Romania

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Introduction

The regulation of financial services in Romania has undergone continuous development in the last few years in the context of an open market, accession to the European Union (EU), and steadily increasing confidence in the financial system by Romanian society and foreign investors alike.

Under the current legal framework, which reflects EU requirements in relation to financial services, each specific financial sector is thoroughly regulated and its activities are supervised by a specific authority. Despite the many changes, the Romanian financial system remains open to improvements. This chapter discusses some of the salient features of the Romanian legal framework on financial services.

The Banking System

The National Bank of Romania

The Romanian banking system has been completely reorganized after 1990, resulting in a two-tier banking structure: the National Bank of Romania (NBR) and commercial banking corporations. Under this structure, the commercial activity previously managed by the NBR was transferred to credit institutions, while state-owned banks began the privatization process in 1998. Consequently, the major banks in which the state was a shareholder became private commercial banks with both Romanian and foreign shareholding.[1]

1 Law Number 83/1997 on the Privatization of Commercial Banks when the State is a Shareholder, as amended.

The NBR is the regulatory, supervisory, and controlling entity of the Romanian banking system.[2] According to its statute,[3] the primary objective of the NBR is to ensure and maintain price stability, functioning as the central bank and currency issuer in Romania.

In addition, the NBR is in charge of formulating the currency policy of credit institutions and for their authorization, regulation, and prudential supervision. A major characteristic of the NBR is its autonomy as a public institution separate from the government and other state institutions.

Credit Institutions

Romanian credit institutions are divided into banks, credit cooperative organizations, savings banks for housing loans, and mortgage banks. As a general rule, they must organize their activity in compliance with the rules of healthy and prudent banking practices and the legal requirements in effect.

According to the register of credit institutions published by the NBR on its official website,[4] in Romania there are currently twenty-nine banks, two savings banks for housing loans, and forty-eight credit cooperative organizations.

Incorporation and Authorization of Romanian Credit Institutions

To incorporate a credit institution in Romania, the general legal provisions on companies and special regulations in the banking law must be observed.[5] In Romania, a credit institution must be established as a joint-stock company registered with the trade register.

However, a Romanian credit cooperative organization is an autonomous and non-governmental association of individuals and performs

2 Under the current banking law, which is Government Emergency Ordinance Number 99/2006 on credit institutions and capital adequacy, as amended, published in the *Official Gazette*, Number 1027/2006. It implements Directive 2006/49/EC of 14 June 2006 on the capital adequacy of investment firms and credit institutions and Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.

3 Law Number 312/2004 on the Statute of the NBR, as amended, published in the *Official Gazette*, Number 582/2004.

4 At http://www.bnro.ro/NBR-Public-Registers-1701.aspx.

5 Government Emergency Ordinance Number 99/2006 on credit institutions and capital adequacy; Law Number 31/1990 on commercial companies, as amended (the Company Law).

activities specific to credit institutions, with the purpose of providing mutual help for its members.[6]

A credit institution must obtain prior clearance and operational authorization (i.e., a license) from the NBR before it may commence its activities. To obtain the authorization, the documents attesting the legal incorporation of the credit institution must be submitted to the NBR.

The NBR cannot issue authorization to a credit institution that does not have distinctive own funds or if the level of its initial share capital is not at least equal to the minimum level established through regulations, which must not be less than the equivalent of EUR 5,000,000 in Romanian currency (lei).

After incorporation, the credit institution may set up different units, either with legal personality (such as subsidiaries) or without legal personality (such as branches, agencies, and similar secondary seats).

Moreover, the legal provisions require special approval for other entities operating in the banking system, such as non-financial banking institutions and assimilated entities, financial institutions, and payment institutions.

Overseas Activity of Romanian Credit Institutions

Romanian credit institutions may carry out activities outside the Romanian territory under specific terms and conditions, depending on whether the activities are carried out in EU Member States or in third countries.[7] In both cases, the activities must be carried out in compliance with both Romanian legislation and the law of the state where they operate.

A Romanian credit institution that intends to perform activities in an EU Member State must either set up branches in that Member State or directly provide banking services based on the EU "passport" principle. If the banking services to be provided are authorized by the NBR, no other approval is needed from the relevant authority of the host state; however, a notification in this respect sent by the credit institution to the NBR and further transmitted to the corresponding supervisory entity in the host state is necessary.

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6 According to Government Emergency Ordinance Number 99/2006 on credit institutions and capital adequacy.

7 The term "third country" refers to non-EU countries.

A Romanian credit institution that intends to perform activities in a country outside the EU must set up branches in the territory of the third country in order to carry out any banking activity. The setting up of branches in third countries is subject to prior approval from the NBR.

Foreign Credit Institutions in Romania

Legal entities (either from Member States or from third countries) also may operate in Romania. The requirements for foreign credit institutions to carry out their activities in Romania are strictly regulated by law.

Any credit institution from an EU Member State may set up a branch in Romania and may directly perform banking activities, provided that a notification is sent in this respect by that credit institution to the relevant supervisory authority in the home Member State, which must then transmit it to the NBR.

Foreign credit institutions from a third country may not directly perform banking activities in Romania, but are required to set up a branch in Romania. The establishment of a branch requires the authorization of the NBR and the approval of the relevant authority in the state of origin.

