

Private mergers and acquisitions in Romania: market analysis overview

- **Resource type:** Country Q&A
- **Status:** Law stated as at 01-Mar-2016
- **Jurisdiction:** Romania

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

The Q&A gives a high level overview of key issues including current major trends, private M&A activity, structuring and documentation in transactions, governing law and arbitration, and reform and future market trends.

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

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Market overview

1. What are the current major trends in the private M&A market?

Continuing the trend from 2014, the Romanian M&A market registered the most dynamic evolution in the Central and Eastern European (CEE) region in the first half of 2015. There was an increase of 250% in the value of transactions, from US\$0.6 billion in the first half of 2014 to US\$2.1 billion in the first half of 2015. The banking and financial services sector registered the highest value transaction in the CEE region, that is, the acquisition of UniCredit Tiriac Bank by Unicredit Bank Austria for US\$770 million.

Other large M&A transactions concluded in 2015 include:

- The acquisition by CEFC China Energy Company of 51% of KMG International (former Rompetrol Group), a unit of Kazakhstan's state oil and gas company, which mainly owns refinery and fuel assets in Europe, including Petromidia and Vega refineries and Rompetrol gas stations in Romania. The agreement was part of a package of deals worth a total of US\$4 billion. KMG's estimated value is between US\$500 million and US\$1 billion.
- The acquisition of the entire shareholding in Volksbank Romania from Austria's Volksbank by Banca Transilvania for an estimated value of EUR728 million.
- The acquisition by the Irish building materials producer CRH of a global package of assets from Lafarge and Holcim. The transaction includes the acquisition of Lafarge Romania for an estimated value of EUR400 million.
- The sale to the Ikea Group of 33,600 acres of forest by Harvard University's endowment arm, exiting a foray into Romanian timberland, for an estimated value of EUR125 million.
- The acquisition of the private medical services network Regina Maria by the private equity fund Mid Europa Partners Network for an estimated price of over EUR100 million.
- The acquisition by Carrefour of 100% of Billa Romania from the German retail group Rewe for an estimated price of EUR96 million.

The most attractive sectors for mergers and acquisitions appeared to be the banking and financial services, medical services, IT and communications, real estate and agribusiness sectors.

In the first half of 2015, the majority of transactions involved strategic investors.

2. What has been the level of private M&A activity in the previous year?

There are no reliable data for 2015 yet, although it is estimated that there were 119 transactions and a total deal value exceeding EUR3 billion.

In 2014, Romania experienced the highest growth in the region (171.3%), with the market reaching a value of US\$3.1 billion. In terms of deal volume, 182 transactions were closed during 2014 (*source: EY M& A Barometer 2014 - Central and Southeast Europe*).

Deal structures

3. What are the current trends in the structuring of private M&A transactions?

In Romania, M&A transactions usually take the form of either share or asset sales, with share sales outnumbering asset sales.

Cash deals are the norm. All types of price adjustment mechanisms (including net cash/debt, working capital adjustments and lock-box) are used in Romania. Earn-outs are uncommon and are generally only encountered in transactions where the seller remains involved in the management of the target following completion.

4. What are the current trends in the terms and documentation of private M&A transactions?

In international deals, English is most often used as the language of transactional documents.

Romania tends to follow the English law market practice, with:

- Detailed representations and warranties provided on an indemnity basis.
- Detailed limitations of liability.

However, Romanian courts have rarely ruled on M&A deals governed by Romanian law and the enforceability of clauses common in other jurisdictions has not been tested yet before Romanian judges. As a result, disputes arising in relation to M&A deals are usually referred to international arbitration (*see Question 7*).

De minimis and aggregate thresholds are generally used, but the market is not yet settled on the percentages of these thresholds. Caps on liability under title warranties are usually 100% of the overall consideration, while a lower percentage generally applies for liability under other warranties.

Warranty and indemnity insurance is not generally used in Romania, although both sellers and buyers have recently started to consider it. Escrow arrangements are largely used in practice. In addition, the use of bank guarantees is becoming more frequent.

