

Romania

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MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year? Please distinguish between trade buyers and private equity backed deals.)

As with 2008, the effects of the global economic downturn have continued to affect the Romanian capital market, making investors hesitant to launch transactions at the Bucharest Stock Exchange (BSE). However, there were significant changes in the regulatory system for mandatory tender offers (see *Question 16*). Minority shareholders sought clarification from the National Securities Commission (NSC) with regard to the area of circumstances in which indirect holdings compelled major shareholders to launch tender offers, based on relevant EU Directives. The NSC ruled in favour of minority shareholders, extending the circumstances in which indirect holdings compelled major shareholders to launch tender offers.

Against those regulatory changes, there have been some significant takeovers during 2009:

- The mandatory public tender offer made by sanofi-aventis, the leading French pharmaceutical group, for Zentiva Romania S.A.
- The mandatory public tender offer made by SABMiller for the local beer producer Bere Azuga SA.

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

The main means of obtaining control of public companies are public sale offers and public purchase offers.

Control is defined by reference to the notion of a parent company (*Article 2, par 1 point 16, letter b, Capital Market Law no. 297/2004*) (Capital Market Law). Control means the relationship between a parent company and a subsidiary or a similar relationship between any individual or legal entity and a company. Any subsidiary of a subsidiary is also considered to be a subsidiary of the parent company.

A parent company is a legal entity that is a shareholder of another company and which:

- Holds, directly or indirectly, the majority of voting rights in the other company.

- Can appoint or revoke the majority of members of the board of directors or the board of auditors, or another person with decision-making power at the other company.
- Can exert a significant influence over the other company, based on specific clauses in agreements concluded with that other company, or on specific clauses in the other company's articles of association.

The following types of public offers are regulated by the Capital Market Law:

- A public sale offer (that is, an offer made by a person to the public, to sell securities held by this person).
- A public purchase offer, that is, an offer made by a person to purchase securities publicly, which is made to all existing shareholders and communicated by way of the mass media or other means (so that the shareholders have an equal opportunity to be informed of the offer). The offer must purport to acquire 33% or less of the voting rights in a public company. In general, the public purchase offer covers a public voluntary or mandatory tender offer (see *below*), or any public offer to acquire voting rights in a public company, below the 33% threshold.
- A public voluntary tender offer (takeover) (that is, an offer by a person who is not legally required to make an offer, which is made to all existing shareholders, for all their stock, with the purpose of acquiring more than 33% of the voting rights of a public company).
- A public mandatory tender offer (takeover). This is an offer by a person who, following previous acquisitions holds more than 33% of the voting rights of a public company, and must therefore launch a public offering to all existing shareholders for their entire stock (see *Question 16*).

Control can also be gained by way of:

- A merger between two public companies.
- Increasing the share capital of a public company.
- Two or more shareholders concluding a shareholders' agreement in relation to a public company, in order to act in concert.

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are not explicitly regulated but they are legally possible. The way the target's board of directors reacts to a voluntary

tender offer determines whether the bid is a friendly or hostile one (see *Question 12*). The board's reaction is likely to be negative if it threatens the wellbeing of the shareholders or the board's position after the proposed takeover.

Hostile bids are not common, as they rarely endanger the position of the target's board members, and usually offer significant benefits to the shareholders, triggering a positive rather than a negative opinion by the board. In addition, given the fact that Romania's corporate culture is still developing, shareholders are relatively unaware of their ability to act together against hostile bidders.

4. How are public takeovers and mergers regulated and by whom?

The main regulations on public takeovers and mergers are:

- Company Law no. 31/1990 (Company Law). This is the general corporate law containing rules on establishing and operating trading companies, particularly joint stock companies.
- Capital Market Law. This regulates securities, brokers, investment funds, stock markets, market operations and public companies whose shares are traded on the capital markets (joint stock companies or issuers).
- NSC Regulation no. 1/2006 regarding issuers and operations on the capital market (Regulation no. 1/2006). This regulates activities concerning securities, especially public offer procedures, admission to trading on a regulated market, issuers' operations (including reporting requirements), special provisions applicable to companies admitted to trading on a regulated market, and inside information.
- NSC Regulation no. 1/2008 on the implementation of Directive 2007/14/EC. This establishes detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
- Directive 2007/44/EC amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC concerning procedural rules and assessment criteria for the prudent assessment of acquisitions and increases in holdings in the financial sector.
- NSC Instruction no. 3/2009 regarding direct and indirect holdings (Instruction no. 3/2009). This further develops the provisions of the Capital Market Law and Regulation no. 1/2006 to set out, more precisely, cases in which a mandatory tender offer must be made (see *Question 16*).