Subsidiaries of foreign banks in Romania are deemed Romanian banks with legal personality and are subject to the incorporation and authorization conditions applicable to Romanian credit institutions.[8]

Another option available to credit institutions based in EU Member States and third countries is the establishment of a representative office. However, a representative office is prohibited from performing any banking operations in Romania and is limited to marketing activities. The authorization for establishing a representative office will be issued by the Ministry of Economy, Commerce, and Business Environment, with a notification sent to the NBR.

Permitted Activities

The activities permitted to credit institutions as established by the banking law consist of financial operations, operations specific to secured transactions (in accordance with the relevant special legislation), and non-financial operations.

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8 Discussed in the subsection "Incorporation and Authorization", above.

Credit institutions may perform a large range of financial operations, such as:

(1) Receiving fund deposits (or other repayable funds) and granting loans (e.g., consumer and mortgage loans);
(2) Financing commercial transactions;
(3) Factoring, discounting, and forfeiture operations;
(4) Financial leasing;
(5) Issuance and management of payment instruments (e.g., credit cards and e-currency);
(6) Fund transfer services;
(7) Issuance of guarantees and undertaking commitments;
(8) Financial and banking consultancy services;
(9) Agency operations; and
(10) Undertaking transactions on their own account or on clients' accounts with money market instruments (e.g., checks, bills of exchange, promissory notes), foreign currency, futures and options agreements, instruments based on currency exchange rates and interest rates, securities, and other financial instruments.

The non-financial operations Romanian credit institutions are entitled to perform include operations based on mandate or commission (especially for other entities in the same group), asset management operations, and services provided to their own clientele (which are considered an extension of their banking operations). However, income from non-financial operations may not exceed ten per cent of the income obtained from the financial operations of the credit institution.

Prohibited Activities

The general provisions of Romanian banking law also stipulate the activities forbidden to credit institutions, such as pledging their own shares to secure their own debts; granting loans secured with the shares of the credit institution, other capital titles, or bonds issued by the same credit institution or by another credit institution in the same group; and receiving deposits or other repayable funds, titles, or other valuables from the public when the credit institution is in insolvency.

Prudential Requirements

Each type of credit institution is subject to specific rules as regards its activities. Accordingly, Romanian law stipulates special requirements

to be observed by credit institutions in order to cover their credit, market, or operational risks; for example, banks are compelled to maintain an adequate level of own funds.

Some of the prudential requirements do not allow the distribution of dividends by credit institutions if their solvency level is lower than the minimum level required by the NBR. Moreover, the value of a qualified participation held by a Romanian credit institution in entities other than credit institutions, financial institutions, insurance companies, and institutions providing ancillary services may not exceed fifteen per cent of its own funds. The total amount of qualified participations of a Romanian credit institution cannot exceed sixty per cent of its own funds.

The acquisition by a Romanian credit institution of qualified participation in an entity based outside the EU must have prior approval of the NBR if, due to the acquisition, the entity falls under the prudential consolidation area of the acquired credit institution according to the applicable laws.

Another aspect of the prudential requirements concerns loans granted to persons having special relations with the credit institution or to its personnel. Such loans are subject to special conditions set by the NBR.

Mergers/Spin-Offs

Mergers and spin offs of credit institutions also are specifically regulated by law. All entities taking part in a merger must be authorized credit institutions and also must obtain approval from the Competition Council and the NBR. In the case of a spin-off, Romanian law requires that the entity to be demerged must be an authorized institution; the approval of the NBR also is necessary.

Bankruptcy

Romanian law specifically governs the bankruptcy of credit institutions.[9] Under the law, a credit institution is considered to be bankrupt if:

(1) Liquid and outstanding debts have not been fully paid for at least seven business days as of the maturity date (the term is thirty days for credit cooperatives);

9 Government Ordinance Number 10/2004 on the bankruptcy of credit institutions, as amended.

(2) The solvency indicator, computed in accordance with NBR regulations, is less than two per cent; and
(3) The license of the credit institution is withdrawn due to incapacity of financial recovery.

In terms of formalities to be performed in order to initiate the bankruptcy procedure, the debtor must obtain the approval of the NBR, unless the NBR is the one filing the insolvency claim.

Professional Obligations

Romanian law pays special attention to professional obligations in the banking system: the bank-client relationship, confidentiality, and banking secrecy.

Bank-Client Relationship Credit institutions may undertake transactions with clients only on a contractual basis, acting in a prudential manner and in compliance with consumer protection laws.

In this respect, the specific legislation states that clients must be informed on every aspect of the contractual terms, starting from the pre-contractual phase and all through the performance of the contract.[10] Thus, the law is very strict in terms of consumer protection, detailing the obligation of credit institutions to inform clients when negotiating or concluding credit contracts, including credit contracts secured with mortgages or other rights related to real estate.

For example, contractual documents must be drafted so that clients understand all the terms and conditions. No penalties, interests, commissions, or other fees can be charged unless expressly stipulated in the contract.

Moreover, the law clearly stipulates the categories of customers who are beneficiaries of the right to be informed (individuals who are either potential or actual clients) and the types of information that must be disclosed to the client.

Such information includes preliminary information necessary to conclude a credit contract, information based on which a credit request is rejected, information concerning the terms and conditions of the credit contract, and information on the assignment of rights or on the

10 Government Emergency Ordinance Number 50/2010 regarding credit contracts for consumers, published in the *Official Gazette*, Number 289/2010.

sanctions applied to credit institutions in case of non-compliance with consumer protection laws in credit contracts.

Credit institutions may not condition the granting of loans or other services on the sale or purchase of shares or other financial instruments issued by the credit institution or by other entities in the same group. They also may not condition the granting of loans or other services on the clients' acceptance of other services not related to the requested credit operations or services.

