GLOBAL LEGAL INSIGHTS

Mergers & Acquisitions

Fourth Edition

Editors: Michael E. Hatchard & Scott V. Simpson
Published by Global Legal Group

CONTENTS

Preface	Michael E. Hatchard & Scott V. Simpson, *Skadden, Arps, Slate, Meagher & Flom (UK) LLP*	
Argentina	Marcelo E. Bombau & Adrián L. Furman, *M. & M. Bomchil*	1
Brazil	Fabiano Gallo, Rafaella Chiachio & Leonardo F. Torre, *Campos Mello Advogados*	5
Bulgaria	Yordan Naydenov & Dr. Nikolay Kolev, *Boyanov & Co, Attorneys at Law*	15
Canada	Kurt Sarno, Shlomi Feiner & Rory ffrench, *Blake, Cassels & Graydon LLP*	25
Cayman Islands	Ramesh Maharaj, Rob Jackson & Melissa Lim, *Walkers*	36
China	Will Fung & Yu Xie, *Grandall Law Firm*	43
Ecuador	Daniel Pino Arroba & Gabriela Guzmán Flores, *Coronel & Pérez*	51
France	Sandrine de Sousa & Yves Ardaillou, *Bersay & Associés*	55
Germany	Dr. Mark Odenbach & Dr. Hendrik Aßmus, *Barber Odenbach,* Dr. Guido Holler, *TIGGES Rechtsanwälte*	62
Indonesia	Theodoor Bakker, Herry N. Kurniawan & Ms. Hilda, *Ali Budiardjo, Nugroho, Reksodiputro*	72
Ivory Coast	Osther Tella, Hermann Kouao & Annick Imboua-Niava, *Imboua-Kouao-Tella & Associés*	78
Japan	Yuto Matsumura & Hideaki Roy Umetsu, *Mori Hamada & Matsumoto*	83
Macedonia	Jasmina I. Jovanovik & Dragan Dameski, *Debarliev, Dameski & Kelesoska Attorneys at law*	92
Mexico	Daniel Del Río & Jesus Colunga, *Basham, Ringe y Correa, S.C.*	99
Morocco	Dr. Kamal Habachi, Salima Bakouchi & Houda Habachi, *Bakouchi & Habachi − HB Law Firm LLP*	109
Netherlands	Charles Honée, Katinka Middelkoop & Jelle Krings, *Allen & Overy LLP*	117
Norway	Ole K. Aabø-Evensen, *Aabø-Evensen & Co Advokatfirma*	127
Romania	Gelu Maravela, Alina Popescu & Marius Pătrăşcanu, *Maravela & Asociatii*	144
Russia	Maria Miroshnikova, Sergei Kushnarenko & Svetlana Makurova, *Ivanyan & Partners*	152
Serbia	Radivoje Petrikić, *Petrikić & Partneri AOD in cooperation with CMS Reich-Rohrwig Hainz*	162
Singapore	Sing Yee Chan & Dawn Law, *WongPartnership LLP*	169
Spain	Marta Gil de Biedma, *Ventura Garcés & López-Ibor, Abogados*	177
Switzerland	Dr. Mariel Hoch & Dr. Christoph Neeracher, *Bär & Karrer AG*	186
Turkey	Dr. Umut Kolcuoğlu, Özge Konukçu & Mert Bülbül, *Kolcuoğlu Demirkan Koçaklı Attorneys at Law*	191
United Kingdom	James Dawson and Max Mittasch, *Macfarlanes LLP*	199
USA	Thomas H. Kennedy & Ann Beth Stebbins, *Skadden, Arps, Slate, Meagher & Flom LLP*	208
Vietnam	Anh Tuan Nguyen, *LNT & Partners*	213

Romania

Gelu Maravela, Alina Popescu & Marius Pătrășcanu
Maravela & Asociatii

Overview

Legislation and practice

The Romanian legal framework governing M&A is much in line with international practice, and hence foreign buyers may expect to find themselves on familiar soil and to run into no major surprises. However, certain specificities do arise from Romania's historic background with privatisation, for instance, having been for a long time a significant component of M&A practice, and restitution laws playing an important part in the assessment of real estate transactions.

