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Private mergers and acquisitions in Romania: overview

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Q&A guide to private mergers and acquisitions law in Romania.

The Q&A gives a high level overview of key issues including corporate entities and acquisition methods, preliminary agreements, main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, competition and environmental issues.

To compare answers across multiple jurisdictions, visit the *Private mergers and acquisitions Country Q&A tool*.

This Q&A is part of the global guide to private acquisitions law. For a full list of jurisdictional Q&As visit For a full list of jurisdictional Q&As visit *www.practicallaw.com/privateacquisitions-guide*.

Marian Dinu, Diana-Elena Ristici, Oana Dutu-Buzura, Elena Monica Preotescu and Tudor Nedelea, DLA Piper Dinu SCA

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Corporate entities and acquisition methods

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1. What are the main corporate entities commonly involved in private acquisitions?

There are several legal structures available for investors wishing to acquire companies in Romania, but the typical forms chosen are:

- Joint stock companies (*societăţi pe acţiuni*) (SAs).
- Limited liability companies (*societăţi cu răspundere limitată*) (SRLs).

Although the general rule is that a company's legal form can be freely chosen by its founders, certain business activities can only be conducted by companies with a certain legal form (for example, banking activities can be carried out only by SAs). Similarly, only shares of SAs can be sold to the public and listed on a stock exchange, and only SAs can issue bonds.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

Shares in an SA are in principle freely transferable, unless the company's articles of association provide otherwise. Bearer shares are transferred by handing them over to the transferee. Registered shares in physical (paper) form are transferred by registration in the shareholders' register and written confirmation of the transfer on the share deed itself countersigned by both the transferor and the transferee or their representatives. However, most commonly, shares are issued in registered dematerialised form and are transferred through registration in the shareholders' register countersigned by both the transferor and the transferee.

The transfer of shares in an SRL to third parties requires the approval of shareholders holding at least three-quarters of the company's share capital, and must be registered in the shareholders' registers kept by the company and the competent trade register. The resolution approving the transfer must be filed with the trade register and published in the *Official Gazette*. Once the resolution approving the transfer of shares is published in the *Official Gazette*, the creditors or any other interested parties can file opposition within a 30-day period. The transfer of shares is effective either:

- When the 30-day period has expired.
- If an opposition is filed, when the judge's decision rejecting the opposition is communicated.

The articles of association and any shareholders' agreement must be checked for other restrictions on share transfers.

Foreign ownership restrictions

As a general rule, there are no regulations or restrictions applicable to foreign investments. However, depending on the market concerned there may be some regulatory restrictions.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

Private companies are most commonly acquired through share deals. Over the past ten years, business transfer (asset) deals have become increasingly common. Mergers, spin-offs and re-organisations are also acquisition techniques but are less commonly used.

Share purchases: advantages/asset purchases: disadvantages

One advantage of a share purchase is the simplicity of the transfer. The purchaser indirectly acquires the business by acquiring the entity operating the business, and the purchaser does not have to identify and transfer all relevant assets and obtain third party consents. In an asset deal, legal title to each of the separate assets which constitute the business must be identified and separately transferred under a specific form of transfer. For instance, real estate assets require a notarial deed while the transfer of contracts requires the consent of the parties (customers or suppliers). In addition, in most cases, new permits and licences must be obtained by the acquirer. Therefore, an asset deal may be more appropriate for companies that have relatively limited operations or have entered into a limited number of agreements, or where only specific assets are intended to be transferred.

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Except for certain industries where a change of control requires the approval of the relevant regulatory body, licences are also normally unaffected in a share deal. If land is part of the transferred assets, a separate sale-purchase agreement must be executed in front of a public notary. This potentially involves high costs and taxes to be paid by the purchaser. In addition, an asset deal may require a number of individual registrations or other formalities, such as registration with the Land Book for a transfer of land and buildings, or registration with the State Office for Patents and Trademarks for transfer of trade marks.

A share purchase has no legal effect on employment contracts, which remain with the target company. However, if an asset transaction qualifies as a transfer of business under the legislation for the protection of employees' rights in the case of a transfer of undertaking (TUPE), a number of legal requirements must be observed that cannot be avoided by contract (*see Questions 31 and 32*).