Confidentiality Credit institutions, their employees, and their management are bound to maintain confidentiality on all facts, data, or information concerning the activities performed for, the services rendered to, or the contracts concluded with clients. The confidentiality obligation includes any other available fact, data, or information that concerns the person, the property, the activity, the business, and the personal or business relationships of clients. Information regarding clients' account balances, turnovers, or transactions also must be kept confidential.

The employees and the management of credit institutions have no right to use or to reveal, either during their term of employment or subsequently, facts or data which, if made public, would harm the interest or the prestige of the credit institution or any of its clients. This obligation also is applicable to individuals who obtain such information from the credit institution's reports or other documents.

In its provisions on the bank-client relationship, the banking law defines "client" as a person who started negotiations with the credit institution, regardless of whether or not the transaction has been concluded or whether that person is a current or a former client of the credit institution.

Banking Secrecy The obligation to maintain professional secrecy in the banking sector is not binding on a competent authority in the course of exercising its supervisory powers at an individual or at a consolidated or sub-consolidated level.

However, the personnel of the credit institution cannot directly or indirectly use, for their own benefit or for the benefit of third parties, the information they hold, or of which they became aware in any manner related to their position. Any banking information subject to banking secrecy may only be disclosed under the following circumstances:

(1) To the account holder or his heirs, including his legal and/or statutory representatives, or with the account holder's express consent;

(2) When the credit institution proves a lawful interest for the disclosure;
(3) On the written request of other authorities or institutions, or *ex officio* when a special law states that such authorities or institutions are entitled to request and/or to receive such information and the information that can be supplied by the credit institutions for this purpose is clearly identified;
(4) On the written request of the account holder's spouse, when the spouse proves that a request has been submitted to the court for the division of joint assets, or upon the court's request;
(5) On the request of a court, in order to settle various cases pending judgment;
(6) On the request of a bank enforcement officer, in order to conduct foreclosure proceedings;
(7) On the request of a public notary, within an inheritance procedure; and
(8) On the written request of the prosecutor or of a court of law after the initiation of criminal proceedings against a client or on the written request of criminal investigation officers, subject to the prosecutor's approval.

Certain categories of disclosure of information are not deemed breaches of the obligation to maintain banking secrecy:

(1) Disclosure of aggregated data, if the identity and information relating to the activity of each client cannot be identified;
(2) Disclosure of data to the NBR's Banking Risk Center, Payments Incident Center, or the Deposit Guarantee Fund organized under the law;
(3) Disclosure of data to the financial auditor of a credit institution;
(4) Disclosure of information on the request of corresponding credit institutions, if such information relates to the operations conducted through corresponding accounts;
(5) Disclosure of data and information to entities belonging to the same group as the credit institution, when the information is necessary for consolidated supervision of banks and financial groups and to fight money laundering and terrorism financing; and
(6) The delivery of information existing in the NBR's database to credit institutions.

Supervision

The NBR supervises credit institutions in Romania.[11] Some of its actions aim to prevent a decrease in the share capital under the minimum level necessary to cover banking risks. Therefore, any decision taken by the NBR must be fully observed by credit institutions.

The sanctions for non-observance of the NBR's decisions range from a written warning to withdrawing the authorization for establishing the credit institution. Moreover, if the funds of a credit institution are less than seventy-five per cent of the required share capital, the NBR is obliged to replace the persons appointed as department heads of the institution or its branches, unless it has decided to withdraw the authorization or declare the insolvency of the credit institution.

The NBR seeks to comply with measures and structures set at international level, in order to constantly improve banking supervision. In addition, the NBR aims at improving the unitary bank rating and early warning system (CAAMPL),[12] implemented since 1999.

Thus, one of the measures taken by the NBR in the prudential supervision of credit institutions was the establishment of the Banking Risk Center, which gathers, stores, and centralizes information on each credit institution in the Romanian banking system.

Non-Banking Financial Institutions

In Romania, non-banking financial institutions are entities other than credit institutions that perform credit activities on a professional basis, in conditions prescribed by the applicable legislation.

According to Law Number 93/2009 regarding non-banking financial institutions,[13] when performing a credit activity, a non-banking financial institution may use either its own financing resources or resources borrowed from credit institutions. The use of other resources is permissible only in accordance with the legal provisions.

The incorporation of non-banking institutions must be notified to the NBR, which has monitoring and supervisory powers over the activity of these institutions. The minimum share capital of non-banking institutions cannot be less than the lei equivalent of EUR 200,000, or EUR 3,000,000 for non-banking institutions granting mortgage credits.

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11 Discussed in the subsection "The National Bank of Romania", above.
12 The specific components of CAAMPL are capital adequacy, the quality of assets, the quality of the stock holding, management, profitability, and liquidity.
13 Published in the *Official Gazette*, Number 259/2009.

Each non-banking financial institution must be registered in specific registries held by the NBR, in accordance with specific conditions and depending on the activities to be performed. For example, only non-banking financial institutions that have a certain turnover, volume of credits, debt level, and similar requirements may be registered in the Special Registry.

Non-banking financial institutions may perform, among other transactions, credit activities such as granting consumer loans, mortgage loans, real estate loans, or microcredits. Credit activities include financing of commercial transactions, factoring, financial leasing, and issuance of letters of guarantee. Certain activities are prohibited.