5. What are the current trends in how private M&A transactions are conducted?

It is usual for purchasers to carry out extensive due diligence processes in order to identify potential issues and evaluate any operational risks. Vendor due diligence reports made available to bidders are fairly uncommon, even in an auction sale process.

While some auction sales have taken place in multiple-bidder scenarios, negotiated sales are much more common.

Cross-border litigation and arbitration

6. Is it common market practice for a share purchase agreement to provide for a foreign governing law and/or jurisdiction? If so, in what circumstances does this occur and which governing law and/or jurisdiction are common choices?

While it is less common than in the past, there are still cases in which share purchase agreements provide for a foreign governing law or jurisdiction, especially in middle-sized or large transactions. In these cases, the law and the courts of one of the parties' nationality are often preferred. English law and courts are the most common choices.

7. Is it market practice for an arbitration provision to be included in private M&A documents? Are arbitration clauses enforceable in your jurisdiction? Do local courts respect the choice of jurisdiction in an arbitration clause?

Arbitration clauses are frequently included in private M&A documents. The preferred choice is often to settle disputes under the rules of

either the:

- International Court of Arbitration attached to the International Chamber of Commerce Paris.
- London Court of International Arbitration.

Domestic arbitration conducted under the rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania has been in constant decline over the last few years.

Arbitration clauses are enforceable under Romanian law and are respected by local courts if they are validly executed (for example, they must be in writing, among other conditions). However, Romanian courts tend to follow a formal approach when assessing the validity of arbitration clauses and can be reluctant in enforcing one-way or hybrid arbitration clauses, which can raise questions as to the consent of the parties to arbitration.

Recent developments and proposals for reform

8. Have there been any significant recent or proposed legal developments affecting the market that could impact on transactions?

Starting from 1 January 2016, Law No. 227/2015 on the Fiscal Code (New Fiscal Code) replaces the Fiscal Code approved by Law No. 571/2003, which was valid until 31 December 2015. The New Fiscal Code, together with the Methodological Norms for applying the Fiscal Code (approved through Government Decision No. 1/2016), introduces significant changes to tax legislation, including regarding transfers of shares.

In addition, a new Fiscal Procedure Code was enacted and entered into force on 1 January 2016.

Before 1 January 2016, non-resident companies that derived revenues from the sale of shares in a company that owned, directly or indirectly, immovable properties located in Romania amounting to a minimum of 50% of the value of the fixed assets registered, were subject to 16% corporate income tax in Romania, applied to the gains derived from the transaction. Starting from 1 January 2016, this provision has been repealed. Non-resident companies must only pay corporate income tax in Romania for the sale of shares held in a Romanian company if, at the moment of the sale, the non-resident company:

- Holds less than 10% of the shares of the Romanian company.
- Does not provide a document proving residency within a state with which Romania has signed a double tax treaty, or no double tax treaty is in place between Romania and the country of residence of the seller.

In addition, starting in 2016, individuals selling shares in a Romanian company have until 25 May of the year following the year of the transaction to calculate and declare to the competent tax authorities the capital gains tax (16%) applied on the gains.

Before 2016, when individuals sold shares held in a Romanian entity to a legal entity (either Romanian or non-resident), the buyer had the obligation to calculate, withhold, declare and pay to the state budget the capital gains tax due for the transaction.

Even if this change eliminates the administrative burden for non-resident entities that acquire shares from Romanian individuals, it may raise practical issues when registering the sale with the Romanian Trade Registry. This is due to the fact that, in practice, the Trade Registry still requests a proof that the capital gains tax was paid in order to register the change of shareholding. This requirement only applies for transactions where the sellers are individual, Romanian residents.

9. What will be the main factors affecting the market next year, and how do you expect the market to develop?

In 2016, M&A activity is expected in the following sectors:

- Technology.
- Telecommunications.
- Healthcare.
- Banking and finance.
- Real estate.
- Fast-moving consumer goods.

Agriculture is also an industry of interest. Projects are encouraged by both EU and Romanian government subsidies available to support investments in the sector.

Regarding due diligence, the authors expect to see a continuing focus on legal compliance, as regulators are becoming more aggressive in enforcing bribery, corruption and money laundering laws.