The main regulatory bodies are:

- **NSC.** This is an independent regulatory agency that reports only to the Romanian Parliament (see *box, The regulatory authorities*). It oversees the market and issues secondary legislation in the form of regulations, which further develop and detail the provisions of the Capital Market Law.
- **Regulated market.** The Bucharest Stock Exchange (BSE) is currently the only regulated market that operates in

Romania (see *box, The regulatory authorities*). The RASDAQ is its over-the-counter (OTC) market. The BSE has its own Code, approved by the NSC, which governs:

- participants in the BSE (how to become a participant, rights and duties, and penalties for breaches of the law);
- issuers (public companies) and financial instruments (covering admissible transactions, promotion and downgrading, withdrawal from transactions, the provision of information to the market, and fees);
- types of transactions and oversight of these transactions (covering the BSE transactions' system, orders, types of transactions (such as cross- and margin), share, preference right, bond and treasury bill transactions, public offers, and governance);
- the management and dissemination of information by public companies.
- **Competition Council.** The Competition Council is an independent administrative authority. It reports to the Romanian parliament, which regulates all competition-related issues, especially those regarding merger control (see *Question 25* and *box, The regulatory authorities*).

PRE-BID

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

On a recommended bid, the bidder can perform due diligence by entering into an understanding with the target's board of directors and gaining access to the target's documents. To avoid the risk of accessing privileged information and the resulting legal consequences of insider trading, the bidder asks the board of directors to provide only information that has previously been publicly disclosed.

Hostile bid

In principle, on a hostile bid, the bidder can only access information in the public domain, since the target's board of directors will most likely be reluctant to allow the performance of due diligence by a "black knight". However, when rejecting a due diligence request, as well as when issuing a negative opinion on a hostile bid, the target's board of directors must act in the best interest of the company and its shareholders, and not dissuade a bid that might be beneficial for the shareholders and the company.

Public domain

The following information on a public company is publicly available:

- At the Trade Registry: articles of association as well as details of share capital, shareholders and directors, and any merger or spin-off plans.
- On the company's website: answers to shareholders' questions raised during the general meeting of shareholders.

- On the NSC and BSE websites: the company's regular reports, including:
 - financial reports (quarterly, half-yearly and annual reports, and reports regarding price-sensitive events that have occurred in relation to the company's business);
 - corporate events (such as convening notices and resolutions of the general meetings of shareholders, and any merger or spin-off plans);
 - information regarding shareholding thresholds (reaching or going below 5%, 10%, 20%, 33%, 51%, 75% and 90% of the voting rights in the company);
 - documents concerning public tender offers (sale, purchase or takeover).
- On the website of the Ministry of Public Finances: the balance sheets of the company.
- On the website of the Electronic Archive for Pledges: information regarding pledges over companies' shares, bank accounts and movable assets.
- On the websites of courts of law: information regarding litigation in which public companies are involved.

6. Are there any rules on maintaining secrecy until the bid is made?

Secrecy must be maintained until the preliminary announcement of the bid is published after the NSC's approval is obtained (see *Question 12*). Between the date of NSC approval and the date of publication (a maximum of five business days), information on the bid cannot be provided to selected individuals, as the public as a whole must benefit from the information's publication.

Insider trading rules provide that, until publication, information regarding the bid is privileged. A breach of this requirement is penalised with imprisonment of between six months and five years, or a fine ranging from between half up to the total amount of the breaching transaction.