For example, non-banking financial institutions may not perform deposit activities, may not issue bonds (except for public offers addressed to qualified investors), and may not grant loans if such an operation is conditioned by the sale or purchase of the respective non-banking financial institution's shares.

Similar to credit institutions, the activities performed by non-banking financial institutions must comply with consumer protection laws. Non-banking financial institutions also must observe certain professional obligations, such as the obligation to respect professional secrecy. This obligation refers to maintaining confidentiality of the available information concerning the person, assets, business, personal or business relationships, contracts, or services provided to potential or actual clients.

Capital Markets

Legal Framework

The legal framework regulating the Romanian capital market has been constantly improved during the last decade, along with that of other financial service sectors. The current legal provisions set forth under the Capital Markets Law[14] are in accordance with rules laid down at the EU level. The Market in Financial Instruments Directive (MiFID)[15] is only one of the European directives implemented under the Capital Markets Law. Additionally, following EU accession, some of the EU legal provisions are directly applicable in Romania.

14 Law Number 297/2004 on Capital Markets, published in the *Official Gazette*, Number 571/2004.

15 Directive 2004/39/EC of 21 April 2004 on markets in financial instruments, OJ 2004 L 145/1–88.

The leading Romanian capital market players are private legal entities, individuals, and entities without legal capacity that have specific functions and purposes, including:

(1) Regulated markets and their operators and alternative trading systems and their operators;
(2) Issuers of securities;
(3) Financial investment services companies;
(4) Investment consultants;
(5) Rating agencies for issuers and their securities;
(6) The Central Depository and other depositories;
(7) Clearing houses, central counterparts, and settlement agents;
(8) Asset management companies; and
(9) Undertakings for collective investments in transferable securities (UCITS).[16]

Regulated Markets

Romanian regulated markets in financial instruments are set up and managed by a legal entity, referred to as a market operator. A market operator is incorporated as a joint-stock company that is the issuer of nominative shares and is authorized and supervised by the National Securities Commission (*Comisia Nationala a Valorilor Mobiliare* — CNVM.

According to recent legislative changes,[17] the Financial Supervisory Authority shall be created as a new independent, autonomous administrative authority, with legal capacity, as competent authority at national level to take over by 15 March 2013, all functions and attributions of the CNVM, the Insurance Supervision Commission and the Private Pension System Supervision Commission, which shall be wound-up. Market operators authorized to work in Romania must be registered in the CNVM Register.

In addition, the list of authorized regulated markets must be delivered to all Member States and to the European Commission, together with the regulations, instructions, and procedures referring to the operations performed in such markets, as well as any subsequent amendments to them.

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16 UCITS are further discussed in the subsection "Undertakings for Collective Investments in Transferable Securities", below.

17 Government's Emergency Ordinance Number 93/2012 regarding the setting-up, organization and functioning of the Financial Supervisory Authority

In accordance with the EU regulations in this respect, the Romanian law states that a regulated market consists of a system for trading financial instruments which operates on a regular basis. The characteristic feature of a regulated market is that the regulations issued by the market operator and duly approved by the CNVM define the conditions for operation, access to the market, and for accepting financial instruments for trading. To ensure that investors are protected, a regulated market must comply with the reporting and transparency requirements referred to in the Capital Markets Law and in the regulations issued by the CNVM in accordance with EU laws.

The organization and operation of a regulated market is laid down in its own regulations, issued by the market operator, adopted by the general meeting of shareholders, and approved by the CNVM, in accordance with the provisions of the Capital Markets Law and the applicable EU regulations. The CNVM supervises regulated markets in order to ensure transparency, appropriate operation of the trading activity, and investor protection.

Securities that do not comply with the requirements to be accepted for trading on a regulated market may be traded under an alternative trading system, which may be managed, by derogation, by authorized intermediaries, or by the market operator, referred to as a system operator. The CNVM must approve the system management, the full description of its characteristics, and the operational rules.

In 1995, the Bucharest Stock Exchange was the first regulated market established in Romania. Soon after, in 1996, the RASDAQ market was established as an over-the-counter (OTC) market, modeled on the American NASDAQ market, and was destined to list the companies subject to the mass privatization program.

In 2004, the Bucharest Stock Exchange and the RASDAQ market agreed on a merger and started a merger process that was concluded on 28 December 2005. The result was the establishment of the Bucharest Stock Exchange (Bursa de Valori Bucuresti SA), which is a joint-stock company under the supervision of the CNVM.

Through the activity of authorized agents, the Bucharest Stock Exchange ensures that the public has adequate systems, mechanisms, and procedures for the performance of securities transactions in a continuing, disciplined, and equitable manner. The Bucharest Stock Exchange constitutes an official and organized market for selling and purchasing listed securities.

Other regulated markets may be established, based on the CNVM's authorization and managed by a market operator organized as a joint-stock

company. A shareholder of a market operator may not hold more than five per cent of the voting rights. Each member of the market operator's board of directors must be validated by the CNVM before assuming office.

A market operator is entitled to issue its own regulations regarding the organization and operation of that market. The regulations must be approved by the general shareholders' meeting of that operator and subsequently endorsed by the CNVM.

The National Securities Commission

Regulated markets are supervised by the CNVM. To fulfill this supervisory function, the CNVM may appoint an inspector, whose primary role is to oversee the securities operations carried out in the regulated markets.

In this capacity, the inspector may propose that the CNVM request the amendment of the regulations issued by a market operator, suspend part or all of the operations with financial instruments on a regulated market, or cancel the authorization granted to a market operator. The inspector has free access to all premises, documents, information, and records of market operators and also may participate in the meetings held by the corporate bodies of market operators.

