

TUCA ZBARCEA  
ASOCIATII

# Better Business

IN ROMANIA

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Published by Țuca Zbârcea & Asociații

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# Better Business in Romania

# Contents

Introduction	5
Corporate	7
Real Estate	21
Creditor & Debtor Disputes	38
Employment	48
Public Contracts	60
Competition	79
Energy	92
Capital Market	114
Financial Institutions & Security Interests	129
Intellectual Property	143
Pharmaceuticals	155
Personal Data Protection	165
Environment	176
Product Liability & Consumer Contracts	183
Insolvency	193
Criminal Law	202
Tax	214

The logo for TUCA ZBARCEA ASOCIATII is displayed in white text on a blue background. The text is arranged in three lines: 'TUCA ZBARCEA' on the top line, 'ASOCIATII' on the bottom line, and a diagonal slash '/' between them. The background of the logo is a blurred image of people walking on a sidewalk, with a prominent red diagonal stripe crossing through the scene.

# Introduction

With the World Health Organization (WHO) announcing a COVID-19 global pandemic in March 2020, the Romanian Government was quick to impose restrictions in all the areas of social and economic life, under the umbrella of an initial “state of emergency”, followed by a “state of alert”. New regulations were adopted in the commercial, banking, social security and taxation fields, including a series of stimulus measures, mostly temporary, to protect the business environment.

To date, Romania is still in a state of alert. At the time of this writing, Government officials are announcing a slow return to “normal” starting with 1 June 2021 allowing for a gradual lifting of some of the restrictions, and stating that this recovery depends upon the rate of anti-COVID-19 serums intake among the general population.

Meanwhile, the Romanian economy is struggling to cope with the effects of the restrictions, with industries such as hospitality, leisure, entertainment, and tourism being amongst the worst hit sectors. Last year, the GDP contraction stood at 3.9%.

This year, however, projections are more optimistic. Recently, the International Monetary Fund (IMF) has improved its forecast for Romania’s GDP growth from 4.4% to 6% under the latest World Economic Outlook (WEO) report issued on 6 April 2021. According to the IMF’s projections, Romania’s growth would be the second-fastest in the European Union. Romania is soon to start negotiations on the National Recovery and Resilience Plan (PNRR) with the European Commission. The current form of the PNRR includes investments worth over EUR 41 billion that Romania wants to finance with EU funds, while the EU funds allotted to Romania for this plan are around EUR 30 billion. This is widely considered to represent a window of opportunity for Romania to boost economic recovery and accelerate reforms in the upcoming years.

The business sector, however, is far less hopeful. According to various surveys, such as the 2021 CEO Outlook Pulse Survey compiled by KPMG, “only one-third (31%) of the CEOs of the world’s most influential companies are anticipating a return to normal in 2021, nearly half (45%) expect normality to resume in 2022. Significantly, 24% of leaders say that their business has changed forever.”

With that in mind, and being well aware of the challenges facing companies today to surviving in the current environment and finding a path forward from the current crisis, we decided to launch the 2021 edition of the “Better Business in Romania” publication to guide you through the maze of regulations and provide you with basic information on the legal amendments brought about by the COVID-19 crisis that are likely to affect your business nowadays.

As always, our team is ready to help you better navigate these uncharted waters. Our COVID-19 related Task Force offers strategic advice on crisis-specific matters: corporate restructuring, review and (re)negotiation of agreements (including collective bargaining agreements and individual employment contracts), performance of the contracts which are affected by force majeure and hardship, unblocking pre-litigation relationships, advice with respect to potential discriminatory acts in the context of vaccination campaigns etc. Additional legal resources (such as legal analysis of the legislative, doctrinal and jurisprudential news issued amid the COVID-19 outbreak, as well as a series of podcasts under the label – “Law in the Time of Corona”) are available in our dedicated section on the firm’s website.

We hope that you will find the current edition of our Better Business in Romania compendium useful, and we are all really looking forward to meeting you all in person soon.

Until next time... we wish you and your families, your colleagues and business partners good health, and all the best.

**Your friends at Țuca Zbârcea & Asociații**

# Corporate

## 1. What are the main legal enactments governing business activities in Romania?

Business activities in Romania are mainly subject to the Companies Law No. 31/1990 (Companies Law) and the Government Emergency Ordinance No. 44/2008 on the performance of business activities by authorised individuals, individual undertakings and family undertakings (GEO No. 44/2008). Also relevant is the new Romanian Civil Code in force as of 1 October 2011 (Romanian Civil Code). Listed companies must additionally observe capital market regulations.

## 2. Which types of legal entities may be incorporated under Romanian law?

As a rule, business activities in Romania may be carried out mainly by companies (owned by Romanian or foreign shareholders without any restriction) or by other forms of business organisations established in accordance with the law, such as authorised individuals, individual undertakings or family undertakings.

The main forms of business organisation in Romania are the following: general partnership (Romanian: *societate în nume colectiv*), limited partnership with shares (Romanian: *societate în comandită simplă*), limited stock partnership (Romanian: *societate în comandită pe acțiuni*), joint stock company (Romanian: *societate pe acțiuni*) and limited liability company (Romanian: *societate cu răspundere limitată*).

## 3. Which types of legal entities are most frequently incorporated under Romanian law? Joint stock companies versus limited liability companies

The types of company most frequently incorporated in Romania are the limited liability company (LLC) and the joint stock company (JSC), due to the flexible rules governing their running and to the limitation of liability to the value of their subscribed share capital that these two types of companies afford shareholders.

LLCs may have up to 50 shareholders and are based on mutual trust among the shareholders. LLCs with only one shareholder are permitted by the Companies Law; such LLC will be governed by the same rules applicable to LLCs with two or more shareholders. After the elimination of a minimum threshold of RON 200, LLCs may currently have a share capital of RON 1 (approximately EUR 0,20) consisting in contributions in kind or cash. Contributions in receivables held towards third parties are not accepted for the purpose of setting up LLCs. The entire amount of the registered capital must be paid up upon registration.

In JSCs, it is the stockholders' contributions to the company's share capital that are essential, while the personal features of each stockholder are less important. JSCs must have at least two shareholders and a share capital of at least RON 90.000 (approximately EUR 20,000). The share capital may be comprised of contributions in kind, in cash and/or in receivables (admitted only where the JSC is established by simultaneous subscription). Cash contributions are always mandatory upon registration. Where the JSC is established by simultaneous subscription, at least 30% of the subscribed capital must be paid upon incorporation, while the remaining 70% must be paid within 12 months (for cash contributions) or within two years from the registration of the company (for contributions in kind).

According to Law No. 129/2019 for preventing and combating money laundering and terrorism financing, and for amending and supplementing certain acts (AML Law), the issuance of bearer shares is currently forbidden. Under previous regulations, bearer shares were titles that did not identify the stockholder, and were presumed the property of their possessor. Consequently, the rights related to the shares were exercised by the natural or legal person holding the shares, and ownership transfer operated by mere handover of the title.

Bearer shares issued prior to the entry into force of AML Law are to be converted into nominal shares and the updated articles of association reflecting the conversion submitted to the Trade Registry.

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#### **4. Which business vehicles are most frequently established by investors in Romania? Which are the distinctive features of a branch?**

Most often, investors choose to establish an LLC with a sole shareholder. However, depending on the scope of the business activities, establishing branches is also a common alternative.

Under the Companies Law, a branch constitutes a sub-division of a company (a

secondary office), having the following distinctive features:

- The branch has no legal personality of its own and therefore it is not able to establish legal relationships on its own behalf;
- The branch will not have its own debtors and/or creditors, and the parent company will be held directly liable for all operations performed by the local branch;
- The branch is economically dependent on the parent company hence the activities performed by the branch are entirely based on the material endowments provided by the parent company;
- Activities carried out by the branch will not exceed the parent company's scope of business, as authorised under the latter's domestic law;
- The branch may have its own governing bodies even though such bodies are necessarily subordinated to the governing bodies of the parent company.

Despite these limitations, the legal regime governing branches is similar in many respects to that applicable to companies, as branches have several obligations normally incumbent upon legal entities (e.g. the obligation to register with the Trade Registry Office and with the fiscal authorities, similar tax obligations, the yearly accounting obligations).

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## **5. What are the procedure, timing and costs for incorporating a business vehicle in Romania?**

Romanian companies are incorporated by registration with the Trade Registry Office. First, one must obtain/draft the documents required for the registration procedures (e.g. certificate issued by the Trade Registry Office proving the availability and reservation of the company name, articles of association of the company, documents attesting to the payment of the subscribed share capital, etc.). The incorporation certificate will be issued within three days as of submitting the required documentation with the Trade Registry Office. The registration costs are about EUR 200. After the registration formalities with the Trade Registry Office are completed, the company must also be registered for VAT purposes with the competent fiscal authority, if the case, and with the labour authorities before starting to employ personnel.

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## **6. Can the corporate structure be changed further to establishing the business vehicle?**

Yes, it is possible to change the legal form of a company during its operations, provided that the legal requirements for the new legal form are met. For instance, where the corporate form is changed from LLC to JSC, the share capital of the company must be

brought to at least the minimum legal threshold required for a JSC.

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## **7. What are the obligations to be fulfilled regarding the UBO identification?**

As per AML Law, the “ultimate beneficial owner” (the “UBO”) means any natural person who ultimately owns or controls a legal entity, and/or the natural person on whose behalf a transaction, operation or activity is performed. This criterion is deemed fulfilled in the case of a natural person holding at least 25% + 1 of the shares within a company, or the participation in the equity of the legal entity in a percentage of over 25%.

Article 56 of the AML Law provides that legal entities subject to registration with the Trade Registry (except for regies autonomes, national companies, companies owned in full or preponderantly by the state and legal entities owned by natural persons only, provided these are the only ultimate beneficial owners), must submit to the Trade Registry an affidavit concerning the UBO of the legal entity upon incorporation, annually throughout its existence, and each time a change occurs in the UBO relevant data (e.g. direct or indirect change of control).

Initially, companies already in existence had 1 year as of the entry into force of the AML Law to comply with these requirements (i.e., by 21 July 2020). However, in the context of the COVID-19 crisis, the Government of Romania extended the deadline; currently, under Government Emergency Ordinance no. 191/2020, the deadline for submitting the UBO affidavit is of 90 days as of the end of the national state of alert, which has been recently extended to 14 April 2021.

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## **8. Are shareholders’ agreements permitted by Romanian legislation?**

Shareholders’ agreements are not explicitly regulated under Romanian law. Unlike the articles of association, shareholders’ agreements are deemed as a confidential matter among the shareholders, rather than a public deed subject to publicity requirements. Consequently, a shareholders’ agreement may not be opposed to third parties unless they were aware of the agreement. In the absence of a legal framework to condition the contents of a shareholders’ agreement, shareholders enjoy absolute freedom to stipulate in their agreement any provisions they consider necessary for the good functioning of the company, to the extent they do not contradict or violate the Companies Law or the company’s articles of association.

A shareholder failing to observe a shareholders' agreement may be held liable for damages towards the other shareholders.

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## 9. Can a company acquire its own shares?

As a rule, a company may not subscribe its own shares. The Companies Law provides however for two exceptions where a JSC may acquire its own shares (i) in a restricted manner, and (ii) in an unrestricted manner.

JSCs may acquire up to 10% of their own shares provided certain conditions are met:

- That the acquisition is authorised by the extraordinary General Meeting of Shareholders (GMS) (the authorisation must provide the terms of the acquisition, the maximum number of the shares to be acquired, the duration of the authorisation which may not exceed 18 months as of the publication of the resolution in the Official Gazette, and where the acquisition is made for consideration, the minimum and maximum value of the shares to be acquired);
- That the shares are fully paid; and
- That the payment of the acquired shares is made only from certain sources allowed by the law (e.g. the distributable profit registered in the previous annual statements).

JSCs may acquire their own shares without the obligation to observe the above conditions when the acquisition is performed:

- With a view to decreasing the share capital; or
- By way of a transfer with universal title (e.g. following a merger or a de-merger procedure); or
- Within the enforcement proceedings taken against a shareholder for debts owed to the company; or
- For no consideration (freely).

In all cases, for as long as they are held by the company itself, the acquired shares do not give rise to the right to vote or to the right to receive dividends.

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## 10. Piercing the corporate veil. Which are the premises of the shareholders' liability?

Piercing the corporate veil is expressly regulated, so that shareholders abusing the limitation of their liability and the distinct personality of the company, thus deceiving the company's creditors, will be held liable without limitation for the company's

outstanding debts. The law deems abusive the shareholder's use of company assets as if they were his own, or diminishing the company's assets for his own or third parties' benefit, while aware that in doing so the company is hindered in performing its obligations. Furthermore, there are specific rules for triggering shareholders liability under insolvency laws and with regards to tax matters.

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## **11. Are there any restrictions on the transfer of shareholdings?**

In JSCs, shares may be transferred freely, unless the shareholders agree otherwise.

In LLCs, shares may be freely transferred among shareholders; unless otherwise provided in the articles of association, the transfer to persons outside the company is only allowed if approved by the shareholders representing at least  $\frac{3}{4}$  of the registered share capital.

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## **12. Does Romanian law permit a company to advance funds, extend loans or provide security for the purpose of the acquisition of its shares by a third party?**

The Companies Law expressly prohibits a JSC from performing such type of operations. The interdiction is however not applicable to (i) transactions performed by credit institutions and other financial institutions in their ordinary course of business; and (ii) transactions intended for the acquisition of shares by or for the company's employees, provided in both cases that such transactions do not cause the company's net asset worth to fall below the threshold of the cumulated value of the subscribed share capital and the reserves that cannot be distributed according to the law or under the articles of association.

Absent an express interdiction, in practice it has been considered that an LLC may advance funds, extend loans, or provide security for the purpose of the acquisition of its shares by a third party.

