The Mergers & Acquisitions Review

Seventh Edition

Editors
Simon Robinson and Mark Zerdin

Law Business Research

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PUBLISHER'S NOTE

In presenting this seventh annual edition of *The Mergers & Acquisitions Review*, the publisher would like to extend warm and heartfelt thanks to editor Simon Robinson, who has recently retired from Slaughter and May. Simon has held the position of editor of *The Mergers & Acquisitions Review* since its inauguration seven years ago, and Simon and his partners at Slaughter and May have been instrumental in the success of The Law Reviews series. Thank you Simon.

The publisher would like to welcome Mark Zerdin, also a partner at Slaughter and May, as current and future editor of *The Mergers & Acquisitions Review*. We are delighted to have Mark on board, and we look forward to future editions in Mark's very capable editorial hands.

Gideon Roberton
Publisher, The Law Reviews
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EDITOR'S PREFACE

This past year has seen some surprising twists and turns, not only in the mergers and acquisitions markets but also in the economic and political environments. November saw the re-election of Barack Obama, although this had less of an impact on the markets than an announcement by Ben Bernanke in May that the US Federal Reserve would consider a slowdown in its programme of quantitative easing. On the other side of the Pacific, Xi Jinping has outlined a new communist doctrine – the 'Chinese dream'. The doctrine reflects the changing economic outlook in China where growth will be increasingly consumer rather than investment-led. A new political rhetoric has also emerged in Japan as Shinzo Abe, elected in a landslide December victory, seeks to reinvigorate the Japanese economy. Both rebrandings flirt with nationalist sentiment and the attitude of these two countries towards one another will continue to bear on the region's business environment.

In Europe, despite an awkward Cypriot bailout, the sovereign debt crisis showed signs of stability and government bond yields are falling. Europe also improved its attractiveness in the eyes of investors and remains the largest destination for foreign direct investment. However, there has yet to be a return to growth. Investors seem split fairly evenly between those who believe Europe will emerge from the crisis in the next three years, and those who believe it will take five years or more. In any event, a return to the boom years is unlikely in the near future, particularly as the emerging markets see a relative slowdown. The IMF data for 2012 shows that the combined growth rate of India and China is at its lowest in over 20 years while global growth fell below 2.5 per cent in the second half of 2012. This global slowdown continues to pull M&A figures down making 2012 the fifth consecutive year in which deal values fell globally.

There are reasons for optimism though, particularly in the US market which has seen some substantial deals (the acquisitions of Heinz and Virgin Media being particular highlights). These deals have been made possible by the return of debt financing where the right deal can attract very favourable terms. Equities have also performed much more strongly over the past year. In May 2013 both the Dow Jones and the FTSE 100 hit record highs – validating to some extent the aggressive monetary policies pursued in the US and the UK. Whether political will can start to lift the markets more broadly still remains to be seen.

I would like to thank the contributors for their support in producing the seventh edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2013

Chapter 57

ROMANIA

Andreea Hulub, Alexandra Malea and Vlad Ambrozie[1]

I OVERVIEW OF M&A ACTIVITY

Among the very few European countries that succeeded in resuming economic growth relatively quickly after the 2008/2009 financial turmoil, Romania maintains foreign-investment attractiveness inherent in its emerging market character and prompted by investment safeguards offered by its EU membership.

Although M&A activity decreased significantly compared to the heyday of 2005–2007, it is generally assumed that the results of year 2011/2012 – showing that Romania attracted less than a €2 billion-volume of overall fresh capital – marked a floor limit and gave encouraging economic signs that there will now be growth.

Regulatory instability, in the public-to-private sectors in general and tax and subsidisation in particular, might endanger future growth prospects, but there are recent, clear signs and political commitments prompting legal framework steadiness.

The M&A activity in 2012 concentrated on a handful of areas, with clear predilection for energy and natural resources deals, as well as for the industrial sector in general, with an emphasis on soft industries. Significant transactions nevertheless occurred in the agribusiness, real estate and financial services sectors.

In terms of market players, a noticeable carefulness of existing institutional investors to embark on new deals and a low influx of new entrants have unlocked the market to strategic investors, be they already present, or attracted.