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

A potential bidder can, in principle, conclude a memorandum of understanding (MOU) with key target shareholders to sell their shares. As this information might be deemed privileged, it is advisable to disclose it to the NSC and the BSE, to avoid insider trading issues even if, ultimately, the takeover does not proceed. The parties must refrain from including any MOU clauses that are contrary to the Capital Market Law or NSC regulations.

In practice, as well as concluding an MOU, the bidder and the target's shareholders can also include their understanding to buy and sell shares in a traditional Shares Sale and Purchase Agreement, supported by covenants and appropriate representations and warranties.

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

If, before announcing the bid, the bidder acquires shares in the target, it must report this acquisition to the NSC, the BSE and the target whenever the following thresholds are crossed: 5%, 10%, 15%, 20%, 25%, 33%, 50%, 75% or 90% of the total voting rights in the target (*Article 228, par 1, Capital Market Law*). The disclosure must be made within three business days of the date that the bidder became aware of a relevant threshold being crossed.

If the bidder, following its own acquisition, or that of a person with whom it acts in concert, holds more than 33% of the voting rights in a target, it must launch a tender offer for all remaining shares in the target (see *Question 16*).

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

It is not common to have a formal agreement between the bidder and target on a recommended bid. Although not specifically prohibited by law, such agreements should be avoided as they might conflict with the fiduciary duty the board of directors has towards the target's shareholders.

A target board is unable to agree not to solicit or recommend other offers. The board has a duty to express an opinion concerning both offers and counter-offers, and not to favour any particular bidder (*Capital Market Law*).

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.

Break fees are neither common nor regulated.

11. Is committed funding required before announcing an offer?

To obtain clearance of the tender offer by the NSC (see *Question 12*), the bidder must submit an application to the NSC, together with either:

- A document proving that a guarantee of at least 30% of the total offer value has been deposited in a bank account of the bidder's broker company (this amount is blocked for the entire duration of the offer period).
- A bank guarantee letter covering the entire value of the tender offer, issued in favour of the bidder's broker company.

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements) and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

Announcing the offer

Before a voluntary tender offer, the bidder must submit a draft preliminary announcement regarding the offer to the NSC for approval. Once the NSC's approval is granted, the bidder must publish the preliminary announcement and send it to the BSE and the target (see below, *Offer timetable*). The bidder must then submit an application for approval of the draft tender document to the NSC.

Offer timetable

A mandatory tender offer must be made as soon as possible, but in any case no later than two months from the date that the 33% shareholding threshold is exceeded (see *Question 16*).

In a voluntary tender offer, the timetable is as follows:

- **Preliminary announcement.** Within five business days of the date that the NSC approves the draft preliminary announcement, the bidder must publish the announcement in at least one national daily newspaper and one local daily newspaper in the target's area, and send it to the BSE and the target.
- **Target opinion on the tender offer.** The target's board of directors informs the target's employees or trade union (if any) of the tender offer, asking for their opinion (see *Question 15*). Within five business days of receiving the preliminary announcement, the target's board sends to the NSC, the bidder, the BSE and the target's employees or trade union a document containing its opinion on the appropriateness of the tender offer. If the board receives the opinion of the employees or the trade union in time, it must attach this opinion to the document containing the board's opinion.

The board can also convene the general shareholders' meeting, to inform the shareholders of its opinion of the offer. If the opinion is negative, the bid is deemed hostile, but the shareholders are not required to follow the board's recommendation.

- **NSC approval.** Within 30 business days of publication of the preliminary announcement, the bidder submits to the NSC an application for approval of the offer document. Within ten business days of this, the NSC issues its decision on the document. If the NSC requests further information from the bidder, the timetable is interrupted and continues from the date that the requested information is provided.
- **Offer announcement and document.** The announcement of the offer can be published by the bidder any time after the NSC's approval of the offer document, in two daily national newspapers. The offer document must be made available to the offerees. It cannot contain terms that are less favourable than those mentioned in the preliminary announcement.
- **Offer period.** The offer period begins within at least three business days of the date of publication of the offer announcement. The length of the offer period can range from 15 to 50 business days.