A transfer of shares is a transaction outside the scope of VAT, and no stamp duties apply. Some fees are payable on registration of the change in the shareholding structure with the Romanian Trade Registry, but they are inconsequential.

However, a transfer of individual assets does qualify as a taxable operation under the Romanian Fiscal Code, subject to 20% VAT if no specific exemption can be claimed.

Share purchases: disadvantages/asset purchases: advantages

A share purchase is not suitable for a purchaser who wants to acquire only part of a business, or is concerned about un-quantified, historical or potential liabilities. For example, in a purchase of shares, the purchaser also takes over the tax history of the company (including fiscal losses, tax litigation, and so on) and may be exposed to potential challenges raised by the tax authorities in the future and even to the potential assessment of additional tax liabilities, and interest and penalties for late payment.

However, an asset purchase allows a purchaser the flexibility to choose the assets to be acquired and the liabilities to be assumed, provided that this is not done so as to harm creditors' rights.

In asset transactions, it is important that the seller remains viable so as to avoid entering an insolvency proceeding shortly after the closing of the transaction. If this cannot be assured, the perceived advantages of a business transfer (as opposed to a share deal) may prove illusory.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Sales of companies by auction are less common than non-auction sales. Usually, the higher the deal value, the more likely the sale is to be organised through an auction.

In general, negotiated acquisitions are not regulated by specific legal provisions. In an auction, the procedure is commonly provided in a process letter issued by the seller and is typically managed by corporate finance advisory firms. The procedure often involves the following steps:

- An information memorandum to solicit interest.
- A first phase indicative bid process.
- A second phase due diligence, with full data room access for those who qualify from phase one.
- Final binding bids and documents negotiations (sometimes with multiple bidders).

Preliminary agreements

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

In a bilateral transaction, a letter of intent (or heads of terms) may be negotiated, which broadly sets out the main contractual terms of the intended sale. These terms typically include:

- The purchase price and any adjustments to the purchase price.
- Conditions to closing/completion.

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- Types of warranties that may be given.
- Non-compete covenants that may be given.
- Exclusivity (if not already addressed in a separate agreement, which is typical).
- Confidentiality (if not already addressed in a separate agreement).

Letters of intent are not usually intended to be legally binding, but rather serve as a framework for the negotiation process. It is recommended that the non-binding nature of the letter of intent is clearly stipulated. If some provisions are intended to be binding (for example, confidentiality undertakings), and others are not, it is important to identify the relevant provisions accordingly.

Exclusivity agreements

Exclusivity agreements allow a buyer the right to negotiate exclusively for a period of time with the seller in relation to the acquisition of the target company.

Non-disclosure agreements

A non-disclosure agreement (also known as a confidentiality agreement) is commonly entered into at the outset of a transaction. It provides that the prospective buyer will only use confidential information for the purpose of evaluating the acquisition and that both parties will keep negotiations secret. Non-disclosure agreements are intended to be legally binding.

Asset sales

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

As a rule, a transfer of business allows the transfer of only such liabilities as are specifically assumed by the purchaser. However, the transfer of business does not

prevent the purchaser or other persons being held liable for other liabilities in certain circumstances, such as:

- Where there are employee-related liabilities (*see Questions 31 to 33*).
- Where environmental damage has been caused by several operators/authors, and they are jointly liable. If damage was caused by simultaneous or successive actions of several persons and it is impossible to establish with certainty who was responsible for the damage, the general principle of the civil liability for tort applies under which all the persons are held jointly liable for the damage.
- Where there has been a breach of the competition legislation. In principle, a fine or the sanction applied in relation to a business transfer follows the business that was the cause of the sanctions. However, in practice, the legal entity which was the owner of the business at the time the relevant infringement occurred would be pursued by the Competition Council first.

Other assets and liabilities (including tax liabilities) do not automatically transfer. They must be specified in the asset sale agreement as an asset that is to be transferred or a liability that is to be assumed, subject to any required consents or approvals.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

As a general rule, creditors do not need to be notified or give consent to the transfer of rights in an asset sale, unless this has been specifically agreed or required through other documents (such as security agreements to which the seller is a party). A notification is required only to render the transfer enforceable towards the other contractual party. However, if the sale causes (or is shortly followed by) the seller's insolvency, its creditors can challenge the transfer.

Rights and obligations under an agreement can be transferred to a third party, provided the other contractual party consents.