1 Andreea Hulub, Alexandra Malea and Vlad Ambrozie senior associates at Popovici Nițu & Asociații.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

An EU Member State since 2007, Romania incorporated in its M&A legal framework the main body of relevant European law having already implemented all key directives in the field, such as the Merger Directive 2005/56/EC, Prospectus Directive 2003/71/EC, Takeover Directive 2004/25/EC, Insider Dealing and Market Abuse Directive 2003/6/EC.

As such, M&A transactions in Romania are largely regulated by Company Law No. 31/1990, Trade Registry Law No. 26/1990 and by the newly enacted Civil Code.

In addition to the regulations mentioned above, listed companies are subject to special rules provided by Capital Markets Law No. 297/2004 and to the regulations issued by the National Securities Commission (NSC). Among such specific regulations: NSC Regulation No. 1/2006 on issuers and securities operations and NSC Regulation No. 6/2009 regarding exercise of certain shareholders' rights in connection to companies' general shareholders meetings, stand out as the most significant.

M&A deals involving banks and non-banking financial institutions, insurance companies or other specialised vehicles are subject to additional sector regulations.

The Romanian merger control rules are provided by the Competition Law No. 21/1996 under the Romanian Competition Council instructions, guidelines and control, with the reservations derived from exclusive jurisdiction reserved by the European Commission under the EU Merger Control Regulation of 2004.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The corporate and takeover legal framework in Romania is generally aligned with the various EU corporate directives, such as the Takeover Directive 2004/25/EC, the Shareholder Rights Directive 2007/36/EC and the Merger Directive 2011/35/EC, as well as with the OECD principles of corporate governance.

The Romanian corporate governance and takeover system is thus a stable one ensuring: a level playing field for shareholders and stakeholders; a good level of access to information and company transparency; and delimitation of board and management responsibilities and related liability.

Recently there have been a number of regulatory amendments to the corporate and takeover framework, mainly derived from short-term practical experience, but also prompted by further EU law development and harmonisation.

The significant recent enactment is intended to simply the merger and spin-off procedures and was brought by Government Emergency Ordinance No. 2/2012 (GEO 2/2012) implementing Directive 2009/109/EC. The majority of the amendments brought by GEO 2/2012 aim to streamline merger and spin-off reorganisations through the elimination of excessive or formalistic procedural and publicity requirements subject to unanimous shareholder consensus.

As regards listed companies, the Government Emergency Ordinance No. 32/2012 (GEO 32/2012) made some important revisions to the provisions of Capital Markets Law No. 297/2004, such as:

a determination of the price to be paid with mandatory takeover bids and in squeeze-out procedures in various practical cases;
b express stipulation of significant shareholders' rights to request in court the convening of a general shareholders' meeting to appoint a director by way of cumulative voting; and
c regulation of emergency court proceedings for cancellation claims targeting shareholders' meeting resolutions (particularly those on share capital increase operations).

These amendments came to regulate an amorphous regulatory and permitting practice of the NSC in what regards takeover bids and squeeze-out procedures, streamlining processes as well as providing for additional shareholder protection mechanisms.

As a Member State, Romania will further extend transparency requirements, shareholder protection and engagement principles, as these are anticipated under the EU Commission Action Plan – European company law and corporate governance.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

By comparison with the M&A results for 2011 – reported by the Romanian National Bank and the Institute of Statistics – the value of foreign direct investments dropped to €1.6 billion, namely by more than 10 per cent below the value reached in 2011 and considerably far from the €9.5 billion all-time record achieved in 2007/2008.

Traditionally, foreign investment is the main driver of the Romanian M&A market, as Romania became an M&A-friendly jurisdiction in the last decade.

Events within the Cyprus financial sector have contributed to strengthening the view that Romania is one of the potential deal-structuring platforms, at least for deals of regional reach. This view is fundamentally supported by: a fairly low 16 per cent flat rate corporate income tax and a fiscal consolidation process well under way; structural reforms in a number of sectors such as public services, and particularly health care; and enhancement of legal and political stability as a result of EU membership.

Romania remains vulnerable, however, to outbound developments, as long as CEE growth forecast is low, unpredictability and turbulence involving important European countries are visible and liquidity constraints are overreaching. Such constraints are likely to have a bearing on the investors' profile, with private-equity stakes in the country remaining low or decreasing and strategic investors becoming more difficult to attract.

