legal due-diligence, in order to assess key issues regarding the target (corporate issues, real-estate, commercial contacts, financial agreements, authorization and licensing, competition compliance, IP protection compliance); assessing key issues related to the implementation of the transaction (incorporation requirements, shareholders' agreements, re-authorization, tax-related issues); preparation and negotiation of the transaction documents and related documents; conducting meetings with the relevant Romanian authorities, proceeding to duly registration and publication.

For further information, contact:

Gabriel Zbârcea

Managing Partner

Direct line: (40-21) 204 88 92

E-mail: gabriel.zbarcea@tuca.ro

Ștefan Damian

Deputy Managing Partner

Direct line: (40-21) 204 88 93

E-mail: stefan.damian@tuca.ro

Ciprian Dragomir

Partner

Direct line: (40-21) 204 88 98

E-mail: ciprian.dragomir@tuca.ro

