CHAMBERS
Global Practice Guides

Corporate M&A

Contributed by
Popovici Nitu Stoica & Asociatii

2017

CHAMBERS® AND PARTNERS

ROMANIA

LAW & PRACTICE: p.3

Contributed by Popovici Nitu Stoica & Asociatii

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law & Practice

Contributed by Popovici Nitu Stoica & Asociatii

CONTENTS

Contributed by Popovici Nitu Stoica & Asociatii ***Authors:*** *Silviu Stoica, Alexandru Ambrozie, Ramona Iancu*

Popovici Nitu Stoica & Asociatii is a leading Romanian independent law firm. Established in 1995, as one of the first incorporated partnerships, the firm brings together strong local resources, with exceptional credentials, outstanding records and distinguished careers in law, business and academia. The Bucharest office today has 80 qualified lawyers and tax advisers. The firm has constantly been involved in the majority of the M&A transactions in Romania in such industries as energy, healthcare, retail, IT, financial services, telecoms and real estate. The corporate M&A team includes five partners and 26 fee earners.

Authors

Silviu Stoica heads the competition/antitrust practice. He specialises in competition/antitrust, M&A, privatisation, healthcare and pharmaceuticals, electronic communications, IT and media. He regularly contributes to industry publications.

Alexandru Ambrozie co-heads the banking & finance, capital markets and tax practices. He specialises in banking & finance, capital markets, corporate and commercial law, public procurement and tax law. He has published articles in a range of journals and periodicals.

Ramona Iancu is a senior associate specialising in competition/antitrust, electronic communications, IT and media, M&A, privatisations and corporate and commercial law. She has contributed to industry publications.

1. Trends

1.1 M&A Market

Simply said, acquisition momentum is expected to continue in 2016. Confidence seems to have returned among sellers and investors, so everyone sitting at the negotiation table exhibits enthusiasm and a healthy appetite for doing business. The year 2015 was a record-breaking one in global M&A and we expect this upward trend in terms of overall value and number of deals to continue in 2016. In Central and Eastern Europe, the M&A sector in 2015 was quite similar to 2014, with perhaps some more optimism surrounding dealmakers. Uncertainty would be the word that best describes doing M&A in Central and Eastern Europe, but this is not necessarily bad for everyone, especially when investors' attention might be caught by jurisdictions that have not been at the top of their lists up to now.

1.2 Key Trends

Romania could be said to enjoy the upsides of the volatile regional climate of political and economic uncertainty, with potentially more M&A activity as new investors shift their attention towards Romania. So, local M&A will probably keep a steady ascending pace, considering that Romania has an appealing and varied range of target businesses for sale. And the investors, especially private equity funds that basically sit on 'big money', are welcomed to Romania to put their money to work.

The key phrase when it comes to private equity investors seems to be consolidation via integration. The development and consolidation of existing portfolios by adding new target businesses that can be easily integrated is expected to come to the fore. Expansion of 'already known' businesses rather than exploring new industries seems to be the preferred approach.

The financial and banking sector is also on the right track in regaining investors' trust with a visible NPL clearance policy. Although not fully 'trustworthy' yet, banks are beginning to once more be seen as credible and reliable business partners, having come up with more attractive and diversified credit offers following their continuous efforts to clean up their financials from non-performing loans.

1.3 Key Industries

Technology, media and telecommunications (TMT), energy and natural resources, agribusiness, banking and finance, and healthcare are leading the charts in terms of M&A activity, experiencing steady and healthy economic growth, thus encouraging investors to put their money to work.

In line with Western European developments, the TMT sector 'promises' further consolidation in Central and Eastern European countries. Dealmakers' focus during the past few years on the TMT sector acknowledges the positive results achieved by the European Commission in its sustained efforts towards implementing the long-desired single telecommunications market.

We also expect a lot of activity in the Romanian agribusiness sector. In Romania, agricultural land still has a rather low price compared to other European countries, especially Western Europe, so Romanian land will continue to be on investors' shopping list.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The preferred tools for buying private companies are share and asset deals. In the past few years, and especially following the global economic crisis, mergers, spin-offs and general reorganisations of businesses have been most commonly used as acquisition techniques on a larger scale.