In such a landscape, the main M&A foreign investors remain those who originate in the United States and the western EU economies, such as Germany, France and Italy. Another capital exporter to Romania is South Africa, through the groups known as New Europe Property Investments and Naspers. Both were recently involved in the largest transactions in the real estate sector (acquisiton of the Lakeview office project in a €62 million deal), and the IT sector (acquisition of the majority stake in eMag, the largest Romanian online retail platform). Additional South African players include Metair Investments (featuring in a €43 million acquisition of local manufacturer Rombat).

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

During 2012, the most attractive sectors for M&A in Romania proved to be energy and natural resources, industrial and agribusiness, real estate, and financial services.

i Energy and natural resources

The energy and natural resources sector remained a main attraction for investors, in spite of a volatile political environment, as investors could not ignore the resources' potential and the favourable investment incentive and tax treatment, therefore seizing local opportunities.

The following transactions are worth mentioning in this field:

a ExxonMobil Exploration & Production Romania and OMV Petrom SA acquired 85 per cent interest in the Midia Block, located in the Romanian section of the Black Sea, from Sterling Resources Ltd, for a total consideration of €29.5 million.

b The Romanian Ministry of the Economy sold 15 per cent in a state-run power grid operator Transelectrica through a secondary public offer (SPO) launched on the Bucharest Stock Exchange. Transelectrica SPO is part of the privatisation programme of the state-owned companies in the energy sector imposed by the International Monetary Fund, being the only offer finalised in the last years. The value of the transaction was €37.6 million.

c The private equity fund Innova Capital expanded its Romanian market presence through acquisition of a 52.8 per cent stake in EnergoBit Group, a leading electrical engineering services company. The European Bank for Reconstruction and Development (EBRD) invested along in a standard minority stake of this company. The deal was estimated to be worth €65 million.

d Romanian petroleum products wholesaler Crimbo Gas International acquired 99.9 per cent stake in liquefied petroleum gas distributor Petrom LPG SA from OMV Petrom SA, in a (equity and debt) deal estimated at €20 million.

e Chinese photovoltaic panels' producer ReneSola entered the Romanian market by acquiring, through the member company ReneSola New Energy, the entire share capital of Lucas Est SRL, in a €1 million deal. ReneSola bought a 6MW solar park in Romania and this acquisition was followed by a similar one, namely the acquisition of Ecosfer Energy SRL, which is developing a 9.43MW photovoltaic power plant in Romania.

ii Industrial and agribusiness

Alongside the energy and natural resources, industrial and agribusiness were the most active areas for acquisitions in 2012.

Romania has significant agricultural resources and, unlike western or central European countries, the agribusiness market is still in the early stages of development, thus offering vertical and horizontal expansion and consolidation opportunities.

Agribusiness

As regards agricultural land acquisition, investors range from institutional investors such as: Rabobank, insurance groups like Generali Assicurazioni or investment funds like the German Germanagrar or Agrarius, to strategic players such as farming companies (like the Danish group FirstFarms) or biodiesel and oil producers (like the Portuguese Prio Foods) and to billionaire families (like the Danish Raunsing family).

In summary, foreign investors appear to already control approximately 10 per cent of Romania's agricultural land fund.

Fast-moving consumer goods (FMCG)

The industrial sector, particularly the FMCG (including retail thereof) and the manufacturing segments, have also seen a number of important deals as well as the year's largest transactions in Romania in terms of value (both as parts of larger cross-European deals):

a takeover by the Canadian giant Molson Coors of the brewery producer Starbev LP operations in seven CEE countries in a deal aggregating €2.65 billion, where the Romanian side accounted for around €300 million; and

b acquisition by the French group Auchan of Metro Group's Real hypermarkets in four CEE countries in a deal aggregating €1.1 billion, where the Romanian side accounted for around €200 million.

As regards market movements, most of the transactions have been consolidations of already-established presences on the local market.

For the FMCG sector, the best example has been the expansion of the French retailer Auchan through various acquisitions and development projects such as the acquisition of the hypermarket developed in Pitesti by New Europe Property Investments for around €28 million; and, in Bucharest, the development of Crangasi commercial centre for around €20 million.

For agribusiness, the acquisition by Bunge (one of the top-three players on the vegetable oil market) of Prio Extractie (Prio Foods' local division of vegetable oil) in a deal of around €50 million is an interesting example.