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## **13. Which are the main bodies of a company?**

The main management body of a JSC is the GMS. Depending on the matters to be submitted for the shareholders' approval, the GMS may be ordinary (e.g. for the appointment or dismissal of directors or auditors, for the approval of the yearly financial statements and of the management report, etc.) or extraordinary (e.g. for

the increase/decrease of the share capital, for changes in the company's legal form, mergers, spin-offs, as well as for any other matter which does not fall under the exclusive competence of the ordinary GMS).

The Companies Law provides for two types of management systems available for JSCs: (i) the one-tier management system, where the effective management is entrusted to a board of directors (Romanian: *consiliu de administrație*) which can, or in certain cases is obliged to, delegate management powers to several managers (Romanian: *directori*), and (ii) the two-tier management system, where the effective administration of the company is ensured by an executive committee (Romanian: *directorat*) under the control of a supervisory council (Romanian: *consiliu de supraveghere*). In practice, the majority of the Romanian JSCs adopted the one-tier management system.

Decision-making in an LLC belongs to the GMS. There is no statutory provision distinguishing between ordinary GMS and extraordinary GMS. However, shareholders may establish through the articles of association the two types of GMS with different duties and voting requirements. The LLC is managed by one or several directors.

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#### **14. Are there any legal restrictions on the quorum and majority necessary in the GMS and may the shareholders derogate therefrom?**

In the case of JSCs, the ordinary and the extraordinary GMS have different statutory quorum and voting requirements.

On first call (i.e. the first convening of the GMS), the ordinary GMS may duly pass resolutions only (i) in the presence of the shareholders (or their representatives) holding at least  $\frac{1}{4}$  of the total number of voting rights and (ii) with the majority of the voting rights exercised in the meeting. The articles of association may provide higher quorum and voting requirements regarding the first call. On second call (which takes place when the necessary quorum is not met upon the first call), there is no minimum quorum and the decision will be taken with the majority of the voting rights exercised in the meeting. The articles of association may not provide a minimum quorum or a higher majority for the second call of the ordinary GMS.

In the case of LLCs, there are no quorum conditions for either the first or second call. As regards decision-making, unless otherwise provided in the company's articles of associations, decisions may be passed at the GMS with double majority: over 50% of the shareholders and over 50% of the share capital. A unanimous vote is required for amendments to the articles of association, except otherwise provided by the incorporation document. In the event that the GMS cannot validly take a decision due

to lack of quorum, the GMS may make a final decision on the second call, irrespective of the number of the shareholders attending the meeting and of their shareholding percentage.

## 15. Which are the main rights of minority shareholders?

The main rights that ensure the protection of the minority shareholders in JSCs are:

- The shareholders holding at least 5% of the share capital may request that a GMS be called, or that the agenda of an already-convened GMS be supplemented;
- Any shareholder may request the auditors to review any act or operation of the company;
- One or several shareholders holding, severally or jointly, at least 10% of the share capital may request the court to appoint one or several experts for analysing certain operations in the management of the company and draft a report to be submitted to the board of directors, directorate and the supervisory council, respectively, as well as to the in-house auditors and the internal auditors of the company, as the case may be, for analysis and in order to propose adequate measures;
- In certain limited cases, the shareholders that did not vote in favour of one of the resolutions of the GMS have the right to withdraw from the company and request the purchase of their shares by the company;
- The shareholders representing, separately or jointly, at least 5% of the share capital, may file an action for damages, in their own name but on behalf of the company against the founders, directors or managers of the company for damages they caused the company.

Although expressly stipulated only for JSCs, most of the above rules are, in practice, equally applicable to LLCs, unless otherwise provided in the Companies Law (for example, the shareholders of an LLC holding  $\frac{1}{4}$  of the share capital may request the call of the GMS).

## 16. Are there any restrictions as regards transactions between the company and its shareholders or its directors in case of conflict of interests?

The shareholder of a JSC or LLC who, in a certain operation, has personal interests or represents the interests of another person that are contrary to those of the company, cannot take part in any deliberation or resolution taken with regard to such operation. In case of breach, the shareholder is liable for the damages caused to the company if the required majority had not been met without its vote.

Moreover, in LLCs, the shareholder may not vote where the decision refers to its own contribution to the share capital or to its own agreements concluded with the company. The interdiction also applies to directors, who are not allowed to take part in any resolution concerning a transaction in which they have a direct or indirect interest contrary to those of the company.

The law provides expressly for an example of conflict of interests between the directors and the JSC, where the company is not allowed to extend loans to its directors (or their spouses and relatives up to the fourth degree). The crediting restriction also applies to companies in which the aforementioned persons are directors or hold at least 20% of the subscribed share capital, alone or together with one of the aforementioned persons.

However, such crediting restrictions do not apply to: (i) operations with a cumulated enforceable value of which is lower than the RON equivalent of EUR 5,000; (ii) operations concluded by the company in its ordinary course of business, and where the terms of the operation are not more favourable to the abovementioned persons than those usually applied by the company in its dealings with third parties.

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## **17. Are there specific approval requirements for certain company transactions?**

There are legal provisions requiring GMS approval for certain operations (such as acquisition, transfer or lease of assets amounting to over half of the book value of the company's assets) before the JSC's directors are allowed to conclude them. In addition, the articles of association may provide several other operations which require the GMS prior approval before allowing the management to conclude a transaction. The capital markets legislation provides for lower thresholds on certain company transactions.

Transactions with affiliates must always be concluded at arm's length and it is advisable to be documented by valuation reports and/or transfer pricing files. The latter are mandatory where such transactions exceed a certain value in a financial year or are requested by the tax authorities during tax audits.

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## **18. What are the rules for challenging the company's resolutions?**

GMS resolutions compliant with the applicable laws and the articles of association are binding even for the shareholders that did not take part in the meeting or voted against them.

Shareholders that did not attend the general meeting or voted against and requested their opposition to be recorded in the minutes may object against GMS resolutions contrary to the law or to the articles of association within 15 days from their publication in the Official Gazette of Romania or, in the case of LLCs, from the date when the shareholder was informed about the GMS resolution.

A challenge seeking to obtain the absolute nullity of the resolution may be filed at any moment and by any person (including third parties).

Within 30 days as of the publication of the GMS resolution in the Official Gazette of Romania, the company's creditors and any other persons prejudiced by it may request the court to hold the company or the shareholders liable for the damages caused.

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## **19. How are directors appointed and removed? Are there special requirements to be observed?**

The directors of a company are appointed through the articles of association at the time the company is incorporated, and may be replaced or removed by the GMS throughout the company's existence.

In JSCs, further requirements must be observed, such as:

- The appointed director must expressly accept his/her designation, and must provide professional liability insurance;
- The duration of the term of office of the directors or members of the directorate or supervisory council is established by the articles of association and may not exceed a period of four years. However, they may be re-elected unless otherwise provided in the articles of association. The duration of the term of office of the first members of the board of directors and of the first appointed members of the supervisory council, respectively, shall not exceed two years;
- An individual may be director and/or member of the supervisory board in no more than five Romanian-based joint-stock companies, at the same time. This restriction equally applies to the individual that is a director or member of the supervisory board, and to the individual that is the permanent representative of the legal entity appointed as director or member of the supervisory board. The prohibition does not apply where the individual elected in the board of directors or the supervisory board own at least  $\frac{1}{4}$  of the total shares of the company, or is a member of the board of directors or the supervisory board of a joint-stock company holding the aforementioned shareholding quota.

## 20. Can a director be also an employee of the company?

In the case of JSCs, the members of the board of directors, the managers (in the one-tier management system), and the members of the executive and supervisory committee (in the two-tier system), may not be employees of the company at the same time; their relationship with the company is regulated by a management contract.

In the absence of an express interdiction, the general view is that a director of a LLC can also be an employee of the company.

## 21. What is the extent of the directors' liability towards the company, shareholders and outsiders?

The directors' duties and liability are regulated by the Companies Law and established on a case-by-case basis in the appointment documents. As a rule, directors are jointly liable towards the company for the following: (i) payments made by the shareholders; (ii) payment of dividends; (iii) existence and correct maintenance of company ledgers as required by law; (iv) appropriate enforcement of the resolutions of the general meetings; (v) strict fulfilment of the duties imposed by the law and the articles of association.

Directors are liable towards the JSC for the prejudices caused by the actions of the managers or of the hired staff, when the damage would not have taken place if they had exercised the supervision imposed by the duties of their position. Moreover, directors will be jointly liable with their immediate predecessors if, having knowledge of the violations committed by their predecessors, they fail to disclose them to the in-house auditors or to the financial auditors, as the case may be. Also, in the case of JSCs managed by a number of directors, the liability for actions or omissions does not extend to directors who have had their opposition to such action/omission recorded in the registry of resolutions of the board of directors and who notified such opposition in writing to the in-house auditors or the internal auditors and the financial auditor.

Also, the directors can be held criminally liable for embezzlement, forgery, use of forgery, bribery and fraudulent management.

## 22. Who can initiate legal proceedings against the company's directors?

As a rule, management members could be held liable only by the GMS for their management operations, according to the applicable rules of quorum and vote.

However, shareholders holding more than 5% of the share capital may engage the liability of the management members in case the GMS does not exercise such right.

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### **23. Which methods for increasing and decreasing the share capital of the company can be used?**

The registered share capital may be reduced by:

- Reducing the number of shares;
- Reducing the nominal value of shares or participations;
- Purchasing the company's own shares, followed by their cancellation (in the case of JSC).

Also, should the decrease not be caused by losses, the registered share capital may also be reduced by:

- Total or partial exemption of the shareholders from their obligation to perform their contributions to the share capital;
- Refund to the shareholders of a share of their contributions, proportionally to the reduction of the registered share capital equally calculated for each share or participation;
- Other methods provided by law.

The registered share capital can only be reduced two months after the day in which the resolution was published in the Official Gazette of Romania. Company's creditors whose receivables existed before the publication of the GMS resolution deciding on the decrease of the registered share capital will be entitled to obtain securities for the receivables not due at the date of publication.

The registered share capital may be increased by issuing new shares or by increasing the nominal value of the existing shares in exchange for new contributions in cash and/or in kind. Also, the new shares will be fully paid-up by incorporating the reserves, except for the legal reserves, as well as the profit or share premiums, or by setting off liquid and payable claims against the company with shares thereof. The articles of association or the GMS may authorise the board of directors or the directorate to increase the registered share capital of the company, within a period of time which cannot exceed five years from the date of its incorporation, up to a determined face value (authorised capital), by issuing new shares in exchange for contributions. The face value of the authorised capital cannot exceed half of the registered share capital existing at the authorisation above.

## 24. Do shareholders have a pre-emption right to the shares issued in the process of increasing the registered capital share?

The shares issued for the increase of the registered share capital will be first offered for subscription to the other shareholders, proportionally to the number of shares they hold. The call option of the shareholders can be limited or revoked only by resolution of the extraordinary GMS. The call option may only be exercised within the deadline established by the GMS or by the board of directors, or by the directorate, but after at least one month has passed from the publication in the Official Gazette of Romania of the resolution on the share capital increase.

## 25. Which companies have to ensure the external audit of their annual financial statements?

Companies that meet for a consecutive period of two years at least two of the following criteria have to prepare their financial statements in accordance with the EC IV<sup>th</sup> Directive and have them audited:

- The aggregate value of the assets is at least RON 16.000.000 (approximately EUR 3.5 million);
- Net turnover amounts to RON 32.000.000 (approximately EUR 7 million); or
- The average number of employees within the financial year is 50.

The same obligation applies to the annual financial statements of medium-sized and large-sized companies, companies of public interest or those which conduct their business in certain specified sectors (i.e. credit institutions, insurance companies, national companies, listed companies, etc.), as well as companies opting for the two-tier management system.

## 26. What were the major changes brought by the COVID-19 crisis in the field? Will these changes last?

The COVID-19 crisis has accelerated the path towards digitalization of processes within public authorities. Digital applications and interaction with the Trade Registry have become preferable and is broadly used. In the COVID-19 context, Romanian authorities passed several preventive measures to allow the calling and holding of the GMS for both LLCs and JSCs by correspondence or long-distance communication methods. It remains to be seen whether these measures will stay in place or were just temporary and taken out of necessity.

As already noted, the term provided by the AML Law for the submission of the UBO affidavit by already existing companies subject to the reporting obligation has been extended against the background of the COVID-19 crisis. This extension is conditional upon the state of alert being established on the Romanian territory: companies will have to comply within 90 days as of the termination of the state of alert ceases, whenever that may be. Failure to do so is punishable by administrative fine of RON 5.000 - RON 10.000.

# Real Estate

## 1. What are the main sources of real estate law?

The main sources of real estate law are: (i) the Romanian Constitution; (ii) the New Civil Code; (iii) the Fiscal Code; (iv) the Cadastral Law No. 7/1996; (v) Law No. 50/1991 on the authorisation of construction works; (vi) Law No. 10/1995 on building standards; (vii) Land Law No. 18/1991; (viii) Law No. 1/2000 on the reinstatement of ownership rights over agricultural and forest lands; (ix) Law No. 10/2001 on the legal regime of real estate illegally seized between 6 March 1945 and 22 December 1989; (x) Law No. 247/2005 for reform in ownership and justice; (xi) Law No. 165/2013 on certain measures for finalising the process of restitution, of real estate illegally seized by the State during the communist regime; (xii) Law No. 213/1998 on public property; (xiii) Law No. 350/2001 on urban development and land use planning, (xiv) Law No. 17/2014 on certain measures on the sale and purchase of *extra muros* agricultural lands, the amendment of Law No. 268/2001 on the privatisation of companies that manage State's public and private property for agricultural purposes, and the establishment of the Agency of State Domains, (xv) Law No. 46/2008 regarding the Forestry Code, (xvi) Law No. 312/2005 regarding the acquisition of private ownership rights over lands by foreigners and stateless persons, etc.