Share sales

8. What common conditions precedent are typically included in a share sale agreement?

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Conditions precedent commonly included in a share sale agreement are:

- Shareholders' approval (typically required in SRLs).
- Merger control clearance.
- Any relevant industry-specific consents.
- Any relevant third party consents, for example consent from financing banks.
- Termination of related-party agreements.

Seller's title and liability

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

Under the Civil Code, the seller is liable to the purchaser for the asset sold. This liability is based on two categories of legal warranties:

- A warranty against eviction (title warranty).
- A warranty for hidden defects.

Warranty against eviction

The warranty against eviction requires the seller to protect the purchaser against the total or partial loss of the asset due to causes existing before the transaction.

The parties can agree in writing to enhance, restrict or even exclude the seller's liability for eviction. However, liability for eviction by the seller or for causes known by the seller at the moment of the sale, but not communicated to the purchaser, cannot be excluded or limited.

Warranty against hidden defects

The seller is legally obliged to provide the purchaser with a warranty against hidden defects if:

- The asset cannot be used for its intended purpose.
- Its use is reduced to the extent that the purchaser would not have bought it or would have paid a lower price had it known of the defects.

The limitation of or exemption from such liability is valid only if the seller acted in good faith (that is, did not know of the existence of such defects). The legal warranty against hidden defects may be of limited value in share sales, as it would be construed as applying to the shares themselves, rather than the underlying business of the company being acquired. This is why, typically, share sale agreements contain extensive warranties relating to the business itself.

Within the limits established by law, the parties may agree to a higher standard by including specific representations and warranties. Similarly, a lower standard may be agreed by limiting the seller's liability, in principle through disclosures.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Misrepresentation may qualify as fraud (*înşelăciune*) (a criminal offence), if the seller intentionally misrepresented certain facts with a view to obtaining an unjust profit and, as a result of such misrepresentation, damages were incurred.

Misrepresentation can also lead to civil law actions. If the buyer's mistake about significant facts was fraudulently caused by the seller (including by the seller's failure to disclose a fact that the seller knew would affect the buyer's investment decision), then the buyer is entitled to rescind the sale and purchase contract, and/or request damages in court.

Advisers

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In theory, the seller's advisers can be held liable for their role in perpetrating a misrepresentation in the context of a mergers and acquisitions transaction. A claim would be based on the general rules of liability for damages.

Main documents

11. What are the main documents in an acquisition and who generally prepares the first draft?

The main documents in a share acquisition are:

- Sale and purchase agreement.
- Disclosure letter (prepared by the seller).

In an asset sale the main document is the business transfer/asset sale agreement, which has several annexes, including:

- List of contracts.
- Employees.
- Assets.
- IP rights transferred.
- Notice form for contractual partners requesting approval of the transfer of contracts.

In a negotiated transaction, it is common for the buyer to prepare the first draft of the sale and purchase agreement. In an auction procedure, it is usually the seller who prepares the first draft, which can be commented by the bidders.

Acquisition agreements

12. What are the main substantive clauses in an acquisition agreement?

Typical provisions in a share sale and purchase agreement include:

- Definitions and interpretation.
- A description of the subject matter of the transaction.
- Purchase price adjustment mechanisms, earn-out provisions.
- Conduct of the business between signing and closing.
- Conditions precedent.
- Closing mechanics.
- Representations and warranties.
- Seller's liability and limitations on the seller's liabilities.
- Indemnities.
- Protective covenants (such as non-compete and non-solicitation).
- Confidentiality.
- Boilerplate clauses relating to costs, notices, assignments, third party rights and entire agreement.
- Governing law and jurisdiction clauses.

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An asset purchase agreement normally also includes a description of the assets being acquired and specifies the liabilities being assumed by the buyer.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

Foreign governing law is permissible, subject to mandatory provisions of Romanian law. For example, the procedure for the transfer of shares must be governed by Romanian law.

Warranties and indemnities

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Other than on vendor auction sales, extensive warranties are usually given to the purchaser in an acquisition agreement. However, their precise extent is a matter for negotiation in each case and depends on the nature of the business of the target company and the respective bargaining positions of the parties.