Nonetheless, activity in 2012 also saw the entry of new players on the local market:

a leading French sugar group and number four worldwide, Tereos, entered the market with the acquisition of Zaharul Ludus, a local sugar refinery in a deal of around €10 million; and

b South African fund Metair Investments took over the local manufacturer of automotive batteries, Rombat in a deal of around €43 million.

Agribusiness market trends and consolidations

In terms of transaction trends, restructuring continued to be the key word in 2012 as relentless uncertainty and economic pressure pushed companies to clean up their balance sheets of non-productive assets or to outsource non-core businesses.

An example for the latter is the sale by Cargill of their local vegetable oil business to the French group Sofiproteol (through their local vehicle Expur) for €20 million. Conversely, the latter consolidated its local position, thus entering the race for the first three positions on the corresponding market alongside the other two notable players Bunge and Glencore.

While restructuring was a quasi-constant in both industrial and agribusiness, each of these sectors has witnessed particular developments.

Thus, in agribusiness, players have continued to target vertical integration of all links in the business chain (from warehousing capacities, to distribution of end products). This movement appears to have dictated an important part of the transactions in this sector, such as:

a full takeover by the grain and fertilisers trader Ameropa Group of 100 per cent of Azomures – Romania's largest chemical fertiliser producer and Chimpex – one of the most important port operators at the Black Sea, further to takeover bids and squeeze-out procedures aggregating up to €67 million;

b takeover of the bakery producer Pambac Bacau by Comfert (fertiliser trader) and Popasul Trebes (grain trader) in a deal of around €10 million; and

c acquisition by the French malt producer Soufflet of two warehousing silos from Cargill in a deal of around €5 million.

Industrial

In the industrial sector and particularly in the manufacturing segment, the economic downturn and specific market contraction created good opportunities for distressed assets transactions, for example:

a acquisition of the freight wagons producer and maintenance companies Astra Vagoane Marfa, Meva and Romvag by Thomas Manns, a German investor, in a deal of around €30 million;

b purchase of the shipbuilding company Navol Oltenita's assets by Evergreen Estates in a deal of around €9.9 million; and

c acquisition of the steel industry plant Laminorul Focsani by the Italian group STG Steel in a deal of around €10.8 million.

In a nutshell, in 2012 the strategic buy-outs were in the industrial sector, with institutional investors taking a more cautious approach, in expectance of improved predictability and more stable market conditions, and with existing players taking advantage of such caution in order to consolidate holdings.

iii Real estate

Real estate remains a key driver for economic growth, particularly in Romania's post-bubble period where market corrections proved to be far more excessive compared with the robust development potential.

Unsurprisingly, new project developments sprouted and the trend was led by developers with strong market experience. For instance, Portland Trust has recently commenced development of the office project Floreasca Park, financed by BCR – Erste, easily secured due to high pre-letting quotas. There is still more to be done here; although vacancy levels in office projects has increased, there is a different rationale these days backing new developments, such as a more city-centre inward-looking vision by developers.

Although, like other markets, Romania has seen its share of investors exiting or potential new ones scrutinising the market only to decide to wait for better times, real estate was among the active areas in terms of transactions.

However, just as in the past few years, the market seems to be dominated by already-existing key players aiming to particularly improve or expand their portfolio. Market consolidations are the prime scope.

With the prominent exception of New Europe Property Investments, the real estate market remains largely unattractive to new investment capital and it is clear that revival lies with financial institutions effectively undertaking to boost the sector.

With a focus on the office sector that was the market's star, the following were the most important real estate transactions.

Immofinanz, the largest foreign investor in the local real estate market, after completion of the €50 million Adama transaction, went on to restructure its second residential project by acquiring three real estate projects, two in Romania and one in Poland (the entire stake in the Caterata portfolio).

This transaction was one of the most complex concluded in Romania in the 2012–2013 time frame. It is particularly worth mentioning that the deal involved interests of six EU and non-EU jurisdictions, while the entire coordination was Romania-based.

Apart from massive acquisitions of land plots throughout the major Romanian cities and the expansion of its various joint ventures, New Europe Property Investments made the highlights by acquiring the 25,000m² Lakeview office project in a €62 million deal.

This is a landmark building located in one of the prime locations of Bucharest, said to become the capital city's La Défense area.

Sellers were local entrepreneur Dinu Patriciu in a joint-venture with AIG Lincoln. As a result, AIG Lincoln depleted its Romanian real estate portfolio.