## 2. Does the law distinguish between real estate properties?

Real estate properties are mainly classified as either public or private property. Save for real estates that are exclusively part of the public property, any real estate can be subject to private property rights.

## 3. Which real estate assets are deemed public property and who are the public property title holders?

Public property includes all real estate that under the law or by its nature is of public use or interest but only if acquired through specific means provided under the law, namely: (i) by public acquisition performed in compliance with the law; (ii) by expropriation for public utility; (iii) by donation or convention, where the asset

became of public use or interest; (iv) by transfer from the State's private domain into its public domain, or from the administrative-territorial units' private domain into their public domain; (v) through other means provided by law. As an example, the public property of the Romanian State includes assets such as roads, beaches, parks, railway infrastructure, etc.

The State and territorial-administrative units (communes, cities, municipalities and counties) own properties consisting of real estate that, according to certain legal principles, belongs either to their public or their private domain.

Under Romanian law, real estate in the public domain (i) may not be subject to transfer; (ii) may not be subject to enforcement procedures and (iii) may not be encumbered by security interests. Any transaction involving an asset that is part of the public domain, and which does not observe the above-mentioned rules, is deemed to be null and void.

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#### **4. Can an investor develop a project on public property? How can such properties be exploited by investors?**

Generally, it is not possible to develop a real estate project on public property land. However, private real estate projects can be developed on such lands based on partnerships with local authorities. Such projects may involve transfers of lands and buildings from public property into private property, or transfers from the public domain of the State to that of territorial units. The law imposes certain limitations on such transfers. Assets in the public domain may usually be exploited by third parties by means of concession. Any sale, concession or lease of such assets must observe public procurement laws.

Exceptionally, the right to use real estate belonging to public property may be granted, free of charge and for a limited period of time, to public utility entities. Public property real estate may also be given into the administration of self-managed public companies, local or central authorities, other public institutions of local, county or national interest, as the case may be, based on Government or local council decision, as applicable.

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#### **5. Who can own land in Romania? Can a foreigner buy land directly?**

As a general rule, any legal or natural entity may be the holder of private property rights. However, the Constitution sets forth limitations on the right of foreign citizens and stateless individuals to acquire land in Romania.

In the Treaty of Accession of Bulgaria and Romania to the European Union, Romania undertook that it shall “liberalise” the land market. The principles of the “liberalisation” of the land market in Romania can be summarised as follows:

- As a general rule, foreign natural persons and legal entities of the European Union/ European Economic Area (EEA) can purchase land in Romania under the same conditions as natural persons and legal entities from Romania, as provided under Article 3 of the Law No. 312/2005;
- For the sale of lands for secondary residences or headquarters: starting 1 January 2012, foreign natural persons and legal entities of the European Union/EEA that are not Romanian residents are entitled to direct purchase, as provided under Article 4 of the Law No. 312/2005;
- For the sale of agricultural lands, forests and forest lands: starting 1 January 2014, foreign natural persons and legal entities of the European Union/EEA are entitled to direct purchase, as provided under Article 5 of the Law No. 312/2005.

Law No. 17/2014 regulates the procedure for the sale of *extra muros* agricultural lands to both Romanian citizens and citizens of any European Union Member State, the States which are party to the EEA, or from the Swiss Confederation, and to stateless persons domiciled in an European Union Member State or a state that is a party to the EEA or to the Swiss Confederation, and to Romanian legal entities, respectively to legal entities from European Union Member States, States that are party to the EEA or the Swiss Confederation.

Law No. 17/2014 imposes limits on the principle of direct access of entitled natural persons and legal entities to purchase *extra muros* agricultural lands in Romania by requiring observance of the pre-emption right of the following categories (listed here by priority - starting with 13 October 2020):

- **1<sup>st</sup>-rank pre-emptors:** co-owners, relatives of first degree, spouses, relatives and relatives by marriage up to the third degree included;
- **2<sup>nd</sup>-rank pre-emptors:** owners of agricultural investments for plantations of trees, vines, hops, irrigations, exclusively private, and/or agricultural lessees. If the lands put up for sale accommodate agricultural investments for plantations of trees, vines, hops and for irrigations, the owners of such investments have priority for purchasing such land;
- **3<sup>rd</sup>-rank pre-emptors:** owners and/or lessees of agricultural lands neighbouring the land put up for sale, in compliance with the provisions of paragraphs (2) and (4);
- **4<sup>th</sup>-rank pre-emptors:** young farmers;
- **5<sup>th</sup>-rank pre-emptors:** the Academy of Agriculture and Forestry Sciences “Gheorghe Ionescu-Sisesti” and the units for research and development in the agriculture, forestry and food sectors, organised and regulated by Law No. 45/2009 on the

organisation and operation of the Academy of Agriculture and Forestry Sciences “Gheorghe Ionescu-Sisesti”, and the research and development system in the agriculture, forestry and food sectors, and the education institutions with agricultural profile, for the purpose of purchasing *extra muros* agricultural lands which have the destination strictly required for agricultural research, and which are neighbouring the lands owned by them;

- **6<sup>th</sup>-rank pre-emptors:** natural persons domiciled/residing in the administrative-territorial units where the land is located or in the neighbouring administrative-territorial units;
- **7<sup>th</sup>-rank pre-emptors:** the Romanian state, through the Agency of State Domains.

If the holders of the pre-emptive right do not express their intention to purchase the land within the legal time limit, Law No. 175/2020 establishes a series of requirements for the purchase of *extra muros* agricultural land by natural persons and legal entities that are not categorised as holders of the pre-emptive right, respectively: (i) to be domiciled/residing/headquartered on the national territory at least 5 years prior to the date when the offer to sell is registered, (ii) to carry out agricultural activities on the national territory for at least 5 years prior to the date when the offer to sell is registered, (iii) to be registered with the Romanian tax authorities at least 5 years prior to date when the offer to sell is registered, for the natural persons, respectively, to prove that at least 75% of the overall income of the past 5 tax years was earned from agricultural activities, for the legal entities. Moreover, the legal persons must meet the following conditions as well: (i) the shareholder/stakeholder controlling the company must be domiciled on the national territory for at least 5 years prior to the date when the offer to sell is registered and (ii) if the shareholding comprises legal entities, the controlling shareholders/stakeholders – natural persons must prove that they have had a domicile on the national territory for at least 5 years prior to the date when the offer to sell is registered.

If the pre-emptive right is not exercised and no other natural person or legal entity which fulfils the conditions indicated above expresses its intention to purchase within the legal timeframe, the sale may be freely executed to any natural person or legal entity.

According to Law No. 175/2020, the alienation by sale of an extra-muros agricultural land before the 8<sup>th</sup> anniversary of its purchase by the seller is conditioned by the seller's payment of a 80% tax of the amount representing the difference between the sale price and the purchase price, calculated based on the grid of notaries in that period.

The same 80% tax is applicable as well in case of direct or indirect sale of the controlling interest in the companies that own *extra muros* agricultural land and which account for more than 25% of their assets. The tax is applicable to the value difference

of those lands calculated based on the notaries' official price chart between the date when the land was acquired and the date when the controlling interest was sold. In this case, the corporate income tax for the value difference of the sold shares shall be applied to a base proportionally reduced by the percentage of those agricultural lands in the fixed assets and any double taxation shall be strictly forbidden. Failure to observe the obligation to pay the tax shall lead to absolute nullity of the sale.

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Also, Law No. 175/2020 provides:

- That, once purchased, the *extra muros* agricultural land will have to be used exclusively for agricultural activities from the date of the purchase and if there are agricultural investments on the land for tree crops, vines, hops and irrigation, their agricultural destination will have to be preserved;
- For the extension of the term for exercising the pre-emption right from 30 calendar days to 45 business days and adds to the procedure the 30-calendar daytime limit imposed for natural persons and legal entities to exercise their intention to purchase, as described above;
- For a Sole Register to be created as regards the transfers and use of *extra muros* agricultural land, which will include information with respect to the disposal of *extra muros* agricultural land;
- For new sanctions: the sale of *extra muros* agricultural land by failure to observe the pre-emptive procedure or without obtaining the necessary permits shall be penalised

by absolute nullity (prior to the amendment, Law No. 17/2014 provided the relative nullity as sanction) and the fine for the failure to observe Law No. 17/2014 has been increased and ranges from RON 100.000 to RON 200.000.

Moreover, Law No. 46/2008 regulates a pre-emption procedure for the sale of lands from the forestry fund. The legal pre-emptors are the co-owners and the neighbours. In case the State or the territorial administrative unit is neighbouring the land to be sold, their pre-emption right shall have priority over those of the other neighbours, provided the forest land of the State or territorial administrative unit is in the public domain. The seller must notify in writing the pre-emptors, through the service of a bailiff or notary public, with the obligation of the pre-emptors to exert their right within a 30-day period. The sale purchase agreement concluded without notifying the pre-emptors or in consideration of a lower price, or under better conditions than those mentioned in the selling offer, is affected by relative nullity.

Non-EU citizens and stateless individuals not domiciled in a EU Member State/ EEA and legal entities outside the EU/EEA may only acquire lands in Romania under reciprocity conditions, as regulated by international treaties (and by taking into consideration the conditions provided by special legislation – e.g. Law No. 17/2014 regarding *extra muros* agricultural lands).

Any foreign investor may acquire lands (including *intra muros* lands) in Romania by setting-up a special purpose vehicle with its headquarters in Romania. This will be a Romanian legal entity and, therefore, will be entitled to acquire land without the legal limitations imposed on foreigners.

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## **6. Are there any formal conditions for the transfer of real estate property? Is authentication required?**

Under Romanian law, deeds having as object the transfer of ownership over real estate must be concluded in writing and in authenticated form (i.e. signed in front of a Romanian public notary), under the sanction of absolute nullity. Corporate transfers (the transfer of the shares of a company owning real estate) may be made through corporate transactions that do not require notarised deeds.

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## **7. Is there any transfer tax (or equivalent) payable on the sale or purchase?**

For transfers of the ownership title or of any other right over real estate, an income tax is owed to the state budget by the transferor. The value of the income tax is computed

and collected by the public notary upon the authentication of the transfer deed. The registration of the transfer deed with the relevant Land Book is conditional upon the payment of the income tax.

Under the Fiscal Code, individuals obtaining income from transferring the right of ownership (or dismemberments of ownership) over real estate (constructions of any kind and the affected land and/or land of any kind free of constructions) are compelled by law to pay income tax to the state budget.

For real estate transfers including constructions of any type and their related lands, by means of *inter vivos* deeds, as well as in case of lands of any type (without constructions), individuals owe a tax which is calculated by applying the quota of 3% over the taxable income.

The taxable income is determined by deducting from the value of the transaction the non-taxable amount of RON 450.000.

Such tax is not due in the following cases:

- The ownership right over lands and constructions was acquired based on special legislation;
- The ownership right was acquired by means of donation between the relatives and the affinities up to the 3<sup>rd</sup> degree inclusive, as well as between spouses;
- In the case of cancellation with retroactive effect of the transfer deeds;
- The finding based on Article 13 of Law No. 7/1996 regarding buildings subject to systematic registration where proof of ownership is missing, which shall be subject to the registration of factual possession in the technical documents;
- For transfer of ownership over real estates from the personal patrimony, according to the provisions of Law No. 77/2016 on discharge of mortgage-backed debts through transfer of title over immovable property, in order to settle the obligations assumed by way of credit, for a single payment transaction.

Notary fees related to the execution of the transfer deed and the costs for the registration of the deed with the Land Book, generally paid by the buyer, are not included in the above-mentioned taxes.

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## **8. How is title to real estate evidenced? Is there a public register?**

A real estate title is evidenced and is made opposable to third parties by registration in the relevant Land Book (Romanian: *Carte Funciară*).

The Land Book provides for a description of estates (cadastral number of the estate, dimensions of the estate, its categories of use and, as the case may be, the buildings and the location of the estate by indicating neighbouring areas), for various aspects related to the ownership right (name of the owner, the legal deed or fact which gives rise to the owner's right, any rights-of-way, legal facts, personal rights or other legal relations or actions taken in connection with the property) as well as for aspects regarding the background of various dismemberments of ownership (the right to use the land located under a construction, dwelling rights, easement rights, mortgages and real estate privileges, leases and assignments of income, encumbrances and related procedures including pursuit of the estate or its proceeds).

The Cadastre Law sets forth the manner in which legal operations regarding real estate properties are to be published.

The records are kept by the National Agency for Cadastre and Real Estate Publicity, through its territorial units. The general cadastre record system is designed to provide a public record of all transactions and relevant legal issues related to real estate located in the same territorial unit.

A right over real estate recorded in the Land Book is presumed to exist, if acquired or created in good faith and lacking any proof to the contrary (registrations in the Land Book do not constitute absolute evidence). Where registration procedures related to a deed or right have been duly performed, third parties may not prove that they were not aware of such deed or right. The Civil Code establishes two relative legal presumptions: that the registered act or right exists, if it was not amended or de-registered; and that a de-registered deed or act does not exist.

Until the expected change in their legal regime, as detailed herein below, registrations with the Land Book shall be carried out according to the Cadastre Law, to the effect of opposability, rather than constitution of rights.

The right to demand fulfilment of registration formalities is protected under the Civil Code, while contractual clauses seeking to limit the right to perform certain registration formalities are deemed null and void.

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## **9. Is a Land Book review of the previous registrations legally required?**

A prior review of the registrations in the Land Book related to any specific real estate property is recommended. A Land Book excerpt is required upon the execution of a transfer agreement, as to evidence proper registration of the previous owner and the

lack of transfer prohibitions.