In a share sale, warranties typically cover:

- The seller's title to the shares and its ability to transfer them free of any encumbrances or third party interests to the purchaser.
- Matters relating to the business of the target company, for example:
  - that the target company owns its assets;
  - that creditors have been paid on time;
  - that the assets are in good working order and appropriately insured;
  - stock levels and the quality of stock;
  - employment of the workforce;
  - debtors;
  - comfort that there are no disputes or litigation involving the target company;
  - that the target company has all necessary licences and complies with all relevant laws and regulations (particularly where large liabilities might arise such as in respect of environmental risks and competition issues);
  - the state of the books and records.
- Tax liabilities of the target company. Customarily, the purchaser also requires a tax covenant that provides a broad indemnity for tax payable by the target company in previous years.

Warranties on an asset purchase are generally less extensive than on a share purchase since fewer liabilities would normally transfer. Therefore, warranties relating to liabilities (such as those relating to historical trading and tax) are much reduced. Similarly, warranties relating to share capital and funding are irrelevant.

15. What are the main limitations on warranties?

Limitations on warranties

Limitations on warranties typically include:

- An overall cap (which tends to be 100% of the consideration in relation to title warranties, with a lower percentage applying to claims under other warranties).

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- Deductible/basket.
- *De minimis*.
- Time limits (see *Question 16*).

Qualifying warranties by disclosure

Warranties are often qualified by a disclosure letter stating that they are subject to matters (fully and fairly) disclosed in the disclosure letter.

The contents of a data room are also often deemed as disclosed (subject to satisfying an agreed disclosure test) as part of the disclosure process.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

The purchaser can seek indemnification from the seller in case of a breach of a warranty (subject to the applicable legal and contractual time limitations for bringing a claim). Alternatively, depending on the nature of the breach and the wording of the purchase agreement, the buyer may also be entitled to terminate the purchase agreement and unwind the transaction.

Time limits for claims under warranties

A distinction is made between:

- Warranty periods, during which the purchaser must notify the claim to the seller.
- The limitation period, which is the period of time during which the purchaser must file a claim in court.

The warranty period agreed in the acquisition agreement is usually around two years for non-tax claims and five to six years for competition and tax claims, while no such limitations are included for warranties regarding title to shares.

The general statute of limitation for claims is three years, but the parties may agree to decrease or increase the periods provided by the law, subject to certain limitations.

Consideration and acquisition financing

17. What forms of consideration are commonly offered in a share sale?

The typical form of consideration is cash. There may be a cash retention or escrow for warranty claims. If shares are contributed to the share capital of another entity, the consideration is in the form of shares issued in that entity. Such cases are generally rare, and are primarily intra-group reorganisations.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

The applicable legal framework varies depending on whether the offering qualifies as a public offering. A public offering is a communication to persons in any form and by any means, presenting sufficient information on the terms of the offering and the securities to be offered, to enable an investor to decide to sell, purchase or subscribe to the securities (*Law No. 297/2004 regarding the capital market*).

Consents and approvals

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If an offering of securities qualifies as a public offering, the issuer must draw up a prospectus. The prospectus must be approved by the Financial Supervisory Authority before it can be made public.

Requirement for a prospectus

A public offering for sale involves the publishing of a prospectus approved by the Financial Supervisory Authority. Different exemptions from the need to prepare and publish a prospectus apply. For example, an offering of shares to less than 150 persons or solely to "qualified investors" does not require a prospectus.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

The main legal provisions concerning financial assistance under Romanian law are set out by Article 106 of Romanian Company Law No. 31/1990 (Company Law), which provides that a company cannot grant advance payments or loans or issue any guarantee in favour of a third party that subscribes for or acquires its shares.

Exemptions

Exceptions include:

- Transactions concluded by credit institutions and other financial institutions in the normal course of their business.
- Acquisitions of shares by or for distribution to the employees.

In both cases, such transactions must not lead to a decrease in the net assets of the company below the cumulated value of the subscribed share capital and the non-distributable reserves.

The prohibition on financial assistance is set out in the chapter of the Romanian Company Law regulating SAs. It should not therefore apply to SRLs, because such prohibitions should be restrictively construed under the general interpretation rules. However, there have been decisions in the Romanian courts in which certain other rules specifically applicable to SAs have been applied to SRLs based on similarity grounds. Consequently, the application of the financial assistance prohibition to limited liability companies remains uncertain.