In public M&A transactions, there are two main methods for acquiring a controlling stake. Firstly, a bidder may undertake a voluntary takeover offer addressed to all shareholders for all their shares, for the purpose of acquiring more than 33% of total voting rights. Secondly, a bidder must undertake a mandatory takeover offer when the 33% threshold is crossed by means of methods other than a voluntary takeover offer.

2.2 Primary Regulators

All M&A transactions that exceed certain turnover thresholds are subject to merger control clearance by the Romanian Competition Council (the Council).

For public M&A, the primary regulator is the Financial Supervisory Authority (FSA), which approves the public offer documentation and oversees the process.

Transactions that might raise national security risks are also subject to scrutiny by the Supreme Council of National Defence (SCND).

Other authorities that oversee transactions related to specific sectors include the Insurance Supervisory Commission, which deals with transactions involving insurers, reinsurers or correspondingly authorised brokers; the National Bank of Romania, which is concerned with transactions involving banks and non-banking financial institutions; the National Audio-Visual Council of Romania, for transactions involving companies holding audio-visual or broadcasting licences; and the Regulatory Authority for Energy, for transactions relating to companies acting in the fields of energy and natural gas.

2.3 Restrictions on Foreign Investment

There are no general restrictions on foreign investments in Romania. With healthy economic growth in the past few years and performances at a macroeconomic level, Romania is now able to offer a business environment that is both safe and predictable. The investment-friendly tax policy, plus a stable legal framework relevant for M&A deals together with a healthy regulatory system stand as the best proof of Romania's willingness to welcome foreign investments in any field. Also, the fact that foreign investors benefit from the same treatment as national investors is a perfect incentive for investment funds. Another plus for foreign investors is that Romania has access to financial support from the European Union (EU) through various European funding programmes, including European structural and investments funds.

When it comes to real estate, Romanian laws bring certain restrictions. The Romanian Constitution stipulates that foreign citizens and stateless persons are allowed to own real estate in Romania, subject to the conditions resulting from Romania's accession to the EU and from other international treaties to which Romania is a party, on a reciprocal basis, under the terms and conditions stipulated by internal legislation.

While special derogations and limitations no longer apply to EU residents, non-EU citizens and stateless individuals who do not have their residence in the EU may acquire land in Romania only in accordance with international treaties and the principle of reciprocity, under conditions no more favourable than those applicable to Romanians and EU citizens and entities.

2.4 Antitrust Regulations

The Council is the Romanian authority in charge of the assessment of business combinations falling under the main merger control legislation, namely the Competition Act No. 21/1996 (the Competition Act) and the Council's Regulation on economic concentrations enforced by the Council's Presidential Order No. 385/2010.

Our domestic merger control rules are relevant for deals that lead to a change of control on a lasting basis over a company or business and meet the following turnover thresholds in the year preceding the transaction: (i) the aggregate turnover of the involved parties exceeds EUR10 million; and (ii) each of at least two of the undertakings involved achieved a turnover in Romania exceeding EUR4 million. If the turnover figures are above the de minimis thresholds set by EC Merger Regulation No. 139/2004, the notification will be forwarded to the European Commission. The party that acquires control must submit the notification to the Council before the effective implementation of the business combination. Effective implementation basically means exercising any rights of control that result from the transaction. The rule is that a notifiable acquisition is brought to the Council's attention for its review after the execution of the legally binding agreement concerning the business combination (for example, the relevant share transfer agreement). In the absence of such an agreement, the Competition Act allows the acquirer of control to submit the merger notification if it proves to the Council the intention to execute a binding agreement, make a public offer, etc, so a letter of intent, a memorandum of understanding or other similar arrangement may be successfully used as support for the parties' intention to combine businesses. Upon a reasonable, documented request from the acquiring party, the Council may give derogation and allow the implementation, under certain conditions, of the transaction before it issues a decision declaring the notified transaction compatible with the competitive environment.

In our jurisdiction, merger assessment from a competition law standpoint can be broken down into two phases. A notified merger does not necessarily have to reach the second assessment phase, if it does not raise concerns regarding its compatibility with a competitive environment (including the scenario when identified doubts have been removed through commitments). If the Council believes that the operation raises serious anti-competitive issues, it opens an in-depth investigation. Phase II of a merger control procedure ends within a maximum of five months after the notification became effective (the 'effectiveness' means that the Council has all the information it needs in order to issue a decision). The Council has two main options here: (i) to simply prohibit the merger, or (ii) to authorise the business combination with or without certain commitments attached.