As to the general framework, Company Law no. 31/1990 and the recent Civil Code (in force as of 2011) provide the main statutory framework for the purchase and sale of corporate entities, or of their assets and liabilities.

In addition, M&A transactions exceeding certain turnover thresholds fall within the scope of merger control rules set out by Competition Law No. 21/1996 and related enactments of the Romanian Competition Council.

From a practical standpoint, in a standard scenario, main deal structures may include share deals (acquisition of shares in the corporate vehicle holding or operating the target), as well as purely asset deals (acquisition of the target itself rather than of the vehicle holding same) or transfer of businesses as a going concern (preferred for tax considerations or in cases where relevant vehicles are undergoing insolvency). Representations and warranties, price adjustment mechanisms and signing-closing sequences are very common in Romanian M&A contracts of certain sizes. In particular, where a merger notification notice to either the Romanian Competition Council or European Commission (depending on the size of the deal) is required, standstill mechanisms are implemented preventing the buyer from gaining control of the target until the merger receives clearance.

In any case, acquisitions largely exceed mergers, which rarely occur in practice. Private deals are still deemed as the strongest component, against the background of a rather weak stock exchange. Nonetheless, hopes for the revival of securities transactions lie with the currently ongoing reform of the capital markets system and the overall upward trend of the national economy.

The specialised mechanics of public M&A are regulated by Law no. 297/2004 on capital markets and related secondary enactments issued by the Government and Romanian regulatory authority in the field, currently the Financial Supervision Authority (FSA). The FSA oversees the compliance of investors and the traded company with the capital markets legislation, issuing in its turn various binding pieces of legislation.

Fiscal provisions and a large number of various other enactments may, of course, also come into play, depending on the specifics of the target and relevant deal.

In terms of specialised M&A dispute resolution, international arbitration holds an important place in large transactions, whereas medium to small deals-related disputes are generally referred to customary courts.

Market

Whilst 2013 had been seen as the turning point of a revived M&A market following the global economic crisis, a barometer drawn up by Ernst & Young based on publicly available information during the first half of 2014 has noted that overall, the size of Romania's M&A market (excluding cross-border deals) fell by 25% in terms of value, to an estimated $600m in the first half of 2014. The same report shows that considering the number of transactions, the IT sector was the most active target industry in the first half of 2014 (9), followed by telecom & media (7) and services (7). In terms of value, the largest transactions seem to have taken place in the energy and mining industry, transportation, banking and financial services.

Although the number of targets for sale is quite significant (in particular in the banking and energy sectors), the rather timid start (contradicting the global trend) may have been partially due to the gap between local sellers' expectations as compared to the value of the targets, and the extent of buyers' desire to spend in the current climate.

Even so, the Romanian market has been witnessing quite a few historical M&As this year, and is expected to go up further in 2015.

Significant deals and highlights

Largest IPO in Romanian stock exchange history

The IPO of the State-owned company Electrica, one of the most important players in the fields of distribution, sourcing and other energy-related services in Romania, took place in June 2014 and was the largest in Bucharest Stock Exchange's history. Electrica sold 177,188,744 shares and Global Depositary Receipts (GDRs) (approx. 51% of the total shares after capital increase) for approximately €444m.

The volume of shares offered was oversubscribed by approximately two times. Investors bought 142,007,744 shares (80.14% of the IPO) and 8,795,250 GDRs (19.86% of the IPO). The shares/GDR ratio was more favourable for shares than in Romgaz's offer of Q4 2013, when almost 2/3 of the securities were sold as shares and 1/3 as GDRs.