Signing and closing

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

If there is a timing gap between signing and closing, due to the need to obtain fulfilment of certain conditions precedent, the sale and purchase agreement and the disclosure letter are signed on the signing date. Other documents are usually in agreed form and attached as drafts to the sale and purchase agreement.

Closing

The actual procedure for the transfer of shares depends on whether the target company is an SRL or an SA (*see Question 2*).

In an SRL:

- The seller must produce evidence of:
  - the publication in the *Official Gazette* of the resolution of the shareholder(s) of the target company approving, in principle, the transfer of the shares; and
  - no opposition claim having been filed in relation to the transfer within the 30-day opposition period, or, where an opposition has been filed, evidence that it has been withdrawn or rejected by a final and binding court decision.

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- A separate short form transfer agreement is usually produced for registration purposes.
- The transfer of the shares to the purchaser must be registered in the shareholders' register maintained by the target company. The entry recording the transfer must be signed by the seller and the purchaser.

In an SA:

- Bearer shares are transferred by handing them over to the purchaser.
- Registered shares in physical form are transferred by registration in the shareholders' register and written confirmation of the transfer on the share deed itself countersigned by both the seller and the purchaser or their representatives.
- Registered shares in dematerialised form are transferred through registration in the shareholders' register countersigned by both the seller and the purchaser.

In addition, the following documents are usually produced/executed at closing:

- Evidence that the conditions precedent were fulfilled, such as any third party waivers or consents in relation to the transfer of shares.
- Resignation letters of former directors and appointments of new directors.
- Corporate resolutions approving the transaction.
- Revised or new articles of association.

In an asset sale, the following are also typically produced/executed at closing:

- The formal approval of the transaction. In SAs, if the value of the assets being transferred exceeds half of the book value of all the assets of the company, the transfer must be approved by the extraordinary general assembly of shareholders.
- Separate agreements that transfer rights in real-estate must be executed in notarised form.
- Assignment of business contracts from the seller to the purchaser. If liabilities under the contract are to be transferred, the other contracting party/parties must also consent to the assignment.
- Evidence of release and discharge of any security over the relevant assets.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

Pre-signing formalities: powers of attorney

A power of attorney governed by Romanian law must be in the equivalent form to the document(s) the attorney will execute. For example, when a power of attorney is issued for the execution of a Romanian notarial deed, the power of attorney must itself be in the form of a notarial deed. When it will be relied on to sign a contract in private form (only), it is sufficient for the power of attorney to be in private form.

Signing formalities

The validity of a contract is not subject to execution in a specific form, unless such a form is required by law. Some contracts can be concluded only in written form while others must be executed in notarised form.

22. What are the formalities for the execution of documents by foreign companies?

The same requirements apply for domestic and foreign companies. Foreign companies execute documents in accordance with their own charter and laws.

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When a power of attorney is relied on to sign a notarial deed governed by Romanian law, it must also be notarised and, depending on the jurisdiction in which it is notarised, legalised/apostilled. The same applies if the power of attorney/other evidence of authority for a foreign entity must be filed with a Romanian public authority.

23. Are digital signatures binding and enforceable as evidence of execution?

Law No. 455/2001 on electronic signatures sets out the legal framework for electronic signatures and documents in electronic format, and the conditions for the supply of electronic signature certification services. Documents having a certified extended electronic signature attached have the same legal force as hand-signed documents. However, it is uncommon for certified electronic signatures to be used in private M&A transactions.

24. What formalities are required to transfer title to shares in a private limited company?

See *Question 2*.

Tax

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

There is no stamp duty or other transfer tax payable on the transfer of shares. Notarial fees and registration fees are payable on a transfer of real estate properties. These typically amount to approximately 1% of the purchase price. It is market practice for the purchaser to pay such fees, although the parties can agree to share them.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Not applicable. See *Question 25*.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

From a corporate tax perspective, the gains obtained by a legal entity from a transfer of shares are generally subject to 16% corporate income tax (CIT) at the level of the transferor.

However, the Romanian Fiscal Code provides that the revenues derived from a sale of shares held in a Romanian entity or a non-resident entity from a country with which Romania has in place a double tax treaty may qualify as non-taxable at the level of the seller if, at the moment of the sale, the seller holds for an interrupted period of one year a minimum of 10% of the shares of the entity being sold.