- **Closure of offer period.** Within seven business days of the closing date, the bidder notifies the NSC, the BSE and the Central Depository of the results of the tender offer, so that settlement can be made.
- **Share transfer and payment.** Within three business days of being notified, the Central Depository transfers ownership in the shares. Within another three business days of this, the offerees are paid.

Alteration of timetable

The above timetable can be subject to alteration, if any of the following events occur:

- During the offer period, but no later than seven business days before closure of the offer, the bidder can ask the NSC to approve amendments to the offer document. If the NSC approves these amendments, it can extend the length of the offer period, to allow at least five business days from publication of the amendment until closure of the offer period.
- During the offer period, a counter-offer can be launched within ten business days of the date that the first offer became public. In this time, the counter-bidder must submit its own offer document to the NSC. The NSC must approve the counter-offer within ten business days, and establish a single closing date for all existing offers.
- The NSC takes one of the following actions:
 - it suspends the performance of an offer if it considers this necessary; it can do this for no longer than ten business days per suspension, if there are serious indications of a breach of the law;
 - it revokes approval of a tender offer, if:
 - it determines that performance of the offer involves a breach of the law;
 - it believes that a change in circumstances since the approval was granted mean that the reasoning behind the approval no longer apply;
 - the bidder informs the NSC that it intends to withdraw the offer before making the offer announcement.

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

The main conditions usually attached to a tender offer are:

- The offer must be performed on the regulated market, through an authorised financial intermediary.
- The offer must ensure equal treatment for all shareholders.
- The offer must be made to all existing shareholders, for all their shareholding, with the purpose of acquiring more than 33% of the voting rights of the target.
- The offer document must be approved by the NSC and made available to the shareholders.

- That, during the offer approval process, the bidder submits to the NSC documents such as its incorporation documents, the brokerage agreement concluded with a financial intermediary and the bidder's statement regarding the investors with whom it acts in concert.
- Offer advertisements are subject to NSC approval.
- The offer is irrevocable and no payments are to be made to the shareholders during the offer period.

Apart from the conditions mentioned above, a tender offer cannot be subject to any other pre-conditions as they could be detrimental to the target shareholders' interests.

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

The target's shareholders receive the following documents on a recommended or hostile bid:

- The preliminary announcement. This is issued by the bidder (see *Question 12*).
- The offer announcement. This is issued by the bidder (see *Question 12*).
- The offer document (see *Question 12*). This is issued by the bidder and contains information made available at the preliminary announcement stage, such as:
 - the price offered per share and how this amount has been determined;
 - the financial intermediary to be used as broker;
 - the source of funds for payment of the offer price;
 - the length of the offer period;
 - the locations where shareholders can subscribe their shares;
 - the opinion of the target's board of directors and/or the general shareholders' meeting regarding the appropriateness of the offer.

The following persons may be liable for any breach of the law in relation to the veracity and accuracy of information contained in the offer document and the preliminary announcement:

- The bidder.
- The board members of the bidder.
- The target.
- The board members of the target.
- The financial auditor that certified the financial statements from which information was taken and included in the offer document.
- The financial intermediary used as broker.
- Any other entity that has accepted responsibility for any information, study or assessment in the offer document.

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

The target's board must inform its employees or the trade union (if any) of the tender offer and ask for their opinion on it. If the board receives this opinion in time, it must attach it to the document containing the board's own opinion (see *Question 12*).

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

General provisions

A bidder that, following its own acquisition or an acquisition by persons with whom it acts in concert, holds more than 33% of the voting rights in the target, must make a mandatory tender offer addressed to all shareholders for their shareholdings in the target.

Acting in concert is deemed to occur when two or more persons, bound by an explicit or implicit agreement, act to implement a joint policy in a listed company. Unless otherwise proven, the following persons are presumed to be acting in concert:

- Involved persons, defined as:
 - persons who control or are controlled by a company, or who are under joint control;
 - persons who directly or indirectly participate in the conclusion of agreements to obtain or jointly exercise voting rights, if the shares subject to that agreement provide a controlling position;
 - individuals from within the company who have management or controlling rights;
 - spouses, second degree relatives and second degree kin of the individuals mentioned in sub-bullet points one to three;
 - persons who can nominate the majority of board members in a company.
- A parent company and its subsidiaries, as well as any of those subsidiaries acting together without the parent company.
- A company, its board members and any involved persons as defined in the above bullet points, as well as any combination of these.
- A company, its pension funds and the company managing these funds.