Institutional investors bought 79% of the securities sold in the IPO, and retail investors the other 21%. The majority of institutional investors who subscribed in the IPO were from Romania, Poland, the UK and USA. Institutional investors received 104,798,107 shares at a price of RON 11/share, and 8,795,250 GDRs at US$ 13.66/GDR. Large retail investors were allocated 17,718,875 shares (10% of the total volume of IPO) at RON 11/share. Small retail investors bought 19,490,762 shares (11% of the total IPO), of which 10,891,971 shares were at RON 10.45/share and 8,598,791 shares at RON 11/share.

After the IPO, the Romanian State remained the largest shareholder, with 48.8% of Electrica shares, but its holdings might increase to 49.9% if the stabilisation option is exercised. The European Bank for Reconstruction and Development has become the second-largest shareholder in Electrica after it purchased €75m worth of shares. ING is the third-largest shareholder of Electrica.

Italian banking group UniCredit involved in significant deals

Another significant deal consisted of Romanian UniCredit subsidiary, Unicredit Țiriac Bank's acquisition of the corporate business of RBS Romania (the Romanian branch of the Royal Bank of Scotland plc).

The deal follows a previous agreement between the same financial institutions signed in April 2013. At the time, UniCredit Țiriac Bank announced it had acquired the retail and Royal preferred banking business from RBS Romania, representing approximately €315m in assets and €230m in liabilities.

The transaction in 2014 involved the corporate business of RBS Romania and related to a total portfolio of aggregate assets of around €260m and corporate deposits of around €315m.

Such deal reflected an increase of transactional activity in the banking sector. More sales of Non-performing Loan (NPL) portfolios from local banks to foreign investors are expected to follow as the Romanian financial services market undergoes major changes and consolidation.

Another large transaction involving UniCredit may consist of the sale by private investor Ion Țiriac of his stake of 45.059% of Unicredit Țiriac Bank stock to the majority shareholder, UniCredit, as part of the exit option agreed by both parties. Based on publicly available info, Ion Țiriac would receive €700m for his stake, paid partially in cash.

The consolidated net profit of UniCredit Tiriac Bank and UniCredit Consumer Financing rose 18% to €16m in the first quarter against the same period of last year due to lower provisioning, while demand for new loans remained weak. The bank's assets amounted to €5.8bn and the capital adequacy ratio stood at 14.1% in May 2014. UniCredit Țiriac Bank operated through a network of 188 branches by the end of March, and the number of employees in the banking and consumer financing businesses reached 3,116.

Important electricity company initiated exit from Romania

In June 2014, the Italian group Enel announced that it was starting a process to divest its generation assets in Slovakia and its distribution and sales assets in Romania, as part of a wider sale programme being implemented to strengthen the group's financial structure. In Romania, the sale would involve the 64.4% stake in Enel Distributie Muntenia SA and Enel Energie Muntenia SA; the 51% stake in Enel Distributie Banat SA, Enel Distributie Dobrogea SA and Enel Energie SA; as well as the 100% interest in the services company Enel Romania Srl.

These companies manage a power grid of about 91,000 kilometres in the regions in which they operate, distributing about 14 terrawatt hours (TWh) of electricity a year, with a domestic market share of 34%, and selling nearly 9.0 TWh a year to about 2.6 million customers, of which 2.4 million are residential customers, with a domestic market share of 20%, and 0.2 million are businesses, with a domestic market share of 38%. In 2013, the companies had consolidated revenues of €1.118bn ($1.5bn) and earnings before interest, taxes, depreciation and amortisation (EBITDA) of €289m.

Although in autumn Enel had announced that it might reconsider its exit, the process appears to be still ongoing, with a deadline for receipt of non-binding offers set for the end of November 2014.

Bucharest: largest transaction involving a single asset

The real estate market was in its turn an important playground for fairly significant transactions. Amongst the highlights, South African developer New Europe Property Investment (NEPI)'s acquisition of Promenada mall from Raiffeisen Investment in a deal worth €148m was deemed to be the largest transaction of a single asset ever concluded in Bucharest, and second-largest in Romania.