## 10. Are there any major legislative novelties regarding Land Book registrations?

As a major legislative novelty in real estate regulations, the Civil Code, in force as of 1 October 2011, provides that the final registration (Romanian: *intabularea*) of a certain right with the Land Book shall have a constitutive effect, i.e. leading to the creation of the respective right, rather than a mere opposability effect, as previously provided. However, this new rule shall only become applicable after the complete implementation of the unitary and mandatory cadastral system providing for a technical, economical and legal record of real estate, a system already initiated in Romania starting 1996.

According to the new rules, the private ownership right over an immovable asset will cease upon the registration with the Land Book of the previous owner's waiver of the transferred right, given under certain regulated forms. However, the ownership right will be obtained without registration when derived from natural accession, inheritance, forced sale, expropriation for public utility reason or other cases expressly regulated under the law. Also, in certain expressly provided cases, registration may have acquisitive effects (for example, in the case of real rights).

Other new rules included in the Civil Code have already entered into force. Provisional Land Book registrations and Land Book notations may only be made in the cases expressly provided by the law. Real rights subject to a condition may not be registered with the Land Book and can only be recorded as provisional Land Book registrations.

The date on which a registration with the Land Book becomes effective is the date on which the application is registered with the Land Book. Where there are concurrent titles emanating from the same predecessor in title, the holder of a right registered with the Land Book is deemed to be the first person who made such registration, irrespective of the date of the title the Land Book registration relies upon.

In cases of transfer of leased assets, the lease contract shall be enforceable against the acquirer under the following conditions: (i) for immovable assets registered with the Land Book, only if the lease agreement was noted; (ii) for immovable assets not registered with the Land Book, only if the certified/certifiable date of the lease agreement occurs prior to the date of the transfer; (iii) for immovable assets subject to publicity formalities, if the lessee fulfilled such formalities; and (iv) for other immovable assets, if the asset was used by the lessee at the time of the transfer.

## 11. Should an investor pay particular attention to any specific item during due diligence over real estate property?

Within the process of acquiring land for the purpose of developing real estate projects in Romania, investors should always consider the critical issue of claims filed by former owners abusively deprived of their property during the communist regime (by way of abusive expropriation, abusive confiscation, abusive nationalisation, etc.). Starting 1991, the Romanian Parliament issued a series of enactments regulating the restitution of such properties, such Land Law No. 18/1991, Law No. 1/2000, Law No. 10/2001, Law No. 247/2005 and most recently Law No. 165/2013.

The general rule is that illegally seized property must be returned in kind (the original real estate, at its original locations/site). Should restitution in kind be impossible, former owners shall be granted compensation. By way of exception, ownership titles issued based on the laws on restitution of land are registered with the Land Book *ex officio*.

Law No. 247/2005 sets forth the legal framework governing compensations, by way of establishing *Fondul Proprietatea S.A.*, a securities collective placement body, in the form of a financial investment company. However, starting 20 May 2013, when Law No. 165/2013 entered into force, a new compensation framework was established, applicable to all cases of restitution, except where restitution in kind is still available. Under the new legal provisions, in case restitution in kind is not available, there are two compensation procedures: (i) compensation by equivalent (by other lands or constructions - if possible) or (ii) compensation by the awarding of points, each point having a value of RON 1.00. A National Fund for agricultural lands and other properties, administered by the Agency of State Domains, is to carry out the new compensation scheme.

In case the restitution of agricultural lands on the old sites is not possible, after the existence of the ownership right and the size of the land parcel validated by the county commissions of land fund or, as the case may be, by the Bucharest Municipality Commission of Land Fund, the former owner(s) or their heirs are entitled to receive lands located on another site. In this respect, within 180 days from the date of establishment of the Local Land Inventory Commission, each such commission shall determine the situation of agricultural forestry lands, located in the public or private domain of the state or, as the case may be, of the administrative-territorial unit, which may be the object of restitution of the property right for each administrative-territorial unit.

In case the restitution in kind on another site is not possible, compensation by the awarding of points shall apply. In order to complete the process of restitution in kind

or, as the case may be, by equivalent lands on a site other than the ones illegally seized during the communist regime, there shall be established the National Commission for Compensation of Real Estates (subordinate to the Chancellery of the Prime Minister). The secretariat of the National Commission, based on the relevant documents, proceeds to verify such documentation from the point of view of the existence of the property right of the person who considers himself entitled to compensation measures.

The real estate object of a compensation decision is evaluated based on the grid used by public notaries (valid at the date when Law No. 165/2013 came into force) and the resulting value is expressed in points.

Within a 3-year period from the issuance date of the compensation decision but not earlier than the 1 January 2017, the holder of points will be able to opt for compensation in cash. Cash compensation is paid in instalments. Starting 1 January 2017, the holder of compensation points can make a request, annually, to the National Authority for Property Restitution, for the issuance of a payment order. The National Authority for Property Restitution shall issue, during five consecutive years, payment orders, in equal annual instalments, within the limit established by the compensation decision. The value of one instalment can not be less than RON 20.000 provided that the amount thus granted does not exceed the total value of the established compensation.

All persons who acquire rights in connection with the restitution of illegally seized property are obliged under the provisions of Law No. 165/2013 to notify the National Authority for Property Restitution about the transactions they concluded in connection with such rights within 15 days from the conclusion of such transactions.

For persons having acquired rights in connection with the restitution of real estate illegally seized by the State during the communist regime (i.e. the assignees), Law No. 165/2013 provides for compensation through points as the sole possible remedy, consisting in a number of points equal to the amount of the price already paid to the former entitled person (based on the private convention/agreement signed with the entitled persons) plus 15% out of the difference up to the value of the property determined based on the public notaries grid.

The number of points cannot be higher than that granted based on the evaluation of the real estate in accordance with the public notary grid.

The compensation granted where the price already paid by the assignees to the former owners is not mentioned in the restitution file, consists of a number of points equal to 15% out of the value of the real estate as established based on the public notary grid.

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## 12. Which is the institutional framework of planning control?

Urban planning policies are carried out by public administration authorities, according to Law No. 350/2001, which establishes the general framework for urbanism policy, among other matters.

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## 13. Are there any mandatory urbanism documentation?

The main urbanism documentations are the General Urbanism Plan (Romanian: *Plan Urbanistic General*-PUG), the Zonal Urbanism Plan (Romanian: *Plan Urbanistic Zonal*-PUZ) and the Detailed Urbanism Plan (Romanian: *Plan Urbanistic de Detaliu*-PUD).

The PUG is the guideline for the development of a certain locality and establishes, *inter alia*, the city limits, the use to which lands located within the city limits may be put, the protected areas, the development of the technical infrastructure, requirements for constructions location and features. The PUG may be updated from time to time, every 10 years at most. The validity term of the PUG is extended, based on the decision of the local council / General Council of Bucharest Municipality, until the new general urban plan comes into force, provided that the elaboration / updating of the general urban plan is initiated before the expiration of the period of validity.

The PUZ mainly ensures coordination between the development plans and the PUG of a specific locality. The PUZ is prepared for certain specific areas of a locality and includes regulations relating to street network organisation, the construction regime, function of the area, building alignment, receding planes and distances to lateral and backside limits of the plot, architectural features of the buildings, permitted construction materials, maximum permitted height, land use coefficient, land occupancy ratio, infrastructure development, etc. Once approved by the competent Local Council, the PUZ<sup>1</sup> becomes compulsory for the respective area in relation to the technical parameters contained.

The PUD is a specific regulation that sets forth detailed requirements regarding the location and area of a construction on a specific plot, including regulations regarding accessibility and connection to the urban networks; general constraints regarding the built volumes and the fittings; functional and esthetical harmonisation with the surrounding areas. The PUD is a specific regulation of a plot in relation to the neighbouring plots and cannot change the higher ranking plans.

<sup>1</sup> On 26 February 2021, the General Council of the Municipality of Bucharest passed a series of decisions aiming the suspension of the coordinating Zonal Urban Plans of districts 2, 3, 4, 5 and 6 of Bucharest for a period of 12 (twelve) months as of entry into force of the G.C.M.B. Decisions, During the suspension period, the urban planning certificates and the building/demolition permits to be issued by the General Mayor of Bucharest and by the District Mayors of Bucharest shall comply with the provisions of previous urban planning documentations issued prior to the decisions approving the Coordinating PUZs.

## 14. Who has the initiative of preparing land development and urbanism documentations?

The initiative of preparing land development and urbanism documentations such as Zonal Urbanism Plan regarding central areas, protected areas and areas for monuments protection and also Zonal and Detailed Urbanism Plans for the development of public interest objectives, exclusively belongs to the public administration authorities. Other kinds of town planning documents may also be initiated by legal and natural persons.

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## 15. Are any amendments permitted to existing urbanism documentation?

Should an investor seek an amendment to the urbanism documentations approved for a certain area, or should the specific conditions of the location or nature of the project require it, the local public authority is entitled, in specific cases, to condition the authorisation of the investment on the preparation by care of the private investor of an amended PUZ and on the approval thereof by the local public authority or, in certain cases, to condition the authorisation of the investment on the preparation and approval of a PUD.

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## 16. May urbanism documentations be initiated or approved for the purpose of bringing unauthorised/non-compliant constructions into conformity with the law?

Starting from 1 January 2012, no urbanism documentations (such as PUZ or PUD) may be initiated or approved for the purpose of bringing into conformity with the law constructions built without a building permit or in disregard of the provisions in the building permit.

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## 17. Which is the document listing the construction requirements for a specific plot of land?

The construction requirements established under the existing urbanism regulations are described, for individual parcels of land, through urbanism certificates (Romanian: *certificat de urbanism*). The purpose of such certificates, which may be issued at the request of any interested person, is mainly to provide information on the legal, economic and technical regime of a certain plot, including in relation to the buildings constructed on it, to detail the town planning requirements as applicable to it and to indicate the approvals and permits required in order to begin construction on the plot.

The urbanism certificate is issued by the local public authorities (the Mayor of the locality where the land is located, or the Presidents of the County Council, if the land on which construction works are going to be performed exceeds the boundaries of a single territorial-administrative unit), and does not grant its holder the right to perform construction works. The urbanism certificate may be issued in paper format or digital (electronic) form having the same value.

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**18. Which is the document that entitles an investor to perform construction works?**

Construction works can only be performed on the basis of a building permit (Romanian: *autorizație de construcție*) issued by the local public authorities with a view to ensuring compliance of the future construction with the legal provisions regarding location, design, and purpose.

Building permits are issued by the same authorities empowered to issue urbanism certificates. If the beneficiary is changed before completion of the works, the building permit remains valid and is automatically transferred to the new beneficiary, who is bound to observe its provisions.

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**19. Are there any conditions or steps to be carried out prior to obtaining the building permit?**

Depending on the type of land (within or outside the city limits), as well as on its purpose of use (agricultural or industrial), certain steps must be taken before applying for a building permit. If the plot is classified as farming (agricultural) land, its class might be required to be changed prior to obtaining a building permit, a process that requires a certain administrative procedure (including preparing cadastral documentation and obtaining approvals from various governmental agencies) and entails costs. The building permit may only be issued after the completion of the following steps: (i) obtaining the urbanism certificate; (ii) obtaining the relevant endorsements and approvals from various authorities as indicated in the urbanism certificate and (iii) submitting the technical documentation of the future construction.

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**20. To whom are the building permits issued to? Is there a specific prerequisite condition for the investor?**

Building permits may be issued to the holder of a real right in the estate (land and/or construction), such as: ownership, administration right, concession right having as

object land in the public or private domain of the State or administrative-territorial units, right of use, usufruct right, superficies or easement right. A building permit may be issued based on a free-lease or lease agreement only for temporary buildings, and only provided that the owner expressly consents to such constructions being built on its land.

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## **21. Are there any fees or taxes applicable for the issuance of building permits?**

The building permit is issued subject to the payment of a tax of (i) 0.5% of the estimated value of residential construction works; (ii) 3% of the estimated value of works related to site organisation, provided that such works are authorised individually, and not together with the main construction works to which they refer; (iii) 2% of the estimated value of construction works for camping facilities, cottages, camps or caravans or (iv) 1% of the estimated value of any construction works (such tax is further adjusted at the end of the project based on the final construction price). Should an extension of the building permit be required, an additional tax amounting to 30% of the initial authorisation tax must be paid.

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## **22. Is there a procedure to ascertain that the construction works have been finalised?**

The completion of the construction works and their compliance with the requirements laid down in the building permit are ascertained by means of reception minutes - a deed prepared by the representatives of the local authorities, of the constructor and of the beneficiary. The reception minutes constitute the deed ascertaining the completion of the construction works and is one of the documents based on which the new building may be registered with the Land Book.

Absent a building permit, constructions completed before 1 August 2001 may be registered with the Land Book based on (i) the tax certificate certifying payment of all tax obligations due to the local public authority and (ii) the relevant cadastral documentation.

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## **23. Which documents are required for the Land Book registration of a building?**

Under the current legal provisions, constructions are registered with the Land Book based cumulatively on the building permit, the reception minutes and cadastral

documentation. As an exception, the ownership right over constructions may also be registered with the Land Book by execution phases in which case the following documents are required: (i) the building permit certificate attesting to the stage of the construction works, issued by the Mayor of the administrative-territorial unit; (ii) the minutes ascertaining the physical stage of the construction works, endorsed by the representative of the public administration authority which issued the building permit, as well as (iii) the cadastral documentation.

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## 24. Is there any limitation imposed on the transfer of real estate?

As a general rule, privately owned real estate may be freely transferred. Exceptions to the free legal circulation rule are included in special laws.