Swedish Skanska placed bets on green office buildings. Following the acquisition in late 2012 of a 15,000m² land plot from local Baneasa Investments, Skanska has just commenced development of a LEED gold-certified office project.

Upon completion of a three-phase delivery, the project is envisaged to accommodate 52,000m² gross leasable area.

In a deal reportedly worth €50 million, two private investors acquired an 87 per cent stake in the 22 stories Tower Centre International office building in Bucharest.

Aside from the magnitude of the deal itself, this transaction is interesting for the fact that 20,000m² office area will now be up for rent, after the building had been held empty for the past three years due to massive disputes between the original owners.

iv Financial services

The financial services sector was dominated in 2012 by consolidation mechanisms. Although these did not have a strong impact on the market, they may be interpreted as incipient signals of banking system consolidation.

The following transactions contributed to reforming the Romanian banking system:

a Intesa Sanpaolo Bank Romania and CR Firenze, two local banks controlled by Intesa Group, completed a bank merger, whereby Intesa Sanpaolo Romania acquired by absorption all CR Firenze's Romanian assets. Intesa Sanpaolo Bank Romania now has 90 branches and 1,000 employees in Romania, while local assets total over €1.1 billion;

b Crédit Agricole SA acquired Emporiki Bank Romania from Emporiki Group Greece, which fully owned the Romanian subsidiary;

c a consortium of investors financed by PineBridge Investments acquired 92.4 per cent stake of MKB Romexterra Bank Romania from MKB Bank, for a value estimated at €20–30 million;

d National Bank of Greece acquired 10.2 per cent of Banca Romaneasca from EBRD, for a total consideration of EUR 26.1 million. Further to this deal, the acquirer holds 99.27 per cent of Banca Romaneasca share capital;

e Erste Bank acquired another 0.23 per cent stake in BCR through a buyout bid, for a total consideration of €8.4 million. Following the transaction, Erste Bank raised its stake in BCR to 93.27 per cent; and

f Dutch insurance group Aegon acquired the Romanian life insurance and pensions division of Eureko in Romania from Achmea Financial Group. Following the transaction, Aegon stated that it will reach 650,000 pension fund members making it the third-largest pension provider, while its life insurance portfolio will become one of the top ten.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

i Overview

The tension between international financial markets undergoing restructuring and local inertia squared have restricted the Romanian financial sector in the past years.

However, during 2012 enthusiastic restructuring began to be seen. There are three drivers of the recent activity.

First, the banks have finally accepted the failure of certain financing projects and, through foreclosure and liquidation procedures, have tested their real values with the market. This approach generated a series of new work-out deals, sufficient in number and volume so as to enable a benchmark. Work-outs either involved individual projects, or, as in the case of retail financing, client portfolios. The restructuring mood was fostered by increase of the non-performing loans, in both corporate and retail lending.

In spite of the new trend, the banking system is still suffering from the 'over-precaution syndrome', with banks mainly focused on reducing the credit risk as much as possible, whether in consumer or corporate financing. As such, customer scrutiny procedures and credit-eligibility criteria have been strengthened.

Second, the sellers' expectations decreased, thus leading to a new dynamic and to the disappearance of the lingering concept of 'frozen market', with sellers being forced to adjust their expectations.

Looking past the purely psychological aspect – the drop in enthusiasm and general interest reverberating directly into the evaluations – one would find the origins of this trend in a deterioration of the economic outlook. Then there is the 'deal under distress' scenario limiting the ambit of potential investors, the nature of capital involved and requiring a certain appetite for risk. All these weigh strongly in valuations.

Third, on the backdrop of the Cypriot deposit meltdown, the banking market is facing scepticism and distrust towards saving schemes. Investors' refocus from liquid-asset income generators (deposits, bonds etc.) to hard-asset income generators (real estate, operating businesses etc.) is noticeable.

In terms of credit developments, following a prudent lending strategy, domestic banks focused in 2012 primarily on short-term lending. Although this approach generated an increase in private sector loans with maturity of up to one year, long-term loans are still holding the main share of the financial market, due to the volume of outstanding credit.

ii Debt to equity ratio

One of the negative consequences of the financial tensions in the eurozone was the equity requirements' increase, with full effects in the Romanian market. As such, in corporate financing, the level of equity required for investors has been, unsurprisingly, significantly increased by the majority of banks.