The offer must be made as soon as possible, but in any event no later than two months from the date that the 33% threshold is exceeded. Until the announcement of the mandatory offer, the bidder cannot exercise the voting rights attached to the shares exceeding the 33% threshold, nor can it acquire any further shares in the target.

Any shareholder who exceeds the 33% threshold as a result of an exempted transaction does not have to make a mandatory offer (*Article 205, par 2, Capital Market Law*). The following are exempted transactions:

- Privatisations.

- Share acquisitions from the Ministry of Public Finance or from other legally entitled entities for the purpose of state budget claims collection. (In such circumstances, the Ministry of Public Finance or other legally entitled entities have acquired shares of companies who failed to pay their state budget debts. To further obtain cash for the state budget, these public authorities sell the acquired shares to private investors.)
- The transfer of shares between a parent company and its subsidiaries or between subsidiaries of the same parent company.

In addition, a mandatory bid does not have to be made following a voluntary offer addressed to all of the target's shareholders for all their holdings in which the bidder acquired more than 33% of the target's issued shares.

If the shareholding that exceeds the 33% threshold is obtained unintentionally, the holder must, within three months, either:

- Make a mandatory tender offer.
- Sell sufficient shares to bring the holding back under the 33% threshold.

Unintentional acquisitions are defined as being (*Article 205, par 5, Capital Market Law*):

- A capital decrease by way of the company buying back its own shares, followed by the cancellation of those shares.
- The exercise of a preference right, subscription right or a right to convert preferred shares into ordinary shares, which brings the shareholding above the 33% threshold.
- Merger or de-merger of the company.

The issue of what constitutes direct and indirect holdings has received further clarification from recent legislative changes (see below, *Direct and indirect holdings*).

Direct and indirect holdings

NSC issued Instruction no. 3/2009, following many controversies concerning the interpretation of the general provisions regarding the circumstances in which a mandatory tender offer must be made (see above, *General provisions*).

A person (Entity) that acts as a shareholder in a target directly holds voting rights that correspond to the shares it holds in that target (*Instruction no. 3/2009*).

In addition, that Entity holds, indirectly, voting rights with persons with whom it is acting in concert, in any of the following situations (*Article 4, Instruction no. 3/2009*):

- The person or persons with whom the Entity is acting in concert holds voting rights in the target and the Entity also holds voting rights in that target.
- The person with whom the Entity acts in concert is a legal entity and a shareholder of the target (Shareholder), and the Entity can influence the way that Shareholder can exercise its rights as a result of either:
 - the Entity, alone or together with the persons with whom it acts in concert (other than the Shareholder), holding directly or indirectly the majority of the voting

rights in the Shareholder. This can also apply to a situation in which the Entity and the Shareholder are bound through a sequence of holdings, if at each level of the sequence of holdings the Entity may be able to influence, directly or indirectly, the way the Shareholder exercises the majority of the voting rights; or

- the Entity, alone or together with the persons with whom it acts in concert (other than the Shareholder):
 - being able to appoint or dismiss most of the members of the management or controlling bodies or other persons holding the power to make decisions in the Shareholder;
 - being able to exert a significant influence over the Shareholder, because of certain clauses in agreements concluded with the Shareholder, or certain provisions under that Shareholder's articles of incorporation;
 - being a shareholder of the Shareholder and within the last two financial years appointing on its own, through exercising its voting rights, most of the Shareholder's managers and members of management or control bodies;
 - being a shareholder of the Shareholder and controlling alone, through an agreement concluded with the other shareholders, most of the Shareholder's voting rights.

Further clarification as to the circumstances in which the Entity is deemed to have an indirect holding is contained in Instruction no. 3/2009.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

Cash is the most common form of consideration offered on a public takeover, but bidders can also offer securities or a combination of cash and securities.

18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

Minimum levels of consideration exist for each type of public offer (*Capital Market Law*).