According to the new Fiscal Code approved through Law 227/2015, starting 1 January 2016, Romanian individuals who transfer shares must declare and pay the CIT to the competent tax authority as beneficiaries of income (CIT will not be withheld by the payer of the income, as it was required before 1 January 2016). The deadline for declaring the gain obtained by the individual is 25 May of the year following the one in which the transaction took place.

Asset sale

A transfer of assets qualifies as a taxable transaction from a CIT perspective, subject to 16% CIT at the level of the seller. The income derived from the sale is included in the taxable basis corresponding to the fiscal period when the transaction took place.

Non-resident companies deriving income from real estate properties located in Romania must compute, declare and pay tax on gains derived from such a transaction. Non-residents can appoint a tax representative or empowered person to fulfil this requirement.

Transfers of assets that take place within restructuring operations (such as mergers, spin-offs, transfers of assets and exchanges of shares) between a Romanian company and a company resident in another EU member state are neutral from a tax perspective, provided that certain conditions are met, and generally do not give rise to any CIT obligation.

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28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

Under the Romanian tax legislation, a transfer of shares held by a non-resident in a Romanian entity qualifies as a taxable transaction at local level. Consequently, the gain derived by non-residents from such a transaction is subject to tax at local level at the standard rate of 16%.

The 16% rate applies on the difference between the selling price of the shares and their tax basis or fiscal value (purchase or subscription price). The tax due to the state budget must be computed, declared and paid by the entity deriving the income.

A more favourable tax treatment for such transfers may apply under the provisions of the relevant double tax treaty (DTT) concluded between Romania and the country of residence of the transferor. The Romanian Fiscal Code gives priority to the provisions of an international treaty over the domestic legislation if they are more favorable.

To be able to apply a DTT's more favorable provisions, the entity deriving the income should supply a tax residence certificate, valid at the moment the transaction is concluded, to the Romanian authorities. This document should be kept at the local level by a Romanian resident local entity appointed for this purpose. In addition, the Romanian tax legislation specifically obliges non-residents that sell shares in local entities (and receive favorable tax treatment under a DTT) to supply a copy of the tax residence certificate to the target company whose shares are sold.

Asset sale

No corporate income tax exemption is available for a sale of assets.

29. Are other taxes potentially payable on a share sale and an asset sale?

A transfer of assets is subject to 20% VAT, unless an exemption can be claimed. For example, the supply of old buildings as well as of non-constructible land plots are VAT exempted operations. However, the seller can opt to tax such operations by submitting a written notification to the relevant tax office.

If taxable persons registered for VAT purposes in Romania enter into sale-purchase transactions of new buildings, constructible land plots or old buildings and non-constructible land plots for which the seller has opted for taxation, a reverse charge mechanism for VAT is applicable. This means that VAT is not actually paid, but only shown by the purchaser in the VAT return as both output and input tax.

VAT is not applicable to a bona-fide transfer of business as a going concern (involving the transfer of a stand-alone business unit, with all the assets, liabilities and employees associated with it).

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

There is no tax consolidation or group taxation in Romania. Each entity (even if it is part of a group of companies) must file separate tax returns. Losses incurred by Romanian entities, even if members of a group, cannot be offset against profits made by other group members.

Employees

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset sale

If an asset sale falls within the scope of Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive) as implemented in Romania by Law no. 67/2006 on the protection of employees' rights in the case of transfer of undertaking, unit or parts thereof (ARD Law), at least 30 days before the transaction's implementation, the seller and purchaser must inform the employees' representatives (or employees directly, where there is no representative body) about:

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- The date and reasons of transfer.
- The legal, economic and social consequences of the transfer for the employees.
- The measures envisaged with regard to the employees, if any.
- The employees' terms of employment which apply post-transfer.

In addition, if the seller or buyer envisages certain measures in relation to its own employees resulting from the transaction (for example, changes to working conditions, health and safety measures, and so on), it (alone) must consult its employees' representatives, with a view to reaching an agreement on the prospected measures, at least 30 days before the implementation of the transaction.

Unless otherwise agreed with the employees (for example by means of the applicable collective labour agreement) or set forth in the company's internal documentation, there is no obligation for the seller or buyer to obtain employees' consent for implementing the transaction.