The purchase price is equivalent to the valuation amount, as estimated by NEPI, which foresees an annual income of about €10m resulting from renting commercial spaces in Promenada, where the monthly weighted average rental is €22 per sq m.

Requiring an initial investment of €130m, the shopping centre located in Northern Bucharest covers a gross leasable area of 35,000 sq m, hosting more than 120 stores and 1,300 parking spaces. Promenada mall is part of Floreasca City, a project also incorporating two office buildings.

It is also noteworthy that, despite the rather large volume of the deal, many other international investors had expressed a strong interest in acquiring the project.

NEPI has become one of the most dynamic real estate developers in Romania in recent years. It is thus estimated that, following the completion of all projects undergoing development, NEPI will reach 660,000 sq m in its asset portfolio, adding to its already-owned leasable area of 380,000 sq m and projects evaluated at over €656m. Most of the ongoing projects developed by NEPI are to be completed in 2014 and 2015. The largest investment of NEPI in Romania is the commercial centre Mega Mall in Bucharest, with an investment of €165m and 70% participation in the project.

Cement giants required to divest

Holcim and Lafarge also need to sell units to gain regulatory approval for their planned merger to form the biggest cement company. Holcim and Lafarge have said they plan to divest businesses accounting for 10% to 15% of their combined earnings before interest, taxes, depreciation and amortisation, which Holcim has said is equivalent to about $1bn. In Europe, where the largest part of their cement and crushed-rock divestments will take place, regulators have set a December 15 deadline to either approve the deal or open a deeper investigation. Hence, transactions will likely be completed next year.

P3 extends its portfolio of logistic parks

Another highlight is the acquisition by P3, the specialist owner, developer and manager of European logistics properties, of a portfolio of three logistics parks, two of which are located in Poland and one in Romania, from CA Immobilien Anlagen AG. The portfolio totals 467,000 sq m of lettable area. The transaction also included approximately 165 hectares of land for development, mainly in Poland and Romania.

The Bucharest Park is the largest of the three standing assets acquired by P3, consisting of 215,000 sq m of almost fully occupied space and 40 ha of land for development. It is a major centre for third-party logistics providers, due to its direct access to the A1 motorway heading westwards and the park's freight-handling facilities as part of the pan-European rail corridor linking Dresden and Nuremberg to Istanbul. The park's location, on the city's principal ring road and its close proximity to central Bucharest, attracts both e-commerce tenants as well as multinationals such as Carrefour.

Key developments

The main developments in the M&A field this year encompass a much awaited reform of the capital markets mechanisms, and amendments to merger control rules.

Capital markets system undergoing thorough reforms

Since November 2013, the Romanian capital market has undertaken a deep reform to eliminate barriers to its development, mainly aiming to ensure easier access of investors to the market, higher liquidity and improved market mechanisms.

Moreover, in August 2014, the Financial Supervision Authority (Romania's stock exchange regulatory authority) initiated the STEAM Project – Action Plan to Obtain the Status of Emerging Market, which is targeted at the obtaining of emerging market status within two years from the initiation of the action plan. The achievement of the objective subsequent to the programme will result in an improvement in the accessibility of the Romanian capital market for investors by increasing the size of the market and liquidity.

Developments include: reduction of the Bucharest stock exchange trading fees; change of provisions regarding public offerings (e.g. the possibility to have the prospectus drafted also in an international language, eliminating the minimum duration of an offer, provisions aimed to clarify certain rights of the offerer/issuer, and to simplify the documentation/procedures related to the offers, etc.); easier procedures for exercise of shareholders' legal rights, involving the depository of financial instruments and amendment of procedures for payments and transfer of the ownership of shares payable in global accounts; improved procedures for admission to trading on a regulated market; introduction of the issuer's obligation to establish and include in shareholders' decisions certain key data and to send to the central depository certain information provided in the report; improved procedures for the exercise of certain rights in general meetings of shareholders; and separation of the trading and post-trading systems of accounts, resulting in the placing of orders and settlement mechanisms in accordance with international standards.