2.5 Labour Law Regulations

In M&A transactions, the acquirers must observe the Romanian domestic legislation on employees' rights in transfers of undertakings, which mostly follow the EC Transfers of Undertakings Directive.

The employees of the acquired undertaking will automatically be transferred to the buyer, together with all the rights stipulated in the individual employment agreements and collective bargaining agreements. The transaction cannot be a reason for dismissing the employees.

If the labour conditions stipulated in the acquirer's collective bargaining agreement are more favourable, those conditions will automatically apply to the transferred employees.

Given the automatic transfer, the acquirer is most interested in knowing exactly, before the transaction, what rights the employees of the acquired business have. The labour legislation requires the seller to inform the acquirer in respect of employees' rights, but any breach of this obligation will not impact employees' rights.

The seller and the acquirer must inform the employees of the details of the transaction at least 30 days before the transfer. Within the same 30-day period, if either party anticipates that the transaction might involve measures which may affect their own employees, the concerned party must meet its employees in order to reach an agreement. Fines apply if these obligations are breached, and, if this is the case, the employees that have suffered losses must be indemnified.

In the case of public M&A, the board of directors of both the target company and the bidder must inform their trade unions (if any) or their employees directly of any voluntary takeover offer. These obligations must be satisfied promptly after the publication of the preliminary announcement.

2.6 National Security Review

Acquisitions are subject to review from a national security risk standpoint if they concern domains considered to be a matter of national security, such as energy safety; safety of information and communication systems; financial, tax, banking and insurance safety; industrial safety, etc.

The Council is bound to inform the SCND of any acquisition of which they have been notified that may raise national security risks.

If an acquisition does not exceed the turnover thresholds required to fall under the Competition Act and therefore does not necessitate notification to the Council, the acquiring party(ies) must send the necessary information about the transaction directly to the SCND in order to allow it to perform an analysis for possible national security risks if deemed necessary.

If the SCND considers that the acquisition raises any national security risks and that the operation should be prohibited, it must inform the Romanian government and the Council. Finally, the Romanian government will issue the decision, based on the proposal made by the SCND, which will prohibit the operation.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

There have been no landmark court decisions in relation to M&A in the last three years. As for legal developments, 2015 brought several changes to the Competition Act, including with respect to the thresholds that differentiate which mergers fall under the scrutiny of the Council. Although the two-level turnover thresholds have been the same since 2003, the revised Competition Act expressly allows the Council to change the value thresholds if it deems necessary. Before making such a change, the Council must obtain the approval of the Ministry of Economy and Commerce. Afterwards, the new thresholds must be approved by decision of the Plenum of the Council, which will be implemented through order of the President of the Council. Any revised thresholds will become applicable after six months from the publication of the order of the President of the Council in the Official Gazette of Romania.

3.2 Significant Changes to Takeover Law
There were no significant changes within takeover legislation during 2015, and none are likely in the future.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies
Institutional investors do not usually build stakes before launching an offer, mainly because this can have an impact on the public offer price and also because third parties may take notice of a potential bidder's interest in the target.

4.2 Material Shareholding Disclosure Thresholds
As a rule, acquisition, sale of shares or any other operation in a listed company should be publicly disclosed to the FSA, the regulated market and the target, when this leads to reaching or falling below the following thresholds: 5%, 10%, 15%, 20%, 25%, 33%, 50%, 75% and 90% of the total voting rights in the target.

It is compulsory to comply with this obligation within a maximum of three business days from the day when the bidder became aware of a relevant threshold being crossed. The company must, in turn, inform the public of the respective operation within the same timeframe.

If, following their own acquisition or that of a person with whom they act in concert, the bidder owns more than 33% of the voting rights in the target company, they must launch a mandatory takeover offer for all remaining shares (see **6.2 Mandatory Offer Threshold**).

These reporting obligations are also applicable each time a person acquires financial instruments granting them the right to acquire voting shares.

In addition, when the target company acquires or transfers its own shares, directly or indirectly, it must comply with the reporting obligations if its stake percentage exceeds or falls below 5% or 10% of the total voting rights.