Therefore, although banks are still willing to carry on disbursing loans, the number of potential eligible borrowers undoubtedly fell.

iii New trend – a more regulated and stable loan market

The most significant events in the banking sector in 2012 derived from Romania's commitment towards the European Union, the International Monetary Fund and the World Bank on preserving an adequate level of bank prudential indicators.

The set of measures adopted by the Romanian government is intended to improve the confidence level of foreign investors in the Romanian financial market.

IFRS conversion

One of these events was the adoption through the National Bank of Romania Orders No. 9/2010 and No. 27/2010 of the IFRS accounting standards as of 1 January 2012 (i.e., Romanian banks were already required to prepare IFRS financial statements in parallel with Romanian GAAP). From 2012 onwards, IFRS will completely substitute local GAAP for banks and will become the sole base for accounting.

IFRS conversion is one of the most important projects the Romanian banking system has been confronted with. Applying a set of global accounting standards was an important step for stability and increased financial transparency, part of the international banking reform.

However, the new approach brought on by the IFRS accounting standards determined an increase in the non-performing loans ratio, mainly considering the balance sheet recognition of any receivables previously recorded in off-balance sheet accounts and the harsher requirements for loans provisioning.

Introducing the bridge bank

In order to provide solutions for banks in distress and to ensure stability of the consolidated financial system, Romania implemented necessary EU-standard-based stabilisation measures to insulate the financial system, which added to the current legal framework related to special administration of credit institutions. Rules have been adopted under the Government Ordinance No. 1/2012 on amending and supplementing certain pieces of legislation in the field of credit institutions.

The stabilisation rules are applicable only to Romanian-incorporated banks and not to local branches of foreign banks, an accolade that is worth mentioning in the aftermath of the Cyprus deposits crisis.

One of the stabilisation measures brought in the concept of a bridge bank, a specialised credit institution established in order to take over the failing bank, to be subsequently sold to a third eligible party agreed upon with the National Bank of Romania. The bridge bank focuses on ensuring the continued performance of banking services related to the assets and liabilities taken over and on finding investors willing to acquire the assets.

The bridge bank is established and functioning for a period of up to two years, with the possibility of extending this period, in situations where a threat to the financial stability still persists or negotiations with the proposed acquirer were not finalised.

iv Financial Supervisory Authority

In line with other EU Member States, the Insurance Surveillance Authority, the National Securities Commission and the Pensions Surveillance Authority are in the process of being consolidated into a single regulator: the Financial Supervisory Authority.

The main goal of the Financial Supervisory Authority is to streamline the operation and supervision of the insurance, stock exchange and private pension markets.

At the end of the consolidation process, Romania will only have two regulators for the financial sector, the National Bank of Romania, supervising the banking sector, and the Financial Supervisory Authority, supervising the non-banking financial markets.

VII EMPLOYMENT LAW

Notable adjustments were made recently to the labour regulatory framework to increase the flexibility and manageability of employment relations, for example, the amendment of Law No. 53/2003 on the Labour Code through Law No. 40/2011, Law No. 62/2011 on social dialogue, as well as the newly enacted Civil Procedure Code and the Law No. 76/2012 on the application thereof.

With these changes, Romania moved away from the image of a jurisdiction that is overprotective of employees.

i Overview

Management of labour resources requires legal intervention at both an individual and collective employment level.

At the individual level, an employer currently has rather wide flexibility in opting for a determined-period labour contract or for a temporary work contract and can extend this status quo up to a period of 36 months.

As regards employees' evaluation and redundancy grounds, the newly introduced 'job performance' notion and evaluation criteria were largely welcomed by employers. These new concepts manage to align the previously formalistic provisions with the realities of a demanding and dynamic labour market.

At the collective level, employers benefit from the liberty of opting whether to add-up an additional level of protection for their employees, i.e. that of a collective bargaining agreement. Thus, while national collective bargaining agreements have been completely eliminated, the industry level ones are applicable only if the employer company has participated in its negotiation.

ii Scrutiny of employment within M&A

Looking at (individual) employment matters in an M&A transaction in Romania would require particular focus on the following fundamental elements:

a conciliation between individual employment contracts and collective labour relations (if applicable);

b salary practices, in respect of which particular importance should be given to special non-compete clauses and related bonus arrangements imposing payment obligations on the employer, as well as to the 'mandatory' types of add-ons/bonuses; as well as

c health and safety compliance, involving mandatory documentation, appointment of specialised personnel or outsourcing to authorised providers, performance of periodic trainings etc.