For instance, a limitation to the free transfer of real estate is included in the Romanian Forestry Code with respect to the transfer of forest lands, which may only be permitted subject to observing the co-owners' and neighbours' pre-emption rights. Where the forest lands subject to the transfer of ownership right are located at the limit/adjacently to public property, the Romanian State prevails over other pre-emptors.

Under Law No. 422/2001 on the protection of historical monuments, the Romanian State, respectively the territorial-administrative units, also enjoy a pre-emption right in the case of transfers of properties classified as "*historical monuments*" under the applicable legal provisions.

Certain limitations to the free transfer of real estate are regulated by specific restitution laws, such as the interdiction of transfer of such properties while they are subject to an ongoing administrative procedure and/or litigation.

Under Law No. 17/2014, sale and purchase agreements regarding *extra muros* agricultural lands concluded in breach of the pre-emption rights of the co-owners, lessees of the land in question, neighbours, the Romanian State through the Agency of State Domains are sanctioned by relative nullity.

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## 25. What were the major changes brought by the COVID-19 crisis in the field? Will these changes last?

Against the background of the COVID-19 crisis, contractual parties can invoke force majeure or, depending on the situation, hardship.

The pandemic does not constitute, per se, a case of force majeure. The application for a certificate confirming the force majeure event is solved within 15 days from the date the required documentation is submitted in full and the fee is paid.

The fact that a force majeure clause explicitly addresses the occurrence of an epidemic or a pandemic is not deemed sufficient for the purpose of invoking force majeure. In all cases where force majeure is invoked, the request for confirmation must be accompanied by justification, as well as notifications sent to the other contracting party. The party invoking force majeure must actually prove that it cannot fulfil its contractual obligations due to specific circumstances arising from the epidemic and outside its control. At the same time, the claiming party must be able to prove it not in a position to take reasonable measures in order to avoid or reduce the occurrence of the event or its effects.

As a rule, if the performance of the contract becomes excessively burdensome due to an exceptional change in circumstances which would render grossly unfair the debtor's obligation to perform, the contract may be altered (renegotiated) or even terminated (under the hardship clause). This applies even more so in the case of contracts that have as object generic, fungible goods or money payments. The debtor must try, within a reasonable timeframe and in good faith, to negotiate a reasonable and fair alteration of the contract. Should negotiations fail, the court may order:

- Either that the contract be adapted, in order for the parties to share in a fair manner the losses and gains arising from the change in circumstances; this means that the judge intervenes in the contract directly or indirectly, by imposing on the parties an obligation to renegotiate; or
- That the contract be terminated at the time and in the manner the court sees fit.

The court may opt for either adapting or terminating the contract only to the extent that:

- The change in circumstances occurred following the conclusion of the contract;
- The change in circumstances and the extent of this change were not and could not have reasonably been taken into account by the debtor upon entering the contract;
- The debtor did not assume, and could not be reasonably deemed to have assumed the risk.

# Creditor & Debtor Disputes

## GENERAL

### 1. What is the structure of Romanian Courts?

The Romanian judiciary system consists of four levels of courts: local courts, tribunals, courts of appeal and the High Court of Cassation and Justice, which is Romania's Supreme Court.

### 2. Which rules of jurisdiction govern the creditor & debtor disputes?

As a general rule, a debt recovery claim will be issued in the court holding jurisdiction over the respondent's business headquarters or domicile.<sup>1</sup> In terms of material jurisdiction, claims may be issued in first instance in the local courts or tribunals, depending on the value of the claim. The current threshold is set at approximately EUR 42,000, with no distinction being made between civil and commercial matters.<sup>2</sup>

### 3. Are there any applicable pre-action protocols to be pursued before commencing litigation?

As of 15 February 2013, the New Civil Procedure Code (NCPC) has repealed the mandatory conciliation procedure for creditor-debtor disputes. The creditor is expected to issue a notice of delay to the debtor before lodging a claim, if not otherwise provided by way of exception in the law or agreed by the parties. The notice of delay will have to include a reasonable deadline for the payment of debt. If such prior notice is omitted, the debtor will benefit from a reasonable timeframe within which payment of debt will

1 Alternative criteria to determine the court having territorial competence as first instance are provided for certain cases, such as the place where the agreement is performed. Other exceptions are provided for claims bearing on immovable assets, where the competency is determined by *locus rei sitae*.

2 The distinction between civil and commercial claims, a pinnacle of former civil proceedings legislation, has been repealed with the entry into force of the New Civil Code on 1 October 2011. All matters covered in the New Civil Code, which also contains regulations in matters formerly included in the Commercial Code, are henceforth deemed "civil". New rules of procedure included in the New Civil Procedure Code are meant to implement this reunification.

lead to the dismissal of the claim, with legal fees to be borne by the creditor.

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#### **4. What are the applicable claim formalities?**

Unlike other jurisdictions, no claim forms are made available or required by the courts in Romania, even though the law requires minimal contents for the application. The NCPC provides a minimal content of the claim but certain formalities may be fulfilled after the registration of the claim, within the term set by the judge.

Any claim issued in court must attach evidence that legal stamp in the required amount has been paid. The amount of the legal stamp depends generally on the value of the litigation.

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#### **5. Which means of evidence are accepted in Romanian courts?**

Romania is a jurisdiction where the type of evidence admissible in courts is limitedly provided by law. They include documents (privately made, authenticated and, since 2001, electronic documents provided with electronic signature), witnesses, interrogatory, expert reports, legal assumptions, confessions and on site assessments.

All evidence must be approved and is taken by the court. The court may permit requests for production of documents in the possession of the adversary or a third party to the trial provided the evidence proposed is legal (including legally obtained), credible, relevant and conclusive and the requested documents do not contain privileged information.

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#### **6. Which interim and urgent measures are available to a creditor in Romanian Courts?**

The NCPC makes available interim applications for creditor-debtor disputes such as injunctions to seize tangible assets or place liens on bank accounts in order to preserve the rights of the creditor. The applications are adjudicated in urgent procedure. In assistance of creditors seeking to preserve rights that may be jeopardised by delay, or prevent, mitigate or remedy damages, or remove impediments that may forestall enforcement, the NCPC provides the urgent application for an injunction, an urgent procedure available prior to or after issuing claims.

## RIGHTS OF APPEAL

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### **7. What are the legal means of challenging a judgment?**

Judgments passed in first instance are usually challengeable by first appeal, in 30 days as of service. The first appeal is an ordinary application seeking to obtain revision of the judgment on its merits and the appellate court may accept new evidence.

Decisions passed in first appeal or without a right of first appeal may be challenged by final appeal within 30 days of service. The final appeal is an extraordinary challenge to be retained within the jurisdiction of the higher court, its scope being limited to examining the lawfulness of the appealed judgment without any reassessment of the facts of the dispute.

Other extraordinary forms of legal redress are revision (mainly for discovery of new evidence, contradictory decisions, *minus* or *plus petita*) and the motion to annul (mainly for breach of jurisdiction rules or failure to fulfil the summoning procedure).

## SPECIAL URGENT APPLICATIONS

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### **8. Which urgent procedures of debt recovery are available to creditors?**

The NCPC regulates the procedure of an injunction to pay, available to creditors holding a receivable that is certain (there is no dispute on its existence), liquid (accurately determined or determinable), outstanding (matured and enforceable) and payable in money. To satisfy the urgency test required by such a procedure, the creditor must be capable of evidencing the debt by documents (agreements, invoices), since other evidentiary means, such as witnesses or expert reports, are not admissible.

The injunction to pay provides significant advantages to the creditors: expedited and simplified procedures, reduced legal fees (a fixed legal stamp fee is required-currently set at the equivalent of approximately EUR 42, rather than a pro rata fee from the value of the claim). However, in practice, debtors generally contest the certainty of debts claimed by urgent application in order to obtain denial of the application as inadmissible, and provoke a settlement on the merits under the general rules, which require *pro rata* legal stamp fees, ample evidence and a broader range of available legal challenges.

## **ALTERNATIVE DISPUTE RESOLUTION PROCEDURES AVAILABLE FOR DEBT RECOVERY**

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### **9. Which alternative dispute resolution (ADR) procedures are available to creditors seeking debt recovery?**

Arbitration, conciliation and mediation are available in Romania as alternative methods of adjudicating claims to the courts. Among them, arbitration is the most common, while the practice of mediation is still in its early stages, despite legislative efforts for increased adherence.

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### **10. Which are the legal coordinates of conciliation as an ADR procedure?**

Conciliation as a type of ADR is available in Romania under the Rules for facultative Conciliation approved by the College of the Court of International Commercial Arbitration at the Romanian Chamber of Commerce and Industry in 1999.

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### **11. Which are the legal coordinates of mediation as an ADR procedure?**

The Romanian Chamber of Commerce and Industry has been offering the service of mediation since 2003, but this alternative dispute resolution method caught the attention of the general public only after 2006, when a law to regulate it was passed. Mediation was expected to develop a significant practice after a December 2012 legal amendment requiring all parties subject to certain types of litigation (including debt recovery under RON 50.000 - approximately EUR 11,500) to take part in informative meetings on the benefits of mediation. However, this amendment has been struck down by the Constitutional Court in June 2014, reducing the frequency of this procedure even further.

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### **12. Which are the legal coordinates of arbitration as an ADR procedure?**

Under the NCPC, the parties may submit disputes to arbitration either to an ad hoc tribunal or to one organised at a permanent court. In ad hoc arbitrations, parties may choose the rules to govern the arbitration, either directly or by reference to an established set of norms, and within the confines of public policy rules.

The most frequent form of arbitration, however, is institutionalised arbitration carried out under the auspices of permanent courts. Most arbitration requests are referred to the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry, established in 1953 and seated in Bucharest, which handles international as well as local, commercial and civil disputes. The Arbitration Rules of the Court (available on its website<sup>3</sup>) as enacted on 1 January 2018, are to be supplemented with the general rules provided by the NCPC. The arbitration tribunal will consist of one or three arbitrators, “depending on the agreement of the parties” (Article 18 of the Rules). Absent such agreement, the matter will be judged upon by three arbitrators, with each party nominating one and the third elected by the already appointed arbitrators.

Unless the parties agree otherwise, arbitral tribunals must deliver the award within six months from constitution. During interim requests, the 6-month term is suspended. Arbitral awards are final and binding for the parties and may only be challenged by action for annulment, within one month of the issue of the award, for reasons provided limitedly by the NCPC (such as invalidity of the arbitration clause, non-arbitrability of the matter, breach of public policy rules through the award). The action to annul the award is filed with the Court of Appeal having jurisdiction over the place of the arbitration. The court settling the action for annulment may stay the enforcement of the award; motions for a stay require the interested party to place a bond. The decision of the court is subject to final appeal.

The number of arbitrations has significantly increased in the past years, especially in commercial matters, but arbitrations are still not very common, due especially to the costs of the proceedings, which are perceived as exceeding the costs of a dispute in court and which, if the parties do not agree otherwise, are borne by the losing party. Also, with limited grounds to appeal an award, parties may prefer to issue their claims in court, where a double level of jurisdiction is available. In practice, annulments of arbitral awards are rare.

## **ENFORCEMENT OF DOMESTIC JUDGMENTS AND ARBITRAL AWARDS**

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### **13. Which legal documents constitute writs of execution under Romanian law?**

In Romania, enforceability is in principle specific to domestic judgments (issued upon first appeal or without right to first appeal, depending on the matter) and domestic

<sup>3</sup> <http://arbitration.ccir.ro>.

arbitral awards, which are recognised and *ipso jure* enforceable on the territory of Romania. There are other instruments to which law recognises enforceability, such as certain agreements (e.g. such as loan contracts concluded with banks), or documents authenticated by the notary public, provided certain conditions are met.

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## 14. What is the general enforcement procedure under Romanian law?

The enforcement procedure begins with the creditor's requests towards a bailiff having jurisdiction over enforcement procedures. The request must contain the following information: a) the debtor's and creditor's name and address/registered office, b) the pursued asset or the type of debt that is owed and c) the types of enforcement requested by the creditor. The title, along with the request for enforcement is then handed over to the bailiff, who will ask the enforcement court to approve forced execution.

Writs of execution may be enforced within three years as of the moment the creditor is allowed to request enforcement, with the exception of writs bearing on rights *in rem*, for which the prescription term is of 10 years.

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## 15. Which types of enforcement does the Romanian law permit?

Enforcement, governed by the NCPC, may be direct, whenever the creditor seeks to satisfy his right by a performance in kind (for instance, when the debtor owes the creditor an asset and the creditor pursues the debtor for that asset), or indirect, when the debt is satisfied from amounts the creditor obtains from enforcement (either from selling the debtor's assets, or directly from the debtor's accounts or from third parties owing money to the debtor). Enforcement is carried out by bailiffs, a professional body organised under the supervision and control of the Ministry of Justice.

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## 16. How can enforcement be challenged by the debtor?

A debtor can resort to legal requests aimed to forestall, stay, or even cancel the enforcement procedure. The procedure may be forestalled by way of a preliminary request for a stay, which is filed by urgent application in advance to the adjudication of a main request for a stay.

The main request for a stay is filed simultaneously with the opposition to enforcement,

and requires the debtor to deposit a bond, generally established prorata from the amount of the debt under enforcement. Oppositions to enforcement seek to cancel the enforcement, wholly or partially, usually for formal miscarriages, such as invalidity of the enforcement formal papers, which are prepared by the bailiff, or the absence of a valid writ of execution.

**RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS**

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**17. Which are the general principles regarding recognition and enforcement of foreign judgments and arbitral awards?**

Foreign judgments may be recognised and enforced in Romania by procedures which differ depending on the place of issue being inside or outside the EU. Neither procedure allows the courts competent to adjudicate applications for recognition and enforcement to review the judgment on its merits.