4.3 Hurdles to Stakebuilding
The thresholds set out by law are mandatory and, therefore, a company cannot introduce different reporting thresholds. However, since there is no express interdiction on imposing different thresholds for internal disclosure only, the articles of incorporation could provide such thresholds, but in practice this is not common.

4.4 Dealings in Derivatives
Dealings in derivatives are allowed, but these are not yet used to their full potential. Derivative instruments can be traded on regulated stock exchange markets or over the counter (OTC).

There are two local regulated stock exchange markets where derivatives can be traded:

- the derivatives market managed by the Bucharest Stock Exchange, on which single stock futures, index futures and currency futures contracts are traded; and
- the derivatives market operated by Sibiu Stock Exchange, on which futures and options contracts concerning stock, currencies, cross rates, interest rates and gold prices are traded. This was actually Romania's first derivatives exchange through the implementation of futures contracts.

4.5 Filing/Reporting Obligations
There are two categories of reporting obligations in relation to derivatives. However, these obligations do not fall upon the client, but on the clearing houses (which, in relation to derivatives, act as central counterparties) and on brokers, on behalf of the clients, in relation to their transactions.

Since February 2014, clearing houses are compelled to report transactions with derivatives, performed either OTC or on the regulated stock exchange market, in accordance with Regulation (EU) No. 648/2012 on OTC derivatives, central counterparties and trade repositories. The report must be sent to a trade repository registered by the European Security and Markets Authority (ESMA).

However, brokers have an obligation to send monthly reports to the FSA on the operations with derivatives of non-resident investors on the Romanian capital market.

4.6 Transparency
Shareholders and, in general, any third party intending to acquire control of a target must make known the purpose of their acquisition and their intentions regarding control of the company, but only in the case of takeover offers.

Each time a potential bidder wishes to launch a takeover offer, they must disclose in the offer document and preliminary announcement the purpose of the acquisition and their plans regarding the control of the company (change of control within the company, liquidation of the company, change of the object of the company's activity and withdrawal from trading).

5. Negotiation Phase

5.1 Requirement to Disclose a Deal
Throughout Europe, a deal is considered to be privileged information, and strictly speaking must be disclosed by the target company within 24 hours of the event or after the date when the information is brought to its attention.

However, given that negotiations take place between controlling shareholders and the potential bidder, and that the market should be kept abreast with reliable information and not mere rumours or intentions, the parties usually try to maintain confidentiality until a final agreement has been reached.

In addition, the target company may delay the disclosure of negotiations by notifying the FSA of this intention. If this is the case, the target must meet the following obligations during the delay period:

- it may not trade, purchase or alienate, directly or indirectly, securities issued by the issuer;
- it may not use inside information for its own or other persons' benefit;
- it may not persuade others who hold inside information to make use of it;
- it may not disclose inside information; and
- it may not determine other persons to act based on inside information.

The timing of disclosure is to be 24 hours after the event or from the date when the information is brought to the target's knowledge.

5.2 Market Practice on Timing
In practice, parties tend to delay the disclosure of pending negotiations for as long as possible.

5.3 Scope of Due Diligence
In public M&A, especially in the case of voluntary public offers, there is a first limited due diligence based on public information. If the majority shareholders confirm their interest in selling the shares, potential bidders may proceed with the full due diligence process.

However, before launching the public offer, potential bidders usually require the target to disclose certain information to which it has access.

In private M&A, once the buyer(s) and the seller(s) reach a 'common' understanding on paramount commercial items of the deal (eg enterprise valuation index, purchase price, main steps of the process), the parties also discuss the 'appropriate' type of due diligence exercise. Whether it will be a limited due diligence or a full, comprehensive review of the target essentially depends on the size, activities, etc of the target. Generally, at least in medium-size to large deals (ie where the transaction price exceeds EUR10 million), acquirers use the must-have 'trilogy' of due diligence investigations: financial, tax and legal. Depending on the actual activities carried out by the acquired business, additional in-depth investigations focused on certain domains might be relevant for the transactions (eg environmental due diligence, technical due diligence).

5.4 Standstills or Exclusivity
Standstills and exclusivity agreements concluded between a potential bidder and controlling shareholders are common practice.

The controlling shareholders may seek to include 'standstill' provisions in order to avoid potential bidders buying shares by using sensitive information.