The CNVM is an autonomous administrative authority with legal capacity, which monitors and regulates the capital market and the regulated commodities and derivatives markets. In addition to its supervisory powers, the CNVM has the power to authorize the entities operating in the market. Its aim is to protect investors, to ensure stability, competition, and smooth functioning of the capital market.

To achieve this aim, it issues regulations on prudential requirements and the adequacy of capital for proper evaluation of risks in order to implement the appropriate risk mitigation measures. In accordance with the Statute of the CNVM,[18] its primary objectives are to:

(1) Establish and maintain the proper framework necessary for the development of regulated markets;
(2) Promote trust in financial instruments markets and in financial instrument investments;
(3) Ensure protection of operators and investors against unfair, abusive, and fraudulent practices;

18 Government Emergency Ordinance Number 25/2002 on the Statute of the CNVM, published in the *Official Gazette*, Number 539/2002, as amended.

(4) Promote fair and transparent operation of the financial instruments markets;
(5) Prevent fraud and market manipulation and ensure the integrity of financial instruments markets;
(6) Establish standards of financial soundness and honest practice in the financial instruments markets;
(7) Adopt the necessary measures to avoid systemic risk in the financial instruments markets;
(8) Prevent any undue influence on the equality in information and treatment of investors and their interests; and
(9) Cooperate at the international level with similar competent authorities for the purpose of achieving its objectives.

Supervisory Powers

In order to execute its supervisory powers, the CNVM may:
(1) Verify the fulfillment of the legal and statutory powers and obligations of directors, managers, executive officers, and other persons in relation to the activity of regulated or supervised entities;
(2) Request the board of directors of a regulated entity to convene its members or, as appropriate, to convene the general shareholders' meeting, deciding on the matters that have to be registered on the agenda;
(3) Request the competent court to order the convening of general shareholders' meetings;
(4) Request information and documents from issuers whose securities are subject to a public offering or were admitted to trading on a regulated market or on an alternative trading system;
(5) Conduct inspections at head offices of the entities regulated and supervised by the CNVM; and
(6) Grant a hearing to any person in relation to the business of the entities regulated and supervised by the CNVM.

Prudential Rules

Investment services related to financial instruments may be performed on a professional basis only by intermediaries. In the course of their business, intermediaries must at all times comply with the prudential rules laid down by the CNVM.

Such rules may range from establishing administrative and accounting procedures to imposing a certain structure which minimizes

the risks of conflict of interests between the investor and the intermediary or between investors of the same intermediary.

An intermediary may not use the assets of a client for the purpose of guaranteeing the transactions concluded on its own behalf or on behalf of another client, except when it has obtained the client's written consent.

Rules of Conduct

Intermediaries and agents providing financial investment services have the obligation to observe the rules of conduct issued by the CNVM and the rules issued by the regulated markets in which they operate. The CNVM supervises observance of the rules of conduct by all intermediaries providing financial investment services in the territory of Romania.

Listing of Securities

Regulated markets list securities and other financial instruments based on a prospectus that is drafted by the issuer and approved by the CNVM. Issuers whose securities are admitted on a regulated market must always observe market transparency requirements.

In order to be listed on a stock exchange, a publicly owned company must fulfill three basic minimal requirements. The first requirement is it must have a minimum anticipated stock exchange capitalization of EUR 1,000,000, denominated in lei. If the stock exchange capitalization value cannot be anticipated, the company must have a share capital representing the lei equivalent of at least EUR 1,000,000.

The second requirement is that it must have been in operation and must have published its annual financial reports during the three years prior to its listing. The final requirement is that at least twenty-five per cent of its shares must be publicly owned.[19]

Advantages and Disadvantages of Listing a Company

The Romanian legal doctrine offers various advantages for the listing of companies.[20] At the same time, the obligations imposed by law result in several disadvantages.

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19 Capital Markets Law, Articles 213 and 217.

20 Tutuianu, *Piata de Capital. Regimul Juridic Aplicabil Participantilor* (2007), at pp. 212 *et seq.*

Some of the key advantages of listing a company are monetary resources from the capital market, an alternative to financing the company's activity, free publicity and enhanced reputation, and increased liquidity of the securities. Other major advantages are the existence of an acknowledged value on the market for the issuer's creditors, for creditors holding securities, and in the case of transactions such as mergers and takeovers.

Other advantages include employee incentives through participation in share option plans, payment of creditors with shares, and simplified records in the shareholders' register and bond register.

The disadvantages of listing a company are the transparency and informing obligations that listed companies must fulfill, supplementary costs, limited activities of the company's management, and loss or dilution of control held by the company's initial shareholders.

Public Offers

Prior to the publication of the announcement of a public offer and/or the prospectus, the CNVM must authorize the public offer of the relevant securities. The Capital Markets Law regulates the following types of public offers:

(1) Public sale offer, which must be made through an authorized intermediary;
(2) Public purchase offer, which is the offer by a person to purchase securities, publicly made to all existing shareholders through an authorized intermediary;
(3) Voluntary takeover bid, which is the offer by a person who is not legally compelled to make the offer, made to all existing shareholders for all their shares, with the purpose of acquiring more than thirty-three per cent of the voting rights of a listed company;
(4) Mandatory takeover bid, which is the offer by a person who, as a result of a purchase, directly or indirectly holds more than thirty-three per cent of the voting rights and must therefore launch a public offer to all existing shareholders for their entire stock, no later than two months after reaching the thirty-three per cent threshold; and
(5) Competitive public offer, which is the public offer carried out in order to allow the squeeze-out or sell-out of minority shareholders.