The regulated spot market has seen the introduction of trading at last. Through such mechanism, domestic and international investors have the opportunity to execute transactions at stable prices, whereas the extension of continuous trading means an extended period of price formation.

Another key development in the field consists of the clarification of the legal regime governing shares listed on the RASDAQ market or the unlisted securities market, clarification which had been demanded by both Romanian and EU practitioners and authorities.

The RASDAQ market was created in 1996 as an over-the-counter trading system modelled on the US NASDAQ market. In recent years, the RASDAQ market has encountered difficulties due to lack of specific regulations, which gave rise to uncertainty over the rights and obligations of RASDAQ issuers, as well as to inconsistencies in the application of capital markets legislation.

Further to the recent changes, RASDAQ and unlisted securities markets cease to operate; issuers, whose shares are traded on these markets, have the following alternatives: admission of shares on a regulated market; admission of shares on an alternative trading system; or delisting.

Since due to their infrastructural and logistical limitations, Bucharest Stock Exchange and the Sibiu Stock may neither desire nor be able to accommodate issuers that are presently traded on RASDAQ, this may potentially lead to the creation by other market operators of a new alternative trading system, meeting the demands of companies that wish to have their shares traded on an alternative trading system.

The Financial Supervision Authority is obviously expected to play a central role in the management of this process, through the regulations to be issued, as well as through its control and enforcement approach.

Amendment of merger control rules

The Romanian Competition Council (RCC) revised its merger control rules in order to lower the administrative burden for both the applicants and the RCC, as an increased number of mergers are now expected to follow the route of the simplified procedure.

Procedurally, the new rules emphasise the importance of pre-notification discussions by recommending merging parties to engage in prior discussions with the RCC at least two weeks before submitting their notification.

The new rules also increase the thresholds for the application of the simplified notification procedure which applies to mergers between undertakings or acquisition of sole or joint control over an undertaking.

Industry sector focus

As per the abovementioned Ernst & Young barometer, the M&A market for the first half of 2014 has been dominated by transactions below the €20m mark. While certain large transactions have appeared in the financial services, energy and construction materials, those are due to complete in 2015.

One of the important and somewhat unexpected trends in the market, given recent legislative changes in the field of renewable energy, consisted of the consolidation of the energy sector, with a focus on the renewable segment, where photovoltaic and small hydropower plants accounted for half of the deals.

Another trend comes from the banking and financial services sectors, with major transactions in banking, insurance and financial leasing.

The real estate market has also seen an important number of transactions of rather high value, and is expected to further evolve in 2015.

In terms of volume, the M&A market was driven by the IT sector, which covered 15% of the total transactions from the Romanian market. 75% of these transactions involved domestic investors. RCS & RDS (the largest cable and satellite television company in Romania and South Eastern Europe) accounted for 71% of the transactions signed in this segment.

In terms of services, most of the transactions registered do not have a disclosed value, however in terms of volume this segment represents 11% of the total transactions from the Romanian market. 29% of these transactions were made between postal and courier services providers.

The year ahead

The M&A market in Romania is expected to go up in the next 12 to 18 months due to large transnational deals such as the expected sale of Lafarge – Holcim assets and the contemplated divestiture of Enel companies in Romania, as well as continued plans for privatisation.

Significant improvements to transport infrastructure in Romania in the coming years, alongside a continued commitment to the privatisation programme and more efficient absorption of EU funds, as well as economic growth and an improved country rating, should also encourage investment in Romanian targets. There is also a growing interest in Romania from other markets, such as China and Japan.

On the other hand, the establishment of the local stock exchange as a viable alternative for raising equity should not be expected to result in a spectacular boom in the short term. Nonetheless, positive signs are expected, with new IPOs contemplated for 2015.