Within an assessment of the collective employment relations one shall consider at least:

a the forms of employees' representation and affiliations to trade union federations;

b the more favourable provisions secured through collective bargaining agreements at industry level (if applicable); and

c the mechanics for resolution of any collective labour dispute.

Additionally, if the deal is structured as a transfer of an undertaking (TUPE transfer), as regulated through Directive 2001/23/EC (implemented in Romania through Law No. 67/2006), careful attention should be directed towards the particular rights of the transferred employees and the buyer's correspondent obligations.

All things considered, the labour legislative climate in Romania accommodates implementation of different transaction structures, whilst allowing employers a good degree of flexibility in labour resources integration and management.

VIII TAX LAW

The recent period was characterised by multiple amendments brought to the general tax framework, all within a fiscal consolidation attempt. The matters of particular interest to M&A transactions include the: regime of fiscal loss; withholding tax on artificial transactions; and the status of VAT on demolished buildings.

i Fiscal loss

Under Government Ordinance No. 15/2012 for amendment of the Fiscal Code, a merger surviving entity would be entitled to take over the fiscal loss of absorbed companies, if in the context of block asset transfers. In addition, spun-off companies are allowed to take over a portion of the fiscal loss incurred by the de-merged company, proportional to the assets and liabilities transferred to them, as long as they may stand alone independently.

Although this newly established facility is restrictive in case of spin-offs, the possibility of taking over fiscal losses is a beneficial and welcomed measure, expected to encourage such reorganisation transactions.

ii Withholding tax on artificial transactions

The beginning of 2013 has brought about a much disputed anti-tax evasion measure through enactment of Government Ordinance No. 8/2013 for amendment of the Fiscal Code. This measure refers to introducing a 50 per cent withholding tax on most types of income (e.g. services, dividends, interest, royalties) derived by non-residents from Romania, if such income is paid to a state with which Romania does not have an exchange of information instrument in place.

This provision overrides the benefits of the Double Taxation Avoidance Treaties concluded by Romania, as the 50 per cent withholding tax applies based on the destination of the funds and not the residency of the beneficiary.

Subsequent legislative changes (Law No. 168/2013 for amendment of the Fiscal Code) have clarified that these provisions apply only to artificial transactions, coming against normal economic practices, with the sole purpose of avoiding taxation or obtaining fiscal advantages otherwise not attainable.

iii VAT on demolished buildings

Year 2012 has also brought a change in the practical approach of the tax authorities regarding buildings which have been demolished with a view of clearing land for subsequent projects.

According to the widespread initial practice of the tax authorities, such buildings were considered 'assets that cease to exist', generating a VAT liability (based on the adjustments to be performed under the capital goods adjustment scheme), leading in turn to various tax disputes and litigations.

Further to the European Court of Justice ruling in C-257/11 Gran Via Moinesti, addressing an identical matter, this approach was changed, therefore VAT deduction is accepted.

IX COMPETITION LAW

The merger control activity of the Romanian Competition Council during 2012 increased in volume by 16.7 per cent. By number of files, the merger control assessments involved prominently the following markets: agribusiness and food industry, real estate, insurance and medical services.

With almost two decades of practice and some very intense recent years of following *de facto* the principles laid down in the EU Merger Control Regulation of 2004 and subsequent guidelines, the Romanian Competition Council has reached an era of legal pragmatism and efficiency. M&A activities are thus, if not supported by the regulator, at least not hindered as in certain past years.

As well as a reformed framework fully aligned with EU legal provisions, the merger control and antitrust legislation was further adapted to address national security stakes, under a distinct procedure of assessing M&A transactions that may raise national security risk (i.e., the Order of the Romanian Competition Council's President No. 941/2011 approving an amendment to the Merger Control Regulation, in force since 11 January 2012).