The validity term of a public offer is stipulated in the announcement and the prospectus. Such periods must observe the minimum and maximum periods provided by law (e.g., a maximum period of twelve months for public sale offers).

In a voluntary takeover bid, starting from the moment when the offeror's preliminary notice is received, the board of directors of the target company may not conclude any acts or deeds or take any measure that might materially affect the company's assets or the objectives of the takeover.

The only exceptions to this rule are transactions entered into during the ordinary course of business and transactions expressly approved by the extraordinary general shareholders' meeting.

Special Governance Rules for Public Companies

In order to protect investors, the Capital Markets Law sets forth a set of rules departing from the customary legal framework for companies set forth under the Company Law. Some of the most important provisions of the Capital Markets Law applicable to publicly owned companies are on shareholdings, share capital, and corporate governance.

Shareholders holding at least five per cent of the shares issued by publicly owned companies, individually or together with other persons, may require the company's financial auditors to present reports on the company's management status and operations.

The general shareholders' meeting of publicly owned companies must be convened by publishing the convening notice and by notifying both the CNVM and the regulated market where the company is listed.

The members of the board of directors of publicly owned companies may be elected by cumulative voting. Elections based on this method of voting are mandatory when a significant shareholder requests it.

The auditors of publicly owned companies must supervise and check the company's bookkeeping. They also must check the accuracy and feasibility of the transactions or acts concluded by the company with its affiliated persons or persons involved with the company.

The term for dividend payment to shareholders may not exceed six months from the date on which the general shareholders' meeting establishes the dividends. The decision of the general shareholders' meeting for dividend establishment must be filed with the Trade Register for registration purposes and published in the *Official Gazette*,

Part IV. The decision will constitute an executory title, based on which the shareholders may start forced execution proceedings against the company.

Any transactions meant to acquire, alienate, exchange, or create encumbrances over the company's fixed assets with a value exceeding, either individually or cumulatively, twenty per cent of the total fixed assets (except for receivables) during a financial year may be concluded by the company's directors only after the prior approval of the shareholders' extraordinary general meeting.

Any increase in the company's share capital by new contributions, either in cash or in kind, should observe the preference right of all the company's shareholders.

Market Transparency and Investor Equality

In accordance with Capital Markets Law and other applicable legislation, investors have the right to access accurate and sufficient information on securities, which must be made public at the appropriate time. Investors also have the right to information on issuers and their activity.

Moreover, publicly owned companies must make available to the CNVM and the market operator reports such as the quarterly, biannual, and annual reports and specific reports with respect to various events. In the event of a material event, publicly owned companies must draft current reports within forty-eight hours.

Any action that is meant to manipulate the market and any transactions based on privileged information are forbidden by law. The legal provisions stipulate sanctions for any holder of privileged information who acquires or transfers, for itself or for other persons, either directly or indirectly, securities or other related rights on which it holds such privileged information. This provision also is applicable to an individual who evaluates such privileged information in any other way, transmits the information, and facilitates its publication for his personal benefit or for the benefit of any third party.

Market Abuse

Both primary and secondary Romanian legislation comprise special provisions with respect to market abuse in the capital market. The principles guiding the capital market are the principles of equality among investors and market transparency.

In Romania, the investor has two principal fundamental rights: the right to be informed promptly, completely, correctly, and precisely; and the right to claim damages in case of any prejudice following illegal acts and/or lack of professionalism of other capital market participants.

Regarding the right of investors to comprehensive and clear information, Romanian law establishes the information obligations that listed companies must observe. As such, investors have the right to be informed on rights resulting from their capacity as shareholders (i.e., information on shareholders' meetings, payment of dividends, and the like); legal deeds concluded by the company with managers, employees, shareholders controlling the company, or other involved persons; actual status of the company; any acquisition or selling of securities issued by the company; privileged information; and major events.

The concept of "market abuse" is not defined in the Romanian legislation, but it may be determined in relation to the defined concepts of privileged (inside) information, accepted market practices, and market manipulation.

The Capital Markets Law defines inside information as information of a specific nature that has not been publicly disclosed, relating to, directly or indirectly, one or more issuers or financial instruments and which, if made public, would have a major impact on the price of the financial instruments concerned. Accepted market practices are those that are reasonably expected in one or more financial markets and have been approved by the CNVM, while market manipulation refers to any deliberate attempt to interfere with the free and fair operation of the market.

In its Regulation Number 15/2004 on the authorization and functioning of investment management firms, collective investment undertakings, and depositories, the CNVM has set forth two important instances where public disclosure of privileged information may be postponed.

The first instance is when the results of ongoing negotiations or related issues would be affected by the disclosure of public information. The second instance is when the disclosure might affect decisions adopted or contracts concluded by the management body of the issuer, which are to be further approved by another body of the issuer, and when such disclosure and the simultaneous announcement of non-approval might affect the fair evaluation of the information by the public.

Under Romanian law, insiders are deemed persons who hold confidential or privileged information. For example, members of board of directors, supervisory board members, auditors, managers, and shareholders' representatives in shareholders' meetings may be deemed insiders.