Exclusivity agreements are usually concluded between the offeror and the controlling shareholders of the company, by which the offeror is seeking to obtain exclusivity from the controlling shareholder.

5.5 Definitive Agreements
The target company is not usually involved in the transaction, which takes place at the level of controlling shareholders. In most cases, they represent a private company.

Therefore, it is uncommon that a definitive agreement is signed when a potential bidder launches an offer. When control is indirectly acquired, definitive agreements may be possible.

6. Structuring

6.1 Length of Process for Acquisition/Sale
In private M&A, acquiring or selling a business usually takes a minimum of six months, but this can vary, as each transaction has its particularities. Generally, three of the minimum six months are dedicated to the due diligence process. In certain transactions, it is possible for the due diligence to be prolonged for as much as a year and a half, but this depends to a large extent on the target business (eg size, activities carried out, potential preliminary areas of risks seen by the buyer, etc) and the agreed timetable for completing each phase of the deal until final closing but also on the rhythm and the powers of the parties sitting at the negotiation table.

In addition to the duration of the usual process for private M&A, in listed companies the duration of the offer (ie, 50 working days in the case of acquiring offers and 12 months in the case of selling offers) should also be taken into consideration.

6.2 Mandatory Offer Threshold
If a bidder owns more than 33% of the voting rights in the target company when they, or a person with whom they act in concert, have made an acquisition, a mandatory takeover offer must be launched, addressed to all shareholders regarding their holdings in the target company.

The persons acting in concert are expressly defined within the legislation as two or more persons linked by a concluded agreement or by a gentlemen's agreement in order to enforce a common policy regarding an issuer.

The following persons are presumed to act in concert, if there is no evidence to the contrary:

- involved persons:
  - (a) persons who control or are controlled by an issuer or who are under joint control;
  - (b) persons who participate directly or indirectly in the conclusion of agreements in order to obtain or exercise voting rights jointly, if the shares are subject to the agreement grant controlling position;
  - (c) natural persons within issuing companies who are part of the company's control and management;
  - (d) spouses, relatives and in-laws, including more distant relatives (second rank ones), of the natural persons referred to under a), b) and c) above;
  - (e) persons who are able to appoint the majority of board members within an issuer;
- the parent company together with its subsidiaries, as well as any of the subsidiaries of the same parent company amongst themselves;
- a firm with its board members and with the persons involved, as well as these persons amongst themselves;
- a firm with its pension funds and with the management company of these funds.

However, the bidder is not required to launch a mandatory takeover offer in the case of an exempted transaction, such as:

- privatisation;
- share acquisitions from the Ministry of Public Finance or any other competent public authorities within foreclosure of budgetary receivables;
- transfer of shares between companies pertaining to the same group;
- following a voluntary takeover or purchase offer addressed to all the holders of those securities and for all their holdings.

If the threshold of 33% is reached unintentionally, the holder must, within three months, either:

- make a mandatory takeover offer; or
- sell enough shares to fall below the threshold.

After conducting the mandatory takeover offer, the bidder is at liberty to acquire subsequent shares in the target.

6.3 Consideration
In public M&A, the consideration can be fixed by the bidder in cash, shares or a combination thereof, but cash consideration is more common. A consideration consisting of shares must also be accompanied by cash as an alternative for the investors.

Cash is also the most common consideration form in private M&A. Nevertheless, in an increasing number of transactions over the past few years, the parties started exchanging shares on the promise of future development and collaboration by keeping the seller in the business, usually with a minority stake, but also as an equal partner.

6.4 Common Conditions for a Takeover Offer
Except for regulatory approvals, the offer must be unconditional.

However, in practice, as long as they do not affect the interest of the target's shareholders, the following conditions may accompany a takeover offer: (i) attaining a minimum threshold of acceptance (the takeover will be cancelled if the minimum threshold is not achieved); and (ii) obtaining the relevant authorisations from the competition authorities.

6.5 Minimum Acceptance Conditions
The following thresholds are the most usual:

- a 33% threshold, which obliges the bidder to launch a mandatory takeover offer;
- a 50%+1 threshold, which enables the bidder to take decisions within the ordinary general meeting of shareholders, if the by-laws of the target do not stipulate higher conditions; and
- a 90%/95% threshold, which enables the bidder to initiate the squeeze-out procedure.