Mandatory tender offer

The price offered must be at least equal to the highest price paid by the bidder, or by persons with whom it acts in concert, in the 12 months before the offer. If no such share purchase took place, the price must be determined in accordance with NSC regulations, taking at least the following criteria into account:

- The average transaction price of the shares on the stock market over the previous 12 months.
- The value of the company's net assets according to the latest audited financial statements.
- The value of the shares, as determined by an expert appraisal made by an independent expert, in accordance with international assessment standards.

Voluntary tender offer

The price offered must be at least equal to the highest of the following:

- The highest price paid for the shares by the bidder, or by persons with whom the bidder acts in concert, in the 12 months before submission of the offer document. To determine this price, the following transactions must be taken into account:
 - public offers;
 - purchases made on the stock market;
 - share capital increases;
 - any similar transaction.
- The average transaction price of the shares on the stock market, in the 12 months before submission of the offer document.
- The price reached by dividing the target company's net asset value by the number of company shares, according to the company's latest financial statement.

Purchase offer

The price offered must be at least equal to the highest of the following:

- The highest price paid for the shares by the bidder, or by persons with whom the bidder acts in concert, in the 12 months before submission of the offer document.
- The average transaction price of the shares on the stock market in the 12 months before submission of the offer document.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

There are no additional restrictions or requirements imposed on a foreign bidder with regard to the consideration it can offer.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

After a tender offer is carried out, the bidder can require the remaining shareholders to sell their shares (squeeze-out), at a fair price, if either (*Article 206, par 1, Capital Market Law*):

- The bidder holds more than 95% of the share capital of the target.
- The bidder purchased, through the tender offer, more than 90% of the target's shares.

A fair price is the price offered in the tender offer provided that the squeeze-out is launched within three months of the date that the previous offer was finalised by settlement.

If the squeeze-out is launched after this three-month period, the price to be offered must be established by an independent expert, according to international appraisal standards. This expert must be selected from the independent experts' list registered with the NSC. The expert must act in a neutral, objective and balanced manner towards any interested party in the squeeze-out. The costs of the appraisal are borne by the bidder.

The initiation of a squeeze-out by the bidder prevents minority shareholders initiating a sell-out procedure. Minority shareholders can normally initiate a sell-out following a tender offer as a result of which the majority shareholder owns more than 95% of the target's share capital.

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

The bidder, and persons acting in concert with it, cannot launch another tender offer for the target for a year after closure of the failed bid (*Article 200, Capital Market Law*).

22. What action is required to de-list a company?

The de-listing of a company is possible in the following situations (*Article 87, par 4, NSC Regulation no. 1/2006*):

- As a result of a squeeze-out or sell-out procedure (see *Question 20*).
- If, in certain special circumstances, the NSC decides this should be done as the company's securities' listing can no longer be maintained on an organised market.
- If the specific de-listing conditions set out in the BSE Code are fulfilled (*Title II Chapter V*).
- If, at the company's extraordinary general meeting, the shareholders decide to de-list the company and to pay out the minority disagreeing shareholders, allowing the latter to withdraw from the company.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Sophisticated defensive tactics such as poison pills, Pac-Man strategies and golden parachutes are uncommon in Romania.

The Capital Market Law (*Article 198*) prescribes the limits within which the target can perform its business after the announcement of a voluntary tender offer. In the period from when the target receives the preliminary announcement (see *Question 12*) up until the closing of the offer period, the target's board members:

- Must inform the NSC and the BSE of all transactions involving the target's shares that are entered into by the board members and by top management.

- Cannot take any act or decision that might affect the target's assets or the objectives of the takeover, except for current business decisions.

Decisions that might affect the target's assets or the objectives of the takeover are deemed to be, among others:

- Share capital increases.
- The issue of securities that grant a subscription right or the right of conversion into shares.
- The placement of encumbrances on assets or the transfer of assets representing at least one-third of the target's net assets, according to the latest annual balance sheet.

The law does exceptionally allow the performance of actions committed to before publication of the preliminary announcement, as well as any actions expressly approved at an extraordinary general shareholders' meeting convened after the publication of the preliminary announcement.