In Romania, market practices that are not compliant with the applicable laws are duly sanctioned. The rules concern market manipulation and abusive marketing practices. An example of market manipulation is a transaction or a transaction order which gives or might give false signals or maintain market prices at abnormal or artificial levels.

An example of an abusive marketing practice is an individual or entity acting in concert with others in order to reach a dominant position in the demand and supply of financial instruments, resulting in price fixing.

Non-observance of the rules aimed at protecting the financial sector in general is sanctioned accordingly. The sanctions imposed by the CNVM range from warnings to fines, and even suspension or withdrawal of authorization.

Investment Services and Activities

Investment services related to financial instruments may be performed on a professional basis only by intermediaries. According to the Capital Markets Law, investment services and activities are categorized into main services and ancillary services. Main services include:

(1) Receiving and transmitting orders received from investors in relation to one or more financial instruments;
(2) Executing orders in the name of the clients;
(3) Dealing on one's own account;
(4) Portfolio management;
(5) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;
(6) Investment advice;
(7) Placing of financial instruments without a firm commitment basis; and
(8) Managing of an alternative trading system.

Ancillary services include:

(1) Safekeeping and administration of financial instruments on the clients' account, including custody and related services, such as fund or securities management;

(2) Granting credits or loans to an investor to allow it to carry out a transaction in one or more financial instruments, when the firm granting the credit or loan is involved in the transaction;
(3) Advising entities on capital structure, industrial strategy and related aspects, as well as providing advice and services relating to mergers and aquisitions of entities;
(4) Foreign exchange services connected to the provision of investment services;
(5) Investment research and financial analysis or other general recommendations regarding transactions of financial instruments;
(6) Services in connection with underwriting of financial instruments on a firm commitment basis; and
(7) All the abovementioned main services and investment activities as well as ancillary services such as the ones described above in connection to the underlying asset of derivatives, when such regard the provisions regulating services and investment activities and ancillary services.

In accordance with the legal provisions, financial investment services for an investor's account must be provided on a contractual basis. The CNVM regulations stipulate the content and minimum terms of agreements concluded with investors, including long-distance agreements.

Intermediaries

Intermediaries providing financial investment services in Romania must be registered with the CNVM either as financial investment services or as intermediaries from third countries that are authorized by the CNVM; as credit institutions authorized by the NBR; or the equivalent of credit institutions and of financial investment services authorized by the competent authorities from EU Member States.

The register of intermediaries maintained by the CNVM is a public document. Natural and legal persons may perform financial investment services in Romania only if they are registered with the CNVM.

Financial investment services are performed by individuals acting as agents for these services. They are employees of the intermediary and conduct the activity exclusively in the name of the intermediary, without the possibility of acting in their own name.

Financial Investment Services Companies

All securities trading in Romania is carried out by brokerage companies called "financial investment services companies". These brokerage

companies are legal entities incorporated as joint-stock companies. They are authorized by the CNVM to exclusively provide financial investment services.

Financial investment services companies issue nominal shares. The initial share capital depends on the activities to be performed, ranging from EUR 50,000 to EUR 730,000.

A financial investment services company may start operating from the date it obtains authorization from the CNVM, provided that it also is a member of the Investors Compensation Fund.

A financial investment services company must have a minimum of two managers, who must be natural persons. Managers undertake the day-to-day management of the company's activity, may only act in the capacity for which they were appointed, and at least one of them has to attest that he speaks Romanian. Managers must have specialized training in business, law, or in any other discipline related to financial activities.

Any individual who proposes to directly or indirectly acquire shares in a financial investment services company when that acquisition would result in a qualifying holding must first notify the CNVM. Any significant shareholder who intends to increase its holding to reach or to exceed twenty per cent, thirty-three per cent, or fifty per cent of the share capital or of the overall voting rights, or who intends the company to become one of its subsidiaries, must notify the CNVM in advance.

Notification also is required if a person intends to directly or indirectly decrease the qualifying holding held in a financial investment services company. If the acquisition or increase in a qualifying holding is conducted without the approval of the CNVM, the related voting rights will be null and void *de jure* and any votes already expressed will consequently be cancelled.

Overseas Activity of Romanian Brokerage Companies A Romanian financial investment services company may provide financial investment services in an EU Member State or in a third country. In a Member State, the service provision must be under the CNVM's authorization. The CNVM will then relay the necessary information to the competent authority in the host Member State. In a third country, the service provision may only be provided through the establishment of a branch of the Romanian company, under the CNVM's authorization and in accordance with the applicable CNVM regulations.

The CNVM has the authority to exercise prudential supervision of the financial investment services supplied by a Romanian financial investment services company in Member States and in third countries,

either directly or by establishing branches, without prejudice to the powers of the competent authorities in the host states. In addition, the CNVM will cooperate with the relevant authorities in Member States in order to exercise its supervisory powers.

Activity of Foreign Brokerage Companies in Romania Foreign brokerage companies authorized and supervised by the competent authority in a Member State may provide financial investment services in Romania under the terms of the authorization granted to them by the home Member State. They may provide services directly, based on the principle of free provision of services, or via a branch; in both cases, no authorization is required from the CNVM.

The establishment of branches in Romania by brokerage companies from third countries requires prior authorization by the CNVM. To obtain authorization, certain conditions must be fulfilled. The foreign company must be authorized in the home country and must comply with legal provisions on the financial investment services that it intends to supply in Romania.

In addition, the home country should have legal provisions similar to those in Romania, or must fulfill the reciprocity conditions for provision of services, within the limits allowed by international conventions.