In practice, there are no acceptance conditions in respect of these thresholds.

6.6 Requirement to Obtain Financing
The takeover offer cannot be conditional on financing, presuming that the available resources exist at the time of drafting the offer documents. To ensure this, the FSA has stated that the bidder is obliged to submit either proof of a deposited guarantee representing at least 30% of the total offer value in a bank account of the bidder's broker, or a bank guarantee letter covering the entire value of the offer, issued in favour of the bidder's broker.

6.7 Types of Deal Security Measures

Match rights and non-solicitation provisions are the only security measures in a public offer.

As a result, the bidder has the opportunity to amend his offer to make it more attractive for the target company, and he may also agree a non-solicitation provision with the target's shareholders, whereby the latter will be prohibited from sending the board of directors in search of a 'white knight' (ie a more favourable offer).

In private transaction documents, the bidder usually tries to obtain break-up fees and non-solicitation provisions as a minimum.

6.8 Additional Governance Rights

In private companies, majority shareholders as a matter of course have certain privileges included in the articles of association that give them control over the commercial and financial matters of the company, and over the management and access to corresponding information. In addition to securing these privileges, a bidder also seeks to gain flexibility on the transfer of shares through tag-along, drag-along, right of first refusal, call or put options.

In listed companies, there are no additional governance rights that a bidder may seek in the target company.

6.9 Voting by Proxy

Shareholders can vote by proxy in the general shareholders' meeting. Moreover, the legal representatives of the shareholders (either legal persons or persons without legal capacity) can appoint a proxy at a later date.

As a rule, any person (either another shareholder or third party to the company) can be appointed to represent a shareholder. There is a limitation in respect of shareholders who are also members of other corporate bodies of the company (such as the board of directors, managers or supervisors), who cannot vote either personally or by proxy in a meeting that affects their management. Similarly, any shareholder who has a conflict of interest with the company regarding a decision cannot vote, not even by proxy. Likewise, the members of the corporate bodies of the company cannot represent the shareholders if, without their vote, the necessary majority for decision-making in the meeting would not be met. Resolutions passed in breach of this interdiction may be cancelled.

The proxy has to be empowered by means of a special power of attorney specifying the proxy's voting limits. Exceeding the granted powers may result in the annulment of the shareholders' resolution if the vote of the proxy was decisive and the shareholder does not ratify the vote. Furthermore, in listed companies, the power of attorney has to observe the template provided by the law.

6.10 Squeeze-Out Mechanisms

Following a tender offer addressed to all shareholders and for all their shares, the bidder is entitled to require those shareholders who have not subscribed to the offer to sell all their shares at an equitable price, within the squeeze-out procedure, if they hold at least 95% of the total number of shares that provide voting rights and at least 95% of the voting rights that can effectively be exercised, or if they have acquired, within the aforementioned takeover offer, shares representing 90% of the total number of shares that provide voting rights and at least 90% of the voting rights targeted in the offer.

There is also a sell-out mechanism in place, according to which a minority shareholder who has not subscribed to the voluntary or mandatory takeover offer is entitled to ask the bidder to buy his shares at an equitable price. The bidder will be obliged to do so only if he finds himself in one of the situations described above for the squeeze-out mechanism.

6.11 Irrevocable Commitments

Although it is not common to obtain irrevocable commitments to tender by principal shareholders of the target company, in practice this can happen. However, it is advisable to avoid insider trading issues. In this respect, transactions usually take place at the parent company's level, outside the market.

7. Disclosure

7.1 Making a Bid Public

The way an offer becomes public differs, depending on the type of offer.

A voluntary takeover offer is made public after the FSA approves the preliminary announcement by: (i) publication in a national newspaper and in a local newspaper in the target company's area; and (ii) its communication to the regulated market and the target. Thirty days after the preliminary announcement is published, the bidder must submit an offer document to the FSA. Within ten business days, the FSA will make a decision on the document.

A purchase offer is made public after the FSA approves the offer document submitted by the bidder.

A mandatory takeover offer must be made no later than two months after the 33% threshold is exceeded.

In all the cases mentioned above, after the approval of the offer document by the FSA, the bidder is obliged to launch an announcement of public offer, stating the ways in which the offer document will be available to the public.

The offer document will be available to the public on the same day the announcement is made.