A second line of developments refer to the commitment procedure within M&A clearance, enacted by: Competition Law No. 21/1996, as amended by Law No. 149/2011 in force since 14 July 2011; and the Order of the Romanian Competition Council's President No. 688/2010 approving the Guidelines regarding the commitments' implementation on economic concentrations, in force from 3 January 2011.

i M&A and the national security risk

The concept was initially enacted in the second half of 2011 in the main legal act on merger control (i.e., Competition Law No. 21/1996. The aim was to bring local legislation in line with states such as the United Kingdom, Germany and the United States. Subsequent to primary legislation amendments, the secondary legislation was amended in 2012 to create the regime to be followed by the institutions involved in the process.

ii Scope

In theory, all takeover operations that raise national security risks would come under scrutiny. Those scrutinised include, *inter alia*: citizen and community safety; border safety; energy safety; safety of information and communication systems; and protection against disasters. There are also two catch-all types of rules.

First, a scrutiny from national security risks perspective shall be put in motion regardless of whether the M&A transaction exceeds the turnover thresholds set by the Competition Law No. 21/1996 or not to trigger the analysis of the transaction's compatibility with a competitive environment. Thus, for those cases where the intervention of the Romanian Competition Council is not called for, the party acquiring control is required to approach the Supreme Council for National Defence directly and ensure information needed for the national security analysis is provided.

Second, the standard of review is very low, by simply referring to 'the possibility to exercise a crucial influence over self-sustainable companies or assets which are of interest from the national security standpoint'.

iii Procedure

Powers for assessment are divided between three public institutions, each with distinct functions (i.e., the Romanian Competition Council, the Supreme Council for National Defence and the Romanian government).

First, the Romanian Competition Council informs the Supreme Council for National Defence of the M&A transactions that could entail national security risks. Should the Supreme Council for National Defence find that the respective transaction is threatening to national security, a proposal for denying the economic concentration is forwarded to the Romanian government, for the latter to ultimately decide.

It is not yet possible to draw conclusions about the impact of this new regulation, since to date there is no publicly known case of national security risk clearance conducted. Still, it carries the potential for significant adverse effects to M&A here and careful consideration shall be given to it.

iv The commitment procedure

The other major development began in 2010, when the domestic legal framework expressly enacted for the first time the commitment procedure in cases of mergers that raise anti-competitive concerns.

In light of these amendments, the Romanian Competition Council assessed two transactions in connection to dialysis services and trading related products markets involving the European industry leader Fresenius Group.

The Romanian Competition Council analysed the notifications in parallel, as both involved the same group and raised anti-competitive concerns due to their horizontal effect. It has further agreed to clear the transactions only on condition of a complex set of commitments consisting of both structural and sophisticated behavioural remedies aimed at removing the concerns raised by the Romanian Competition Council.

In a first for Romania, in the second half of 2012, the acquiring parties complied with their structural commitments by signing a transaction whereby, as per the commitments undertaken, they sold two of the dialysis clinics they had initially acquired. What is more, this compulsory transaction was in itself, regardless of the structural commitments, an economic concentration as per the meaning of the Competition Law No. 21/1996 notified and cleared by the Romanian Competition Council.

X OUTLOOK

Forecasts for 2013 are cautiously optimistic.

By reference to macroeconomics and fundamental parameters, the M&A market looks set for a robust recovery, but the level of new capital per year remains at historically low levels.

Advancement of the Romanian M&A market is tightly linked to the European economy and significantly depends on the local ability to increase attractiveness by comparison to neighbouring eastern European markets.

So far, energy and natural resources, real estate and agribusiness as well as certain sectoral privatisations appear to be more appealing to new investors.

Indeed, local energy and natural resources are already well-known and expected to continue to attract new capital, while a number of matured projects require exit. In this vein, shale gas investments remain a hot topic on the investors' agenda, but 2013 is unlikely to bring any clear answers to the associated geopolitical and social concerns.

As regards real estate, it appears that restructuring will reach its peak in 2013 and potential developments and exits are expected, but mainly depending on the expected shift of regional institutional investors towards Romanian market.

The agribusiness sector looks set to grow organically and new acquisitions are likely to happen, from land banking deals to conglomerates involving chain food processors and manufactures, related logistics and distribution networks.

Should the government confirm and proceed with the expected privatisations of various strategic companies, potentially by using the stock market and IPO instruments, capital markets may receive a new impetus.

Deals might include Romgaz, the national gas company, Electrica Distributie, electricity distribution companies, Transgaz, gas transportation company, Romanian Post Company, National Railway Freight Transportation Company CFR Marfa, Cuprumin (Romania's largest copper mine) or Oltchim (petrochemical plant).

Appendix 1

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