The bidder is liable for damages caused to the target, if there is proof that the tender offer was announced for the sole purpose of preventing the target from taking measures prohibited during the offer period.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

Stamp duties are not payable on the transfer of listed companies' shares. However, certain other taxes and fees are payable on the sale of shares in a company that is incorporated and/or listed in Romania. They are borne by the person selling the shares and fall into two categories:

- Capital gains tax (CGT), regulated by the Romanian Fiscal Code.
- NSC and BSE fees.

CGT

CGT is calculated on the basis of the difference between the sale price and the acquisition price, where a gain has been made, less related costs. The following tax rates are applicable:

- 1% for individuals who have held the relevant shares for more than 365 days.
- 16% for individuals who have held the relevant shares for less than 365 days.
- 16% for legal entities, calculated on the basis of annual aggregate profit.

If the seller is a foreign entity, it should consider the relevant double taxation treaty and the provisions of the Romanian Fiscal Code, to establish the relevant place of taxation, taxable base and tax rate.

NSC and BSE fees

Certain trading fees are payable to the NSC and BSE.

Various fees and commissions are payable to the BSE. These are either fixed amounts or are calculated as a percentage of the traded value of the stock, depending on the type of transaction.

The rates of NSC taxes and commissions vary depending on the type of transaction. They may be as much as 0.5% of the offer's value in a public sale offer.

Tax avoidance

Payment of the above taxes and fees cannot be avoided. However, in relation to CGT, the applicability of a relevant double taxation treaty may be beneficial, if an applicable alternative fiscal regime charges lower tax rates.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

Under Competition Law no. 21/1996, transactions that meet certain criteria are subject to assessment and approval by the Romanian Competition Council (*see box, The regulatory authorities*). However, if the thresholds set by EC Regulation no. 139/2004 (EC Merger Regulation) are met, the transaction is subject to clearance from the European Commission.

A transaction is subject to clearance by the Competition Council if the following turnover thresholds are met:

- The aggregate turnover of the undertakings involved exceeds the RON equivalent of EUR10 million (about US\$13.6 million).
- At least two of the undertakings concerned each achieve turnover in Romania of at least the RON equivalent of EUR4 million (about US\$5.4 million).

These thresholds are assessed on the undertakings' financial results in the year before the transaction. Turnovers are calculated on the basis of all sales in Romania and any other jurisdiction where the undertakings are active, less any export and any excises due. The turnover assessment is also made on the basis of the turnovers of the undertakings themselves and any group of companies that they belong to.

If a transaction must be notified to the Competition Council under these rules, it cannot be implemented until clearance is obtained (*Article 15, par 2, Competition Law*). Once a transaction is notified, the parties cannot undertake certain irreversible measures before clearance is obtained. However, while waiting for clearance, the undertakings can take any measures necessary for the running of the business, provided they do not significantly alter it.

THE REGULATORY AUTHORITIES

National Securities Commission (NSC)

Head. Gabriela-Victoria Anghelache (President)

Address. 2 Foisorului Street
3rd District
Bucharest
Romania

T +40 21 326 68 74

F +40 21 326 68 48/49

E cnvm@cnvmr.ro
relatii publice@cnvmr.ro

W www.cnvmr.ro

Main area of responsibility. The NSC is an independent regulatory agency that reports only to the Romanian parliament. It oversees the financial market and issues secondary legislation (in the form of regulations) to further develop and detail the provisions of the Capital Market Law. In relation to takeovers, the NSC:

- Approves preliminary offer announcements, offer documents and related advertising materials.
- Oversees the compliance of shareholders and investors with the takeover regulations.
- Issues formal opinions on the interpretation and implementation of capital markets' laws and regulations.
- Protects investors' interests by ensuring equal treatment and access to information.

Contact for queries. Luminita Ciocan.

Obtaining information. By phone, e-mail, fax or post using the above contact details. Certain formal requests may be subject to fees.