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**18. What is the legal procedure for recognition and enforcement of judgments issued in EU Member States?**

The procedure for the recognition and enforcement in Romania of judgments issued in Member States is governed by the European Parliament and Council Regulation No. 1215/2012 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. According to this simplified procedure, the interested party submits its application for enforcement to the competent local authority, having attached (i) a copy of the judgment which satisfies the conditions necessary to establish its authenticity, as well as (ii) a certificate issued by the court that passed the judgment, certifying that the judgment is enforceable and containing an extract thereof. The local enforcement authority will limit its verifications to the enforceability of the judgment.

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**19. What is the legal procedure for recognition and enforcement of judgments issued in non-EU Member States?**

The procedure for the recognition and enforcement in Romania of judgments issued in non-Member States is regulated by the NCPC. In order to obtain recognition, the creditor must prove that the foreign judgment is final, that the foreign court had jurisdiction to rule on the case (without such jurisdiction being exclusively based

on the presence of the defendant or assets belonging to him, in the State of the said jurisdiction, if this presence held no direct relation to the dispute) and that reciprocity exists with respect to the acknowledgement of the effects of foreign judgments between Romania and the State of the issuing court. The enforcement of non-EU foreign judgments in Romania is conditional upon the petitioner proving the fulfilment of conditions similar to the ones for recognition, as well as the enforceability of the judgment.

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## **20. What is the legal procedure for recognition and enforcement of arbitral awards?**

Foreign arbitral awards are recognised and enforced in Romania under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and under the NCPC.

In case of inconsistencies, the New York Convention prevails. The above-presented conditions in relation to the recognition and enforcement of foreign judgments issued in Non-Member States will apply, in principle, to the recognition and enforcement of foreign arbitral awards.

## **INSOLVENCY**

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## **21. What is the general insolvency legal framework in the Romanian system?**

Insolvency in Romania is governed by Law No. 85/2014 (Insolvency Law) passed in the process of harmonising domestic laws with the legal principles applied in the European Community.

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## **22. Which conditions are to be met for being granted insolvency status?**

According to Romanian law, insolvency means the debtor's manifest incapacity to pay its matured debts out of the available liquidity. Under Romanian law, a "debtor" can be any professional, i.e. legal person carrying out an enterprise, as well as a *regie autonome*.

The insolvency procedure may be initiated at the request of the debtor itself, of any of its creditors, or at the request of certain especially enabled institutions, such as the

Fiscal Supervision Authority for debtors-listed companies.

The following conditions must be cumulatively met to ground an application:

- The debtor owes amounts in excess of RON 40.000 (approximately EUR 8,500) or in excess of six national average salaries for debts arising from labour or civil relations;
- The debtor is unable to pay its matured debts in cash for more than 90 days;
- The debtor may declare itself insolvent and place itself under the protection of a judicial reorganisation procedure should its insolvency be imminent. For such an application to pass, the total of tax debt must take less than 50% of the amount of all declared debts.

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### **23. Who are the participants to an insolvency procedure?**

All applications under the Insolvency Law are, in first instance, within the jurisdiction of the insolvency division of the tribunal where the debtor is headquartered. The participants to the insolvency procedure are: the court, the syndic judge appointed by the president of the court, the creditors' collegial bodies (the assembly and the committee), the official receiver (appointed by the creditors), the special administrator of the debtor (appointed by the debtor's shareholders) and the liquidator (appointed by the syndic judge for liquidation/bankruptcy).

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### **24. Which are the main steps of an insolvency procedure?**

The Insolvency Law makes available two types of procedures for debtors unable to pay their outstanding debts: the general insolvency procedure and the simplified procedure.

The general procedure consists of two stages:

- The judicial reorganisation procedure, aimed at allowing the debtor to pursue its activity and pay its debts under a reorganisation plan. If the debtor does not comply with the plan or the continuance of its activities causes losses or new debt, the official receiver or any of the creditors may request, at any time, the syndic judge's approval to commence bankruptcy procedures;
- The bankruptcy procedure, wherein the debtor's assets are liquidated and the amounts obtained are distributed to satisfy the creditors. The liquidation of a debtor's assets is carried out by the liquidator under the control of the syndic judge. In order to maximise the value of the debtor's assets, the liquidator will take all measures necessary to publicise the sale, in whatever manner deemed adequate.

The liquidation costs are borne from the debtor's assets.

After a period of observation, insolvency under the general procedure allows for reorganisation. The legal text highlights that assistance provided to the debtor in view of surviving financial distress, reorganising its activity on an efficient basis and satisfying its creditors' claims best fulfils the goal of insolvency procedures, which is not limited to the paying of creditors, but also includes the debtor's economic redress.

The simplified procedure, applicable in certain cases (such as the debtor having been already placed under judicial reorganisation within the previous five years from application), permits the bankruptcy procedure be opened without the preliminary stage of the judicial reorganisation.

## **COVID-19**

### **1. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?**

On 16 March 2020, the President of Romania issued Decree No. 195 which established a 30-day state of emergency for the whole territory of Romania. Under this decree, all civil cases were automatically suspended. However, the courts continued to examine such urgent matters as established by the Management Committees of the High Court of Cassation and Justice or of the Courts of Appeal (for example, interim injunction applications, the stay of the enforcement procedure, public procurement disputes were among these urgent matters). Hearings could only be held by videoconference and documents only communicated by electronic means.

A new presidential decree (Decree No. 240 of 14 April 2020) extended the state of emergency by 30 days; therefore, most civil cases were automatically suspended until 15 May 2020. In the meantime, the state of emergency has been replaced by the a "state of alert" extended monthly by the authorities, and court proceedings have been resumed as per usual, with the exception of the sanitary protection rules put in place (masks, distancing etc.).

Overall, one notices that the number of debt recovery disputes has increased against the background of the COVID-19 crisis, most of them being however resolved amicably rather than being brought before a judicial body.

However, it is still too early to evaluate the real and long-lasting impact of COVID-19 pandemic on the litigation field.

# Employment

## OVERVIEW

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### **1. What is the legal framework regulating employment in Romania?**

Romania is a civil law jurisdiction and the core employment regulation is the Labour Code. Besides the Labour Code, specific enactments regulate other labour-related aspects, such as health and safety in the workplace, insurance for work accidents and professional diseases and social dialogue.

Collective bargaining agreements also provide binding rules and obligations to be complied with by employers.

Considering Romania's membership to the European Union, EU law and CJEU decisions are also relevant.

## INDIVIDUAL EMPLOYMENT AGREEMENTS

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### **1. Is it mandatory to conclude written employment agreements with the employees? If yes, are there mandatory clauses or information to be included in the written agreement?**

The individual employment agreement must be concluded in writing, based on the consent of the parties. Although the parties are obliged to conclude the employment contract in writing, the High Court of Cassation and Justice of Romania has recognised the employees' right to initiate a declaratory action in order to prove the existence and effects of an employment relationship, despite the fact that the parties did not conclude the agreement in writing.

Prior to concluding an employment agreement, the employer is required to inform each

employee of the general clauses to be included in such agreement.

The employer's failure to conclude written employment agreements constitutes an administrative offence.

Individual employment agreements must include the following mandatory data:

- The identity of the parties;
- The place of work or, if the workplace changes location, a provision that the employee may work from various places. Employees who perform work by using information and communications technology can perform work, theoretically, from any other place than the one made available by the employer, as provided in the employment agreement or addendum to the employment agreement ("teleworking");
- The position or occupation of the employee according to the specifications of the classification of occupations in Romania or other regulatory acts, as well as the job description;
- The evaluation criteria of the professional activities performed by the employee;
- The specific risks of the job position;
- The effective date when the agreement shall enter into force;
- The duration of the employment agreement when concluded for a fixed term;
- The duration of the rest leave the employee is entitled to;
- The duration and the specific conditions of the notice period (both for dismissal and for resignation);
- The wage, other elements of the wage, as well as payment terms;
- The working time, expressed in hours per day and hours per week;
- Provisions on the applicable collective bargaining agreement; and
- The duration of the trial period (if applicable).

Aside from these compulsory terms, the parties may also agree on any other terms (such as confidentiality, non-competition and intellectual property rights), provided they are no less favourable than certain statutory rights.

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## **2. Can individual employment agreements be concluded for a fixed duration?**

As a general rule, individual employment agreements are concluded for an indefinite period, but, subject to certain conditions, the parties may conclude employment agreements for a fixed term.

The maximum duration of employment agreements concluded for a fixed term is of 36

months.

In certain cases, the above term may be extended if the employment agreement was concluded to substitute a certain employee whose employment agreement was suspended for more than 36 months.

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**3. Is there a minimum level of rights and benefits for the employees provided by the law?**

Employees cannot be given rights and benefits which are below the level established in the labour legislation and the collective bargaining agreements. Any derogations from or waivers of such rights shall not be considered valid, even if accepted by the employee or expressly provided in the individual employment agreement.

Besides the monthly remuneration received by employees in exchange for their work, there are also other benefits provided by the law such as mandatory bonuses (e.g. for overtime or night work, etc.); paid health insurance; childcare leave; disability leave; food, gift, nursery or holiday vouchers; holiday entitlement etc.

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**4. Which is the maximum trial period permitted by the law?**

The trial or probation period cannot exceed 90 days for employees holding a non-management position, and 120 days for employees holding a management position. Other probation periods are provided by the Labour Code for specific situations. The employer cannot, however, extend the trial period at his or her sole discretion beyond the limits set forth by the law.

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**5. What is the regular working time? Is overtime allowed under the Romanian law?**

Regular working hours is eight hours per day and 40 hours per week. For people under the age of 18, regular working hours means six hours per day and 30 hours per week. Employees' consent is required for overtime work.

The maximum work time is 48 hours a week, including overtime. Additional overtime is exceptionally accepted, provided that the average work time computed on a 4-month basis does not exceed 48 hours per week.

The employee or the employer cannot set up different working hours outside the legal

framework provided in this respect.

All categories of workers who perform overtime work are entitled to receive corresponding paid time off within the next 60 days after performing such work. If the compensation of overtime work with free paid days off is not possible, the employees are entitled to receive an allowance amounting to a minimum of 75% of the base salary for the overtime work performed. Overtime work is forbidden for minors.

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## **6. Is the employees' right to annual vacation and holidays expressly regulated by the law?**

The minimum paid leave provided under Romanian law is of 20 working days. A longer period for paid leave may be provided under collective bargaining agreements concluded at the levels of different industries or at company level.

As a rule, employees must take their annual leave every year. Exceptionally, where the employees for objective reasons cannot fully or partially exhaust their annual leave, the employer is obliged to grant the remaining annual leave within the next 18 months starting with the following year.

The duration of the annual leave cannot be affected by the employee's temporary disability, by maternity leave, maternal risk leave, or childcare leave. Such periods shall be deemed as periods of actual work.

Employees are entitled to annual leave even when their temporary disability lasts for a whole calendar year. In such a case, the employer shall grant the employee the annual leave within the next 18 months starting with the year following the medical leave. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. In such cases, holiday entitlement is calculated on a pro rata basis with the time the employee has worked in that same enterprise during the respective year. In addition to the annual paid leave, employees can be granted paid or unpaid leave in certain circumstances.

Also, the Labour Code provides for a number of days off that must be observed by the employers. The following days are public holidays under the law: 1 and 2 January; 24 January; the Friday before Easter, the first and second Easter days; 1 May; 1 June, the first and second Pentecost days; 15 August; 30 November; 1 December; the first and second Christmas days; two days for each of the three religious holidays, other than the Christian ones, for the workers who belong to such faiths.

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## **7. Is the employees' right to sick leave or sick pay expressly regulated by the law?**

Romanian law recognises sick leave and the allowance for temporary incapacity for work. The allowance for temporary incapacity cannot exceed 183 days per calendar year running from the first sick day.

A longer period of paid leave is available for certain diseases, such as heart disease, tuberculosis and AIDS.

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## **8. Is it possible under the Romanian law to impose any non-competition obligations on the employees?**

Under the Labour Code, employees have a general obligation of loyalty towards their employers preventing them from performing similar activities for other employers throughout their employment.

The parties may agree to turn this obligation of loyalty into a non-competition obligation applicable after the termination of the individual employment agreement for a maximum of two years.

In such case, a monthly indemnification shall be granted by the employer to the employee for the entire non-competition period following employment termination, which indemnification cannot be less than 50% of the employee's average gross salary for the previous six months.

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## **9. How can an employer terminate the individual employment agreement?**

The employment agreement can only be terminated in specific and limited cases as provided by the Labour Code, always ensuring that procedural requirements are met. Romanian law recognises two main categories of dismissals: for causes unrelated to the employee (i.e. restructuring, redundancy); and dismissal for causes related to the employee.

Employers may undertake dismissals for causes unrelated to the employees where economic or operational reasons require a reduction in the number of jobs.

Dismissals for bad performance and for disciplinary reasons are among the most common types of dismissal for causes related to the employees.

In both cases, specific procedures must be followed. Employers' failure to comply with such procedures may trigger the annulment of the dismissal decisions in court. The same sanction shall apply if the employers cannot prove that the causes for dismissal are real and fall within the categories recognised by the Labour Code as entitling employers to perform dismissals.

Employers are obliged to observe a 20-day notice term for all categories of dismissal, except when the dismissal is done for disciplinary reasons or when the employee is arrested for more than 30 days.

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## 10. Are there any special rules applicable to collective dismissals?

Special rules on collective dismissals provided by the Labour Code apply where, within a period of 30 days, the number of redundancies is of at least:

- 10 employees out of a total of more than 20 and less than 100 employees;
- 10% of the employees, where the total number of employees is of at least 100, but less than 300; or
- 30 employees out of a total of 300.