Share sale

As opposed to an asset sale, in a share deal transaction (being outside the ARD Law scope), there is no express legal obligation to inform or consult employees or their representative bodies about the envisaged transaction, unless otherwise agreed with the employees (for example under an applicable collective labour agreement) or required under the company's internal documentation.

However, under the legislation establishing the general framework in connection with employees' information and consultation, the employer must inform/consult employees' representatives, among others, if measures are envisaged that could lead to important changes in the working conditions or structure. Therefore, the information and consultation requirements may be triggered in a share deal if a significant impact on working conditions is envisaged.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Business sale

The ARD Law expressly provides that a business transfer cannot constitute a reason for the seller and/or purchaser to dismiss employees. In addition, in the event of termination of an individual employment contract as a result of substantial changes in the working conditions to the detriment of the employee, the employer is deemed responsible for the termination of the employment relationship.

Share sale

Romanian employment legislation does not provide for express regulations in case of a share sale. Therefore, there are no express legal provisions protecting employees from dismissal either before or after a share sale event.

Transfer on a business sale

Provided that the business sale falls under the ARD Law, all employees attached to the transferred business at the transfer moment are automatically transferred to the seller as of the date of the transfer.

In order to safeguard the employees' rights in the context of the transfer of business, the ARD Law sets out two rules:

- All rights and obligations arising from the individual employment contract and applicable collective labour agreement in force on the transfer date are transferred to the transferee by operation of law.
- The employees employed by the transferred business cannot be dismissed on the grounds of their transfer.

Pensions

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33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

It is not usual for Romanian employers to provide private pension schemes for their employees as an employment benefit. Therefore, although the optional private pensions system has somewhat increased in popularity during the recent years, particularly among employees holding senior positions, this sort of arrangement is not yet a common practice.

Pensions on a business transfer

In the absence of express legal provisions, whether an optional private pension scheme (set up as a benefit for the employees) is automatically transferred to the purchaser should be analysed on a case-by-case basis by looking at the grounds under which the benefit is granted (whether it is an individual employment contract, collective labour agreement or unilateral decision of the seller). In a business transfer context, employees' pension-related benefits may be "acquired rights" under the ARD Law and subject to transfer.

Competition/anti-trust issues

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

Under Competition Law No. 21/1996, any transaction entailing a change of control over another company or over the whole or part of another company's assets is considered an "economic concentration".

An economic concentration may occur, for example, through a:

- Merger.
- Acquisition of a majority stake.
- Acquisition of a minority stake which enables the acquirer to obtain substantial influence on the target.
- A transfer of assets that constitutes a business to which a market turnover can be clearly attributed (such as the goodwill).

If the relevant turnovers for filing a notification with the European Commission are not met, transactions qualifying as economic concentrations are subject to the Romanian Competition Council clearance where both the following turnover thresholds are exceeded:

- The combined worldwide turnover of all the parties involved (or, if they are part of a group of companies, the combined turnover of the groups) in the financial year preceding the acquisition exceeds the RON equivalent of EUR10 million.
- The turnover of each of at least two of the parties involved derived from activities carried out in Romania exceeds the RON equivalent of EUR4 million in the last financial year.

Notification and regulatory authorities

There is no deadline for filing a merger notification to the Romanian Competition Council. However, until the Romanian Competition Council issues a decision on the notification, no implementation of the proposed transaction can take place.

Substantive test

Mergers are assessed based on the SIEC (significant impediment of effective competition) test, based, in particular, on the creation or consolidation of a dominant position.

Environment

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35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

The "polluter pays" principle generally applies in Romania with regards to environmental liabilities.

Romanian law requires parties involved in certain transactions to inform the competent environmental protection authority in writing, within 60 days from signing the document completing the transaction, of the obligations that have been undertaken in relation to environmental protection.

Online resources

Romanian legislation

W www.monitoruloficial.ro

Description. Official website where original language text of legislation can be obtained.

Contributor profiles

Marian Dinu, Country Managing Partner

DLA Piper

T +40 372 155 881
F +40 372 155 810
E marian.dinu@dlapiper.com
W www.dlapiper.com

Professional qualifications. New York State Bar; Romanian Union of Lawyers.

Areas of practice. Mergers and acquisitions; equity and debt offerings; competition/anti-trust.