All in all, the most attractive sectors for acquisitions in 2015 are expected to remain within the areas of energy and natural resources, banking and financial services, IT, construction and agriculture.

As a highlight, there is significant growth potential for agriculture in Romania, which displays significant resources for agri-business, there being both room and the need for major investment. Projects are encouraged by both EU and Romanian government subsidies available to support investments in the sector. On the downside, the very fragmented state of agricultural land resulting from the restitution of formerly State-owned lands to a multitude of owners, may substantially slow down the process.

Clearly, Romania's tremendous energy and natural resources potential, including newly discovered reserves, coupled with the current focus on alternatives to Russian supply, privatisation of several State-owned companies in the field and potential divestiture of Enel businesses, are likely to account for yet another record year for M&As in this field.

Acknowledgment

The authors would like to acknowledge the assistance of their colleague, Gabriela Petrea, Senior Associate, in writing this chapter.

* * *

Source

- EY Report "Romania M&A Barometer H1 2014"; public information from various sources.

Gelu Maravela
Tel: +40 21 310 17 17 / Email: gelu.maravela@maravela.ro
Gelu Maravela has been lead counsel in a large number of high-value projects and has worked for an outstanding number of high-profile corporations as well as for many public authorities. Gelu holds wide-ranging expertise in mergers & acquisitions, having been involved in some of the largest deals closed in Romania, including privatisations and all forms of private dealings in the field, and possessing solid insight of capital market regulations and know-how acquired through a large number of projects realised on the capital markets and the day-to-day assistance of publicly held companies. He also has extensive experience in pharmaceuticals and healthcare matters, having worked for an impressive portfolio of international clients including 9 of the top 12 medicine and medical devices manufacturers worldwide, as well as in energy and natural resources matters, having recently been awarded as 2014-2015 Energy Law Lawyer of the Year by Best Lawyers International.

Alina Popescu
Tel: +40 21 310 17 17 / Email: alina.popescu@maravela.ro
Alina Popescu has been at the forefront of some of the largest projects and transactions in Romania as well as some of the most significant commercial and investment arbitrations involving Romanian counsels. She has advised a broad range of high-profile private clients and multinational corporations in connection with the structuring and implementation of high-value investment projects in various sectors, as well as with respect to the successful closing and enforcement of intricate commercial and M&A transactions, including competition-related aspects. In addition, she holds vast expertise in international commercial and investment arbitration proceedings as well as the enforcement and setting aside of arbitral awards. She is a constant contributor to national and international publications in the legal field.

Marius Pătrășcanu
Tel: +40 21 310 17 17 / Email: marius.patrascanu@maravela.ro
Marius Pătrășcanu has established a wide-ranging practice focused on mergers & acquisitions, commercial and corporate matters, as well as real estate & construction, and IT & telecoms. Marius has worked for some of the largest corporations in the US, Europe and Asia, having advised on a high number of complex matters, spanning corporate structuring and re-structuring, incorporated and unincorporated joint ventures, asset deals, shares deals and business transfers, including insolvency and corporate finance & securitisation-related aspects. Marius's corporate and mergers & acquisitions practice is complemented by his real estate expertise, in respect of which he has advised clients on all legal aspects involved ranging from due diligence, permitting, deal structuring, financing & securitisation, and real estate development, construction and operation. Marius also advises on IT & telecoms matters, having an in-depth knowledge and understanding of the facts and legal framework regulating this niche area.

Maravela & Asociatii

6A Barbu Delavrancea Street, Building C, Ground Floor, 1st District, 011355 Bucharest, Romania
Tel: +40 21 310 17 17 / Fax: +40 21 310 17 18 / URL: http://www.maravela.ro

Other titles in the *Global Legal Insights* series include:

- Banking Regulation
- Bribery & Corruption
- Cartels
- Corporate Real Estate
- Corporate Tax
- Employment & Labour Law
- Energy
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control