The procedure that must be followed in the case of collective dismissals entails prior information and consultations with the trade unions or the employees' representatives in respect to any available means of avoiding collective dismissals and the appropriate means for mitigating the consequences of the collective dismissals (such as support for requalification and professional retraining).

The labour authorities must also be informed in writing about the initiation and outcome of the information and consultation process.

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## 11. Does the law provide for specific compensation to be paid to dismissed employees?

Employees whose individual employment agreements are terminated for reasons not related to their person, including those collectively dismissed, are entitled to receive severance payments according to the provisions of the applicable collective bargaining agreements (if any).

Such compensation is mainly computed based on the length of service.

## FOREIGN EMPLOYEES

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### **1. Which are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?**

For this specific issue, it is important to distinguish between EU, EEA and Swiss nationals and non-EU, non-EEA and non-Swiss nationals. EU, EEA and Swiss nationals have the right (subject to certain exceptions) to enter and work freely in the Romanian territory without the need to obtain a visa or a working permit.

For non-EU, non-EEA and non-Swiss nationals, working in Romania is permitted only for those who obtain a visa and a working permit. The following general and special conditions must be fulfilled in order for non-EU, non-EEA and non-Swiss nationals to be employed in Romania:

- The employer, legal person, authorized person or individual undertaking, performs, on the Romanian territory, activities compatible with the job position for which it requests the employment of the foreign citizen;
- The employer has not been finally convicted for a crime regulated by the Labour Code or for an intentional crime against a person, regulated by the Criminal Code;
- The vacancies cannot be filled by Romanian citizens or citizens of other EU Member States, of EEA countries or of the Swiss Confederation or by permanent residents of Romania;
- The employer intends to conclude a full-time individual employment agreement for a fixed term or indefinite period with a foreign citizen;
- The foreign citizens fulfil all the legal requirements regarding their entry and staying on the Romanian territory;
- The workers fulfil special conditions regarding professional qualifications, experience and authorisation required by the employer according to the legal provisions;
- The workers prove that their state of health is such as to enable them to carry out the relevant activity, and that they have not been convicted for crimes that are incompatible with the activity they carry out or intend to carry out in Romania;
- The number of admitted workers remains within the limits of the yearly contingency approved by government decision;
- The employer has paid its contributions to the state budget regularly throughout the last quarter;
- The employee shall effectively perform the activity for which it obtained the working permit, and
- The employer has not been sanctioned for undeclared work or illegal employment in the last 6 months.

The number of working permits issued every year is limited and determined by government decision. The employees working for a corporate entity with its seat in one jurisdiction may work for the same corporation with a second seat in the Romanian territory based on secondment permits which can be obtained following a similar procedure as in the case of working permits.

Hiring non-EU, non-EEA or non-Swiss nationals without a working/secondment permit constitutes misdemeanour and is punished by fine.

## **TRADE UNIONS**

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### **1. Is the employees' right to establish a trade union expressly provided by the law?**

Employers cannot ban employees from establishing or joining trade unions, as such rights are guaranteed by the law. Nevertheless, a few conditions apply. A minimum of 15 people working in the same unit are required to set up a trade union. A person may only belong to one trade union organisation within the same employer at the same time. Certain categories, such as public officials, members of the military and members of certain government ministries may not establish trade unions.

In defending the rights of their members, trade unions are entitled to undertake any action provided for by the law. This includes the ability to bring court action on behalf of their members based on an express mandate from the persons concerned (the action cannot be brought to court or continued if the person concerned opposes or renounces the trial).

The trade union is entitled to receive from employer any necessary information for the negotiation of collective bargaining agreements and other agreements relating to employment relations.

Employees who are elected to the management body of a trade union are protected against all forms of constraint or limitation on the exercise of their functions.

In addition, the European Directive on the Establishment of European Works Councils has been implemented within Romanian law. The main provisions regulate the creation of a European works council (or an alternative procedure) for informing and consulting employees at the European level.

## COLLECTIVE BARGAINING AGREEMENTS

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### **1. Are collective bargaining agreements regulated by the Romanian law?**

The Labour Code obliges companies with more than 21 employees to conduct collective negotiations in view of concluding a collective bargaining agreement.

The obligation is to carry out negotiations only, and not to actually conclude the collective bargaining agreement.

Collective bargaining agreements may be concluded at different levels: company, group of companies and industry/sector level. Collective bargaining agreements concluded at lower levels cannot provide for rights inferior to those set forth by those concluded at applicable higher levels.

The provisions of collective bargaining agreements are compulsory for the parties and apply to all employees, irrespective of whether they are members of a trade union or not. Collective bargaining agreements may be concluded for a minimum of 12 months and for a maximum of 24 months.

The parties may agree to extend the collective bargaining agreement only once, for a period not exceeding 12 months.

## BUSINESS TRANSFERS

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### **1. Is there any legislation to protect employees in the event of a business transfer?**

The main enactments regulating the transfer of an undertaking, business or part of an undertaking or business are the Labour Code and Law No. 67/2006 on the safeguarding of the employees' rights in cases of transfer of undertakings, businesses or parts of undertakings or businesses (transposing Council Directive No. 2001/23/EC of 12 March 2001 on the approximation of laws of the member states relating to the safeguarding of employees' rights in the event of the transfer of undertakings, businesses or parts of undertakings or businesses).

Under the statutory protection rules in the event of transfer, the transferee is liable to observe the rights that the transferred employees had with the transferor under their

individual employment agreements and the applicable collective bargaining agreement. Both the transferor and the transferee shall be under the obligation to consult their employees about the transfer and to inform them on specific issues. For the purpose of the transfer, no consent from the employees is required.

However, the transfer of undertakings, businesses or parts of undertakings or businesses shall not be used as grounds for the transferor or the transferee to perform individual or collective dismissal of employees.

If a transfer involves a substantial change of work conditions to the detriment of the employee, the employer is liable for the termination of the individual employment agreement.

## **LABOUR CONFLICTS**

### **1. Which types of labour conflicts are regulated?**

Labour conflicts may regard collective or individual rights of the employees. Collective labour conflicts may occur when:

- The employer refuses to proceed with the negotiation of the collective bargaining agreement, where no such agreement was signed or the existing one has expired;
- The employer refuses to accept the employees' demands;
- The parties do not reach an agreement until the date set up for completing the collective negotiations.

Collective labour conflicts may culminate in strikes. As a matter of principle, strikes may be declared only in order to protect professional, economic and social interests of the employees and cannot have political goals. During strike, hiring employees to replace those on strike, or dismissing employees on strike, are strictly forbidden. Unlike other legal systems, Romanian labour legislation does not recognise the "lock-out" as a strike counter-measure.

Individual labour conflicts may occur whenever the employees' rights provided expressly by the law or by the applicable collective bargaining agreements are breached by the employer. Individual labour conflicts are settled amicably, through the conciliation procedure with the involvement of an external consultant specialising in labour law or directly by the courts of law.

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## 2. May an employee agree to waive statutory and contractual rights?

Employees may not waive statutory rights provided in their favour by labour enactments. Any transaction seeking for the employee to waive his legal rights, or to limit such rights, shall be null and void. However, the law does not prohibit an employee from waiving contractual rights through negotiation with the employer.

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## 3. What is the status of limitation for bringing employment claims?

The law provides for several time limits, considering the specific object of the claim:

- Claims referring to the conclusion, execution, suspension or termination of the individual employment agreement may be brought before the court within 45 days from the date when the employee became aware of the criticized measure;
- Claims referring to the payment of any compensation may be challenged within three years from the date the employee was entitled to ask for that compensation;
- Actions seeking nullification of an individual employment or collective bargaining agreement may be filed throughout the duration of that agreement; and
- Actions regarding failure to apply the collective labour agreement or clauses thereof may be filed within six months from the date on which the cause of action occurred.

## COVID-19

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### 1. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?

- **Teleworking and working from home as a rule**

During the “state of alert” (which has been extended montly by the authorities in the past year and is currently in place until 15 April 2021, to be most likely extended yet again), employers must organize their employees’ work schedules as telework or working from home.

If employees cannot fulfil their duties by telework or working from home, in order to avoid congestion in public transportation companies with more than fifty employees must by internal decision organize their employees’ work schedulesso that they are divided into groups that start and finish work at least one hour apart.

As a general rule, teleworking can be adopted only after the conclusion of an addendum to the individual employment contract and when the duties specific to the position, occupation or profession that the employee holds involve the use of information and communication technology. The employer must provide employees with occupational safety and health training.

These obligations are incumbent upon the employer throughout the state of alert, under pain of a fine applied by the competent labour inspectors.

- **Mandatory health and safety measures for employers**

During the state of alert, employers must implement and ensure several other health and safety measures for the employees, such as the taking of temperature, hands disinfection, maintaining distance of at least 1.5m between employees, always wearing facemask and other measures related to the prevention of the spread of COVID-19. Disregarding such measures can be sanctioned by the competent bodies, according to the legal provisions in force.

- **Support measures for the employers during the state of emergency/alert**

During the state of alert, as well as for a 90-day period after its conclusion, the validity of collective labour agreements is prolonged.

Until 30 June 2021, employers may under certain conditions benefit of:

- 50% of the employee's salary, but no more than RON 2.500, for a period of 12 months, for each new hired employee who may be an individual over 50 years of age or a young individual of 16 to 29 years old, who became unemployed during the state of emergency or the state of alert, or Romanian citizens whose employment relationship with foreign employers has ceased for reasons not attributable to them;
- Partial settlement of the salary, in the amount of 45% of the base salary, without however exceeding 41.5% of the average gross salary established in Romania, for those employees with employment contracts concluded for a fixed period of maximum 3 months;
- Settlement of a part of the day laborers' remuneration, representing 35% of the remuneration due for the working day, for a period of 3 months;
- An indemnity borne by the Romanian State of 75% of the base salary, without however exceeding 75% of the average gross salary established in Romania, for the employees who have children under 12 years of age or children with disabilities under 26 years old, who benefit from paid days off, in case the competent authorities limit or suspend teaching activities performed in schools.

# Public Contracts

## 1. What is the relevant legislation regulating the award of public contracts?

The 2004 European legal framework on public procurement and concessions was reviewed by the representatives of the European Commission and the findings and conclusions of the review were comprised in a report called the Monti Report.<sup>1</sup> Pursuant to the Monti Report, the European Commission enacted a document entitled "Strategy 2020 a strategy for smart, sustainable and inclusive growth" (Europe 2020 Strategy) aiming to achieve a sustainable future: smart growth – developing an economy based on knowledge and innovation; sustainable growth – promoting a more resource efficient, greener and more competitive economy; inclusive growth – fostering a high-employment economy delivering social and territorial cohesion. These three priorities are mutually reinforcing and they offer a vision of Europe's social market economy for the 21<sup>st</sup> century. These priorities are put in place by seven flagships (i.e. "Innovation Union", "Youth on the move", "A digital agenda for Europe", "Resource efficient Europe", "An industrial policy for the globalisation era", "An agenda for new skills and jobs", "European platform against poverty) referring to the actions to be taken by the Member States for the transformation of Europe in the next decade.

All those priorities and flagships are implemented in the Directives adopted in the public procurement field in 2014:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Directive 2014/24/EU);
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Directive 2014/25/EU);
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Directive 2014/23/EU).

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<sup>1</sup> Former President of the European Commission, Jose Manuel Barroso, sent to Professor Mario Monti a letter called "Mission letter from the President of the European Commission" on 20 October 2009, asking him to prepare a report containing options and recommendations for an initiative to relaunch the Single Market as a key strategic objective of the then new Commission.

In addition, there is a separate directive, Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, which regulates the award of certain contracts in the fields of defence and security (Defence Directive). The Defence Directive was transposed by the Government Emergency Ordinance No. 114/2011 on the award of certain contracts in the fields of defence and security (Defence Procurement Law), but no methodological norms were enacted to implement the said law so far.

The new legal framework on public procurement was transposed in Romania by enacting a legislative package, comprised of:

- Law No. 98/2016 on public procurement (Public Procurement Law) which transposes Directive 2014/24/EU;
- Law No. 99/2016 on utilities procurement (Utilities Procurement Law) which transposes Directive 2014/25/EU, and
- Law No. 100/2016 on works concessions and services concessions (Concessions Law) which transposes Directive 2014/23/EU.

The new legislative package on public procurement was completed by the adoption of Law No. 101/2016 on remedies and review procedures and the organisation and functioning of the National Council for Solving Complaints (Remedies Law) which transposes Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors that have been amended a number of times. In addition to the remedies available at national level, the European Commission may take legal action against a Member State in front of the Court of Justice of the European Union in relation to any alleged breach of EU legislation.

Furthermore, for the purposes of implementing the new legal framework on public procurement, the following national secondary enactments were adopted:

- Government Decision No. 395/2016 approving the Methodological Norms for the application of the provisions on the award of the public contract/framework-agreement as provided for by Law No. 98/2016 on public procurement (Norms for the application of the Public Procurement Law);
- Government Decision No. 394/2016 approving the Methodological Norms for the

application of the provisions on the award of the sectoral contract/framework-agreement as provided for by Law No. 99/2016 on sectoral procurement (Norms for the application of the Utilities Procurement Law);

- Government Decision No. 867/2016 approving the Methodological Norms for the application of the provisions on the award of the works concessions and services concessions (Norms for the application of the Concessions Law).

A separate piece of legislation was enacted to regulate the award and the performance of public-private partnerships contracts, namely the Government Emergency Ordinance No. 39/2018 on public-private partnership (Public-Private Partnership Law), but the norms for implementing the Public-Private Partnership Law have not been enacted so far.

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## 2. What are the main novelties brought by the Public Procurement Law?

The reform of public procurement brought by the Public Procurement Law is quite significant, both in relation to the matters concerning the award procedures and in relation to the implementation stage of the public procurement contracts.