Bucharest Stock Exchange (BSE)

Head. Stere Farmache (Chairman, General Manager)

Address. 34-36 Carol I Boulevard 020922
14th Floor
Bucharest 2
Romania

T +40 21 307 95 00

F +40 21 307 95 19

E bvb@bvb.ro

W www.bvb.ro

Main area of responsibility. The BSE regulates and oversees the regulated market.

Obtaining information. By e-mail, phone or fax using the above contact details.

Competition Council

Head. Bogdan Marius Chiritoiu (Chairman), Alexe Gavrilă (Vice-chairman), and Neagoe Otilian (Vice-chairman)

Address. 1 Piata Presei Libere, corp D1
013701
Bucharest 1
QP 33
Romania

T +40 800 800 267

+40 21 405 44 29

F +40 21 405 44 02

E presa@consiliulconcurentei.ro

W www.competition.ro

Main area of responsibility. The Competition Council regulates and oversees competition-related issues, particularly those concerning merger control.

Obtaining information. Preferably by phone using the above numbers.

Clearance by the Competition Council usually takes between two and six months. Notification of the transaction must be made by the undertakings concerned within 30 days of signing of the deeds (or operations) that give rise to the concentration.

The Competition Council can request that the parties commit to certain measures that modify the structure of the proposed transaction, to ensure normal levels of competition in the market. If the parties refuse to commit to those measures or the remedies that are offered do not allay the Council's concerns, the Council can oppose and therefore block the transaction on the grounds that it may create or consolidate a dominant position on the relevant market for the benefit of the acquirer (*Article 46, par 2, letter a, Competition Law*).

In practice, the Competition Council rarely prohibits economic concentration operations (it has prohibited only one transaction in the past decade).

Romanian law also contains certain investment controls, depending on the activity of the companies involved. For instance:

- The intention to acquire a significant participation (10% or more) of a credit institution or a non-banking financial institution must be notified to, and is subject to the approval of, the National Bank of Romania.
- The intention to acquire a significant participation (10% or more) of a financial investment company must be notified to, and is subject to the approval of, the National Securities Commission.
- The intention to acquire a significant participation (10% or more) of an insurance company must be notified to, and is subject to the approval of, the Insurance Supervision Commission.
- The acquisition of a participation in an electricity company must be notified to the National Regulatory Agency for Energy.

26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are no restrictions on foreign ownership of shares.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

There are no restrictions affecting or limiting the repatriation of profits by foreign companies. However, the National Bank of Romania may, as a safeguard, impose exchange control rules or restrictions on the repatriation of profits by foreign companies when the country's economic situation or any market instability requires this.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

Following the announcement of the offer, there are no restrictions or disclosure requirements imposed on persons involved in the process, other than those set out below.

After launching the bid, the offeror can only acquire shares outside the bid (on the market) if the following conditions are met:

- The acquisition is made at a price higher than the offer price.

- The acquisition is made at least eight business days before the closing of the bid.

However, under those circumstances, the offeror must increase the offer price, to at least equal to the highest price paid by the offeror on the market. In this case, the offeror must request that the NSC approve an amendment of the initial offer document.

The disclosure requirements placed on the target's board members regarding transactions in the target's shares, as set out in *Question 23*, are applicable.

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

There are currently no proposals for reform. The most important outstanding issue, concerning the cases in which a mandatory tender offer must be made, has recently been dealt with (see *Question 16*).

CONTRIBUTOR DETAILS

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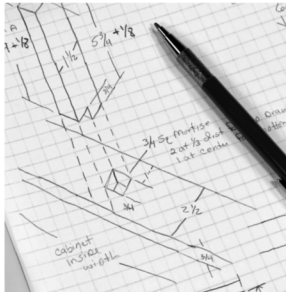
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 - Privatisation and PPP (Legal 500, Chambers Europe)
- Banking & Finance (PLC Which Lawyer, IFLR 1000, Legal 500)
 - Capital Markets (IFLR 1000, PLC Which Lawyer)
- Dispute Resolution (PLC Which Lawyer?, Legal 500, Chambers Europe)
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 - Environment (PLC Which Lawyer?)
 - Tax (PLC Which Lawyer?)
- Private Equity/Venture capital (PLC Which Lawyer?)
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