The announcement of public offer will be published in at least two national newspapers.

The offer document will be deemed available to the public in one of the following ways:

- by being published in one or more national newspaper;
- by being available to a potential investor, free of charge, in a printed form, at least on the premises of the bidder and of the broker involved, or at the premises of the operator of the regulated market where the securities are admitted to official listing;
- by being published in electronic form on the bidder's website and on the broker's website;
- by being published in electronic form on the website of the market operator, in the market where admission to official listing is sought;
- by being published in electronic form on the website of the FSA, if it has decided to offer this service.

7.2 Types of Disclosure
If the bidder issues shares as consideration for the offer, the disclosure will take the form of an offer document. The offer document must contain the exchange ratios and all the information regarding the issued shares, similar to the information contained in a prospectus.

7.3 Requirement for Financial Statements
According to Regulation No. 1/2006, in the case of voluntary or mandatory takeovers, the offer document and preliminary announcement must contain economic and financial data pertaining to the bidder, in accordance with the latest approved financial statements (total assets, total equity, turnover, result of the financial exercise). Thus, the bidders are not obliged to produce full financial statements.

7.4 Disclosure of the Transaction Documents
Under the Romanian legal framework, there are no transaction documents that must be disclosed in full. Nevertheless, the main provisions and conditions of the transaction documents must be disclosed within the offer document.

8. Duties of Directors

8.1 Principal Directors' Duties
There are no special rules governing the directors' mandate in a business combination context. The directors should observe at all times the regular corporate fiduciary duties and act in good faith, in addition to observing the particular limits set under the articles of association.

Amongst its specific duties in a business combination, the management is required to gather and disclose relevant information about the process and the financial valuation of the business acquired or sold, and to document thoroughly its decision either to sell or to buy.

In performing their duties, the directors must observe the interest of the shareholders and the company. Only the shareholders can hold the management liable for all their management, policy and opportunity decisions.

None of the persons involved in the management of a company owes per se any duties to the stakeholders. Nevertheless, those stakeholders who have a direct, contractual link with the company do have means to enforce their rights accordingly.

8.2 Special or Ad Hoc Committees
It is not common practice for boards of directors to establish special or ad hoc committees in business combinations, mainly because the board of directors does not have decision-making powers with regard to selling a business, their role being purely advisory. According to the law, the decision to sell a business lies with the shareholders of the company; the role of the board of directors being purely consultative.

8.3 Business Judgement Rule
In Romania, like in most EU countries, the passivity rule prevents the directors from taking defensive measures to frustrate the offer without the consent of the shareholders. Because of this circumstance, Romanian courts have not ruled on the judgement of directors.

8.4 Independent Outside Advice
Given the above, no form of independent, outside advice is commonly given to directors in a normal business combination. If the initiative to perform a business combination comes from the directors, it is rather obvious that they have based their decision on certain reports from financial institutions.

8.5 Conflicts of Interest
There is significant case law in Romania targeting conflicts between the interests of various power-position holders from a company and the company's own interests. The most interesting decisions of the courts of law concerned situations when decisions made by the state, in its capacity as majority shareholder of certain companies, conflicted either with the interests of the respective company or with those of the minority shareholders. In such cases, the interests varied, from decisions for the sole benefit of another company owned by the state, or for the direct benefit of the state (a

donation), to decisions obliging the minority shareholders to invest in other state-owned companies.

9. Defensive Measures

9.1 Hostile Tender Offers
Hostile tender offers, as this concept is understood in the majority of states, are not recognised in Romania. This is mainly because of the rule of board neutrality, in that the board has only a consultancy role, not a decision-making role.

9.2 Directors' Use of Defensive Measures
Irrespective of the 'passivity rule' which prevents directors from formally using defensive measures, boards of directors have some duties that may create obstacles within the takeover process, such as:

- drafting a report regarding their position towards the takeover, which should be filed with the FSA, the bidder and the regulated market;
- calling an extraordinary meeting of the shareholders, in order to inform them of their view of the takeover;
- notifying the FSA and the regulated market with respect to all their operations that include the securities which are subject to the offer (starting from the moment when the preliminary announcement is received by the target).

9.3 Common Defensive Measures
Many of the defensive measures applicable on a European and international level are not legally prohibited and could be used, but only with the prior approval of the shareholders.