Market Traders

Traders are legal entities performing transactions with derivative financial instruments such as options and futures contracts exclusively on their own account. Traders are authorized by the CNVM and registered in the CNVM Register.

Traders may operate only with the approval of the market operator and in accordance with the regulations of that market. Traders are prohibited from:

(1) Holding funds or financial instruments of other persons;
(2) Negotiating and concluding transactions in the name and on behalf of other persons;
(3) Entering into express or tacit understandings with other persons in order to act in concert on the regulated markets; and
(4) Having employment relationships with another intermediary or a market operator.

Investment Consultants and Rating Agencies

Investment consultants are natural or legal persons registered with the CNVM that provide professional investment consulting services in relation to financial instruments. The Capital Markets Law defines investment consulting as "the personal recommendation provided to a client in relation to one or more transactions involving financial instruments".

The CNVM issues regulations on the requirements for obtaining authorization to provide consulting services (including the minimum share capital requirements). The CNVM regulations also contain the procedures for the functioning, supervision, reporting, and monitoring of investments consultants and suspension and withdrawal of their operational authorization.

Rating agencies assess and rank issuers admitted to trading and financial instruments traded on regulated markets. Rating agencies must inform the CNVM of the ratings issued to issuers and financial instruments traded on a regulated market.

Undertakings for Collective Investments in Transferable Securities

In Romania, UCITS are open-end investment funds and investment companies that focus on investments in securities. UCITS are set up either as open-end investment funds based on a civil agreement or in the form of investment companies.

UCITS must cumulatively fulfill two conditions: first, their sole business must be the performance of collective investments, placing money in liquid financial instruments and operating according to the principles of risk diversification and prudential management; second, at the holder’s request, the units must always be redeemable, directly or indirectly, from the assets of the investment fund.

UCITS for which Romania is the home Member State must conduct their activity on the basis of the authorization issued by the CNVM, in accordance with the applicable legislation. Such UCITS are authorized after the CNVM has previously authorized the asset management company or expressed its consent in relation to the request of the asset management company in an EU Member State to manage the UCITS, authorized the rules of the fund or, as appropriate, the articles of incorporation of the investment company, the selection of the depository, or the issuance prospectus.

Other Undertakings for Collective Investments in Transferable Securities

Other UCITS publicly collect financial resources from individuals and/or legal entities and are supervised by the CNVM. They may be established as closed investment funds or as closed-end investment companies.

Closed investment funds are set up based on a civil agreement and are obligated to redeem the participation titles at time periods set in advance or on certain dates, in accordance with the incorporation documents. They must be registered with the CNVM. Closed-end investment companies are set up under the articles of incorporation. They may issue a limited number of shares and are traded on a market.

Asset Management Companies

Romanian asset management companies are established as joint-stock companies. They issue nominative shares, and operate based on the authorization granted by the CNVM. The minimum share capital on the date when incorporation is requested must be EUR 125,000, fully subscribed in cash.

All asset management companies must observe the rules regarding transparency and publicity, rules on key information provided to investors, and prudential rules laid down by the CNVM. They also must comply with the applicable legal and regulatory provisions.

Asset management companies authorized by the competent authorities in other EU Member States may provide services in Romania within the limits of the authorization granted by the competent authority in the relevant Member State. Services may be provided directly, based on the principle of freedom to provide services, or via a branch; in both cases, the CNVM does not need to impose a minimum capital requirement or grant authorization (or equivalent measures). However, the establishment of a branch of a foreign asset management company in Romania must be authorized by the CNVM.

Depositories

Depositories are credit institutions authorized by the CNVM that are entrusted with the safekeeping of assets belonging to UCITS. Depositories carry out activities such as keeping in custody the financial assets belonging to UCITS and recording the applications for subscription and redemption of participation titles and related operations.

In Romania, a depository may be a Romanian banking company or the branch of a European credit institution, provided that it has the necessary professional skills, sufficient share capital, and an adequate management structure to duly carry out the depository activity to meet the commitments incumbent on it in accordance with the Capital Markets Law.

The Central Depository

The Central Depository is a joint-stock company, authorized by and acting under the supervision of the CNVM. It performs clearing and settlement operations related to securities transactions, securities custodianship functions, and related operations.

In accordance with the legal provisions, the shareholders of the Central Depository are not allowed to hold more than five per cent of the voting rights each, except for market operators, who may hold up to seventy-five per cent of the voting rights. Each member of the market operator's board of directors must be validated by the CNVM before assuming office.

The Central Depository also protects security interests. The financial instruments kept in accounts opened with the Central Depository must be recorded so as to clearly distinguish them from assets held in the Central Depository's own account and cannot be subject to any claims made by the Central Depository's creditors.

Investors Compensation Fund

The Investors Compensation Fund is a legal entity organized as a joint-stock company, incorporated under the approval of the CNVM. The purpose of the Investors Compensation Fund is to compensate investors if the financial investment services company is unable to return the proceeds or financial instruments owed to or belonging to the investors and that were managed in their name for the purpose of providing the financial investment services.

Conclusion

The Romanian financial system is dominated by the banking sector, which has witnessed significant reform and restructuring since privatization of the sector began in 1998.

Romania's accession to the EU in 2007 has driven additional reforms to the laws and regulations on financial services to bring the Romanian financial sector in line with EU standards.

The Romanian regulations on financial services therefore reflect the European requirements. The transition to an open market has not been very easy, but Romanian society and foreign investors have welcomed the new changes, although the system is still open to improvements.