Romania remains attractive to investors and has the potential to be extremely attractive in the coming years. The attractive fiscal regime, improvements to the transport infrastructure in the coming years, alongside a continued commitment to the privatisation programme and more efficient absorption of EU funds, should encourage investment into Romania and move the market forward.

Contributor profiles

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Professional qualifications. Bucharest Bar, Lawyer, 2000

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

Recent transactions

- Advising the Irish agribusiness group Origin Enterprises in the process of acquiring the Romanian companies Redoxim and Comfort, two separate but simultaneous transactions representing the group's entry in Romania.
- Advising Belgium's leading postal operator in connection with the submission of the non-binding offer in the privatisation process of CN Posta Romana.
- Advising Aryzta, one of the largest frozen bakery companies in the world, on the acquisition of the Fornetti Group, one of the most successful bakery franchises in Europe, a multi-jurisdictional transaction requiring in-depth knowledge of franchise law and intellectual property law besides top quality transactional expertise.
- Advising a leading international financial services company serving unbanked and under-banked consumers on a subsequent acquisition following its market entry in Romania (the transaction has been aborted). The matter required financial regulatory expertise in combination with M&A skills, as a large part of the negotiations was conducted directly by the lawyers on the ground in Romania, while the client was based in the US and was only able to attend a few meetings.

Languages. Romanian, English

Professional associations/memberships. Member of the Bucharest Bar and the National Union of Romanian Bars since 2000; Member of the International Bar Association since 2008.

Publications

- Contributing author to the *Anuarul ZF Energie 2015 (Yearly Energy Guide)* issued by Ziarul Financiar, the most prestigious Romanian business publication.
- Contributing author to the *Romanian Energy & Resources Overview 2015* issued by The Diplomat.
- Contributing author to the Romanian Chapter in *Global Renewables Energy Guide (2010-2013)*, a comprehensive publication providing an overview of the applicable legislation and incentives available to renewable energy companies worldwide (36 jurisdictions).

Diana-Elena Ristici, Senior Professional Support Lawyer

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- *Doing Business 2009: Starting a Business, Protecting investors and Closing a Business surveys, The World Bank and International Finance Corporation* (regional contributor).
- "The European takeover directive and its implementation", New York: Oxford University Press, 2009 (contributing author).
- *BNA's Eastern Europe Reporter - "Foreign Exchange Rules significantly liberalised"*.
- Author of several legal articles on various topics such as insolvency, public procurement and competition matters.

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.** BA in Economics, Academy of Economic Studies, Faculty of Finance and Banking, 2001**Areas of practice.** International tax practice; mergers and acquisitions; business restructuring schemes; corporate tax consultancy projects; due diligence projects.**Recent transactions**

- Advising Boehringer Ingelheim International on a challenge against a tax assessment decision which established additional tax liabilities through additional quarterly claw back contributions regulated by GEO 104/2009, and corresponding interest and late payment penalties. Successfully obtained the suspension of the decision and of the corresponding enforcement procedures by way of a bank guarantee letter.
- Providing an assessment of the permanent establishment risk and VAT implications triggered by a business structure envisaged to be implemented in Romania by one of the largest companies acting in the oil and gas industry.
- Advising a Luxembourg equity fund during the exit phase involving the sale of the Romanian subsidiaries and assignment of the shareholder's loans.

- Assisting an important international insurance company during a tax litigation process with the Romanian Fiscal Authority (ANAF) and in relation to administrative acts issued by ANAF which imposed on the client an obligation to pay a total amount of about EUR1.5 million, representing VAT and related accessories.
- Assisting 100 Turkish companies during the refund process of approximately EUR6 million in VAT paid for acquisitions in Romania.
- Assisting one of the world leading pharmaceutical companies during the VAT refund process to recover almost EUR3 million.

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

Resource information

Resource ID: 1-625-0803

Law stated date: 01-Mar-2016

Products: PLC Cross-border, PLC UK Corporate, PLC UK Finance, PLC UK Law Department, PLC UK Tax, PLC US Corporate & Securities, PLC US Law Department, Private Mergers and Acquisitions Global Guide

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