However, even these are uncommon in Romania. If the shareholders authorise the board of directors to take defensive measures, in practice these measures consist mainly of looking for more favourable offers.

9.4 Directors' Duties
Because of the 'passivity rule', directors are rarely in the position of taking defensive measures. Still, in cases where they are enabled by the shareholders to act defensively against the hostile takeover offer, these measures must be objective, taken in good faith and in the corporate interest of the company. Their decisions must benefit the company first and then the shareholders, creditors and other interested persons.

9.5 Directors' Ability to "Just Say No"
The directors cannot prevent a business combination, but they may influence the outcome of the offer through the report sent to the FSA, and in the general meeting of the shareholders, where they can express their point of view in front of the shareholders. Whether they succeed or not will depend on the individual director's personality and powers of persuasion, and not on their legal rights.

10. Litigation

10.1 Frequency of Litigation
M&A deals can be subject to disputes irrespective of whether the companies involved are majority-owned by the state or are private companies.

Within the entire range of economic sectors, transactions with state-owned companies have led to many disputes, failed privatisations, breaches of contract, securities enforcement and winding-up attempts. These problems are usually caused by poor preparation by the authorities, conflicts of interest and conceptually flawed investment programmes.

With private companies, the process runs more smoothly. Previous experience has shaped the market so that sufficient structures are in place to protect interests during and especially after an M&A deal (extensive due diligence activities are required, whether it is a share deal or an asset deal). Litigation in connection with M&A deals is rare in Romania and when it does occur, parties will seldom not reach a settlement before the closing of the trial. Furthermore, in an attempt to keep their internal affairs private, parties turn to institutionalised arbitration as an alternative to solve their disputes. Also, there are non-contentious M&A deals involving MBO schemes and classic exit strategies where all aspects of the deal are straightforward and open to scrutiny from the beginning.

Statistically, it seems that most of the M&A litigation is multi-jurisdictional, regardless of whether the majority shareholder is the state or a private entity.

Litigation in public M&A is not common but may occur, especially with respect to insider dealing and squeeze-out procedures.

10.2 Stage of Deal
If litigation has not occurred during the offering procedures – when issues usually stem from uncompetitive sale practices and a failure to maximise value for shareholders – the public sector may commonly be affected by litigation at the initial negotiation stage.

As regards the private sector, litigation is frequently brought in the post-completion phase and arises from post-closing price adjustment mechanisms, incorrect warranties or various residual obligations. Rarely does any dispute arise from a refusal to close a signed transaction.

A separate type of litigation can occasionally occur from a violation of the rights of minority shareholders and other stakeholders. Because deals can proceed at a fast pace (and because legal means to prevent a deal externally or to suspend it before completion may often prove ineffective), although such violation of rights happens before completion, many disputes might be dealt with in the post-completion phase.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not a common feature of Romanian corporate life. In most cases, the minority shareholders have a passive attitude and become animated only if their interest in the company is seriously jeopardised by the majority shareholders.

More commonly, minority shareholders are taking an active part in former state-owned companies where the employees received shares during privatisation.

11.2 Aims of Activists

In general, activists will seek to encourage companies to enter M&A transactions, spin-offs or other operations only if it is in their own particular interest to do so.

11.3 Interference with Completion

In the past, minority shareholders would make use of their powers in order to block any decision of the majority shareholders, including the completion of any transactions, for the sole purpose of obtaining a personal gain. This practice has decreased significantly in recent years but, forced by the constant interference of the minority shareholders in their decisions, the majority shareholders found themselves forced to offer minority shareholders an amount substantially higher than the market value.

Nowadays, those minority shareholders who are also employees (as in former state-owned companies) may become vocal and try to challenge the transaction if they fear that the buyer is planning to take measures that may jeopardise their jobs. Even in these cases, apart from the inevitable discussion, if they cannot identify any clear breach of the corporate law requirements, their chances of successfully preventing bad business combinations are rather low.

Popovici Nitu Stoica & Asociatii
239 Calea Dorobanti
6th Floor
1st District
Bucharest
București
Romania
010567

Tel: +40 21 317 79 19
Fax: +40 21 317 85 00
Email: office@pnsa.ro
Web: www.pnsa.ro

POPOVICI NIȚU
STOICA & ASOCIAȚII
Attorneys at Law