Non-professional qualifications. Vienna University of Economics, Master of Business Administration (MBA), 2008; Northwestern University School of Law, Chicago, Illinois, USA, Master of Laws (LL.M.) with Honours, 1998; University of Bucharest, Faculty of Law, Romania, LL.B., 1996

Recent transactions

- Advising Publicis, one of the largest communications groups worldwide, in consolidating its presence in Romania through redefining its group structure at the local level. This involves in principle multiple acquisitions (in companies where Publicis does not have a controlling interest or no shareholding interest at all), mergers and consolidations of certain local entities.
- Advising Diaverum, a major supplier of renal healthcare services in a series of acquisitions in Romania.
- Advising the Irish agribusiness group Origin Enterprises in the process of acquiring the Romanian companies Redoxim and Comfert, two separate but simultaneous transactions representing the group's entry in Romania.

Languages. Romanian, English, French

Professional associations/memberships. ICT Committee of the American Chamber of Commerce: Romania; Energy & Environment Committee of the American Chamber of Commerce: Romania.

Publications

-

- Contributing author to the *Anuarul ZF Energie 2015* (Yearly Energy Guide) issued by Ziarul Financiar.
- Contributing author to the *Romanian Energy & Resources Overview 2015* issued by *The Diplomat.*
- Co-author of the article *Crowdfunding - an alternative for start-ups?, Wall-Street.ro*, 2013.
- *Insolvency as a solution*, *Money Express* (leading Romanian business weekly), 16 December 2010.
- Co-author of the chapter on Romania of the treatise *The European Takeover Directive and its Implementation* (*Van Hooghten, Oxford University Press, 2009*).

Diana-Elena Ristici, Senior Professional Support Lawyer

DLA Piper

T +40 372 155 850
F +40 372 155 810
E diana.ristici@dlapiper.com
W www.dlapiper.com

Professional qualifications. Lawyer registered with the Bucharest Bar and National Union of Romanian Bars, 2004.

Areas of practice. Corporate M&A; competition law

Languages. Romanian, English

Publications.

- *Doing Business 2009: Starting a Business, Protecting investors and Closing a Business surveys, The World Bank and International Finance Corporation*, regional contributor.
- Co-author of the chapter on Romania of the treatise *The European Takeover Directive and its Implementation* (*Van Hooghten, Oxford University Press, 2009.*
- BNA's *Eastern Europe Reporter* - "*Foreign Exchange Rules significantly liberalised*".
- Author of several legal articles on various topics such as insolvency, public procurement, competition matters.

Oana Dutu-Buzura, Managing Associate

DLA Piper

T +40 372 155 805
F +40 372 155 810
E oana.dutu-buzura@dlapiper.com
W www.dlapiper.com

Professional qualifications. Lawyer registered with Bucharest Bar and National Union of Romanian Bars, 2008.

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Areas of practice. Corporate M&A; energy, oil and gas.

Languages. Romanian, English, French.

Professional associations/memberships. Member of the International Bar Association, 2015.

Publications. Contributor to *Doing Business 2015: Going Beyond Efficiency*. Washington, DC: World Bank.

Elena Monica Preotescu, Managing Associate

DLA Piper

T +40 372 155 858
F +40 372 155 810
E elena.preotescu@dlapiper.com
W www.dlapiper.com

Professional qualifications. Lawyer registered with the Bucharest Bar and National Union of Romanian Bars, 2005.

Areas of practice. Employment

Languages. Romanian, English

Professional associations/memberships. Member of the International Bar Association, 2015.

Publications.

- *Disciplinary Liability and the Cancelation of the Disciplinary Sanction*, *HR Manager* magazine, June 2015.
- Regional contributor to *Doing Business 2013-2014 reports, The World Bank and International Finance Corporation.*

Tudor Nedelea, Tax Director

DLA Piper

T +40 372 155 815
F +40 372 155 810
E tudor.nedelea@dlapiper.com
W www.dlapiper.com

Professional qualifications. Academy of Economic Studies, Faculty of Finance and Banking, Degree: B.A. in Economics, 2001.

Areas of practice. International tax practice; mergers and acquisitions, business restructuring schemes, various corporate tax consultancy projects and due diligence projects.

Professional associations/memberships. Member of Romanian Chamber of Tax Consultants; Member of the UK Association of Chartered Certified Accountants.

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Resource information

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Series: Country Q&A

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