Amongst these novelties, for the first time in the European legal framework on public procurements, the market consultation was expressly regulated as a tool for contracting authorities to design a procurement process and to inform the economic operators of their future projects and requirements. The Norms for the application of the Public Procurement Law provide that market consultation will be applied in case of highly complex procurements or procurements in areas of advanced technology. Also, the Norms for the application of the Public Procurement Law regulate the market consultation mechanism. Another novelty is the full use of electronic means, as a rule, in the application of all the award procedures, including the negotiation stage which may also be carried out by electronic means. By exception, specific categories of contracts which cannot be awarded by electronic auction were expressly identified.

For the first time in the European framework on public procurements, the European Commission has implemented and managed an electronic system, called *e-Certis*, comprising information on certificates and other attestations that are most commonly requested by the contracting authorities, and which can facilitate the participation of small and medium-sized enterprises of the Member States in the award procedures.

For the same purpose of facilitating the participation of small and medium-sized enterprises of the Member States in the award procedures, the European framework on public procurement introduced the setting of official lists of economic operators to be

invited to take part in such procedures.

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### 3. Which are the entities subject to public procurement legislation?

The contracting authorities which shall apply the provisions of the Public Procurement Law are the following:

- Public authorities or public institutions, acting at central or local level;
- Bodies governed by public law, meaning bodies having all of the following characteristics:
  - They are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - They have legal personality; and;
  - They are financed, for the most part, by public authorities or public institutions or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by public authorities or public institutions or by other bodies governed by public law;
- Any association formed of one or more of the abovementioned contracting authorities.

The contracting entities which shall apply the provisions of the Utilities Procurement Law are the following:

- Contracting authorities as defined by the Public Procurement Law;
- Public undertakings, meaning entities carrying out economic activities over which contracting authorities directly or indirectly exercise a dominant influence as a result of ownership, financial participations or specific rules provided for in the incorporation documents of the undertaking;
- Any legal subject, other than those referred to above, which performs one or more relevant activities in the public utilities sectors based on a special or exclusive right, granted by a competent authority, whenever it awards public contracts or concludes framework agreements for the performance of such activities;
- Any association comprising at least one of the contracting entities listed above.

The contracting entities which shall apply the provisions of the Concession Law are the following:

- Contracting authorities as defined the Public Procurement Law;

- Public undertakings which apply the Utilities Procurement Law;
- Any legal subject, other than those referred to above, which operates on the basis of exclusive or special rights granted in order to pursue any of the relevant activities.

The public partners which apply the Public-Private Partnership Law are the contracting authorities and contracting entities as defined by the Public Procurement Law and Utilities Procurement Law, respectively.

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#### **4. Which are the contracts regulated by the public procurement legislation?**

The contracts regulated by the public procurement legislation include: works contracts, supply contracts and services contracts. The general rule is that all the contracting authorities/contracting entities as defined by the Public Procurement Law/Utilities Procurement Law shall apply the provisions of the public procurement legislation when awarding public procurement contracts the estimated values of which are equal to or greater than the thresholds set out therein.

Depending on the relevant thresholds and object, public procurement contracts may be:

- Public contracts entirely governed by the Public Procurement Law/Utilities Procurement Law;
- Public contracts only partially governed by the Public Procurement Law/Utilities Procurement Law, having a special procurement regime;
- Public contracts that can be awarded without following the procedural requirements set out by the Public Procurement Law/Utilities Procurement Law.

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#### **5. Are there special public procurement awarding procedures?**

Depending on its specifics, a contract is awarded, by one of the following public procurement award procedures:

- The open procedure, where any interested economic operator may submit a tender;
- The restricted procedure, where any economic operator may submit applications, but only the candidates selected during the first stage may submit tenders;
- The competitive negotiation procedure, where the contracting authority/contracting entity carries out consultations with the shortlisted candidates and negotiates contractual clauses, including the price, with one or more of them;

- The competitive dialogue, where any operator has the right to submit applications, following which only candidates meeting the qualification and selection criteria have the right to participate in the dialogue stage and only the candidates left at the end of dialogue are entitled to submit final tenders;
- The innovation partnership, where the contracting authority carries out successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works;
- The negotiation without publication of a contract notice, where the contracting authority/contracting entity awards the public procurement contract without publishing a contract notice in SEAP-SICAP<sup>2</sup>, exclusively in the special cases set forth by the relevant enactment;
- A contest of solutions, which is a special procedure whereby a plan or a project is acquired by competitive selection carried out by a jury, with or without a prize, and which is more often used in areas such as land development, town planning and landscaping, architecture or data processing;
- Own award procedure applicable when purchasing social services and other specific services which benefit from a special procurement regime;
- A simplified procedure, applicable where the values of the contract to be awarded are less than the thresholds which trigger the application of the regular procurement procedures, but equal to or greater than the threshold for the direct purchase.

The Public-Private Partnership Law sets forth that the procedures for the award of the public-private partnership contracts are the award procedures laid down by the Public Procurement Law and Utilities Procurement Law, respectively.

## 6. What are the novelties regarding the award procedures?

In order to implement the priority areas of the Europe 2020 Strategy, namely a smart, sustainable and inclusive growth related to the research and innovation field, a new award procedure was introduced, i.e. the “innovation partnership”, used if the contracting authorities/contracting entities intend to purchase innovative works, services, products or processes, given that the solutions available on the market, at any given time, do not satisfy the contracting authority’s/contracting entity’s needs.

## 7. Must public procurement procedures be publicised?

In view of ensuring the necessary transparency in awarding public procurement

<sup>2</sup> SEAP-SICAP is the national electronic system where the contract notices are published by the contracting authorities/contracting entities.

contracts, mandatory rules require that the tender notice, invitation to tender and award notice must be published. A prior information notice is also to be published where a contracting authority/contracting entity intends to apply for reducing the minimum period from contract notice until submission date. The contract notice, contract documents and answers to clarifications must be published in the SEAP-SICAP. As a novelty, the contracts are awarded by electronic means and the evaluation must be performed automatically through the electronic means employed.

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## **8. Is participation in procedures for the awarding of procurement contracts more flexible than before?**

The use of the European Single Procurement Document (“ESPD” or “DUAE”, in Romanian) was introduced with a view to removing the administrative burden faced by economic operators submitting tenders/applications. Thus, the DUAE replaces the tenderer’s/candidate’s former declaration on own responsibility, and the ESPD template was approved by European Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document. Pursuant to the Norms for the application of the Public Procurement Law/ Norms for the application of the Utilities Procurement Law, the contracting authority/contracting entity shall generate an electronic DUAE filled with the information required by the tenderers with respect to the qualification and selection criteria.

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## **9. On which grounds can tenders be rejected?**

All grounds for exclusion of an economic operator from the award procedures provided by Directive 2014/24/EU and Directive 2014/25/EU were regulated under the national legislation as being compulsory, noting that, even where in abstracto it falls within one of the exclusion cases, the tenderer/candidate is given the chance to demonstrate its reliability in concreto. A special emphasis was placed on the self-clearing actions which shall be scrutinised by the contracting authorities/contracting entities, on a case-by-case basis. Another novelty is the active role played by the Competition Council, as it will be requested by the contracting authorities/contracting entities to give its opinion prior to taking decisions to exclude economic operators on grounds of possible breaches of the competition rules. The Competition Council’s involvement in preparing a guide to draw attention to the best practices in the economic operators’ submission of a joint tender to the award procedures should also be noted.

A specific new ground for exclusion was introduced by a recent legislative amendment targeting economic operators organized as joint stock companies, whose share capital is represented by bearer shares and which fail to prove the identity of the actual holders

/ beneficiaries of the bearer shares.

The evaluation committee appointed by the head of the contracting authority/  
contracting entity must verify:

- Whether the qualification and selection criteria have been met by each tender, and the required documents have been provided;
- Whether the ESPD is filled in accordance with the requirements of the contract documents;
- Whether the price stipulated in the financial proposal does not exceed the available funds for the respective public procurement contract;
- Whether the contracting authority/contracting entity cannot make available additional funds for the fulfilment of the respective public procurement contract where the offered price exceeds the estimated value communicated through the contract notice;
- Whether, although the contracting authority/contracting entity can make additional funds available for the fulfilment of the respective public procurement contract where the offered price exceeds the estimated value communicated through the contract notice, by accepting such an offer a material change of the contract would occur by exceeding the threshold of 10% of the price of the contract, in case of services and supply contracts, and 15% of the price of the contract, in case of works contracts;
- Whether the offered price is abnormally low, or the tender contains prices which are not the result of free competition or which cannot be properly justified;
- Whether the technical proposal is compliant with the technical specifications set forth in the contract documents and is correlated with the financial proposal.

Depending on the nature of non-compliance with the relevant legal provisions or with the contract documents, tenders may be rejected as irregular or unacceptable or unsuitable. If any of the non-compliance situations mentioned above is found to exist, the tender shall be rejected without applying the award criterion provided in the contract documents.

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## **10. Which award procedures are applicable for contracts with an estimated value below the thresholds provided by the Public Procurement Law/Utilities Procurement Law?**

A more flexible award procedure was set out for contracts having an estimated value below the thresholds provided by the Public Procurement Law/Utilities Procurement Law, but exceeding the thresholds which entitle the contracting authorities/contracting entities to carry out direct procurement. A simplified procedure was introduced, with

shorter periods for submitting and evaluating the tenders. Such simplified procedure can be conducted in one or several stages which may also involve a negotiation stage.

As regards direct procurements having an estimated value less than the RON equivalent of EUR 27,000 (for supplies and services) or EUR 90,000 (for works), the contracting authorities/contracting entities are encouraged to use electronic catalogues which display and organise information in a way that is common to all participating tenderers and can be electronically processed.

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**11. Do the social services benefit of a special regime of procurement?**

The Public Procurement Law/Utilities Procurement Law comprises certain specific provisions applicable to the procurement of a special category of services, also referred to as “services to persons”.

Specifically, for the public procurements having an estimated value equal to or greater than the threshold of the RON equivalent of EUR 750,000, and for the utilities procurements having an estimated value above the threshold of the RON equivalent of EUR 1,000,000, respectively, the contracting authorities/contracting entities are to make known their intention to purchase by means of a contract notice or by means of a prior information notice, which shall be published continuously, and to publish an award notice. As regards the applicable procedure, a recent amendment permits own award procedures as a specific manner of awarding the contracts, provided that the principles of the public procurement/utilities procurement are observed, regardless of whether the estimated value of the procurement is above or below the relevant threshold.

As regards the procurements having an estimated value less than the threshold of the RON equivalent of EUR 750,000, and for the utilities procurements having an estimated value less than the threshold of the RON equivalent of EUR 1,000,000, respectively, the contracting authorities/contracting entities shall apply their own simplified award procedures by observing the public procurement/utilities procurement principles.

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**12. Are the economic operators based in non-GPA signatory countries allowed to submit tenders under the same conditions as domestic operators?**

Currently, the non-GPA signatory countries based economic operators are allowed by

law to participate in public procurement procedures and the contracting authorities/contracting entities are required to observe the fundamental principles governing public procurement, such as equal treatment and non-discrimination.

However, the most recent intention of the Romanian national authorities is to amend the legislation to allow access to public procedures in Romania only to tenderers resident in the GPA signatory states or in states with which Romania has concluded bilateral agreements on public procurement. Such legislative change, if implemented, occurs in a pre-existing context at the level of the European Union which aims to ensure a level playing field in relation to economic operators established in the European Union, which are required to observe a set of uniform rules and regulations, and economic operators from non-EU countries, which should be required to observe similar rules and regulations.

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### **13. What types of information on evaluation methodologies must be disclosed up-front? Which are the aspects that may be considered in evaluating a tender?**

All the minimum qualification requirements, the documents to be provided by interested economic operators in demonstrating compliance with the qualification and selection criteria, the award criterion, the tender evaluation factors and their proportional weightings, as well as the calculation algorithm or the actual methodology used to score the advantages resulting from the technical and financial proposals provided by tenderers, must be included in the contract documents.

The contracting authority/contracting entity must ensure that the contract documents are made available to any interested economic operator. Technical specifications comprised in the contract documents (requirements, prescriptions, technical characteristics that allow each product, service or work to be objectively described in compliance with the requirements of the contracting authority) shall be defined in such a manner as to meet, to the extent possible, the requirements/standards of any potential user, including disabled persons. Technical specifications must afford equal access to participants, and must not result in unreasonable obstacles to the opening up of public procurement to competition.

The contracting authority/contracting entity must define technical specifications either by reference to national standards transposing European standards, European technical approvals, international standards or other technical reference systems established by the European standardisation bodies, or by specifying the requested performances and/or operational requirements. No tender may be rejected if the bidder proves, by whatever appropriate means, that its technical proposal meets in an equivalent manner

the requirements of the contracting authority/contracting entity. In order to prove compliance with the requested technical specifications, the contracting authority/contracting entity must accept certificates issued by bodies acknowledged in any Member State.

Performances and functional requirements may also include environment-related characteristics. In this case, the contracting authority/contracting entity has the right to use, in full or in part, specifications defined by “eco-labels”, European or (multi-) national. The contracting authority may not consider a technical proposal noncompliant merely because the tendered products or services do not bear the “eco-label” required, if the tenderer proves, by whatever appropriate means, that the tendered products/ services are compliant with the requested technical specifications.

The contract documents may not set out technical specifications referring to a specific make, source, production or a particular process or to a brand name or trade mark, a patent or a production license to the effect of favouring or disqualifying certain undertakings or products. Contract documents may set out special requirements for the fulfilment of the contract, seeking to obtain social effects or environmental protection effects, and to promote sustainable development.

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#### **14. What are the authority’s disclosure obligations and the parties’ right of access to information during public procurement awarding procedures? Are there any confidentiality obligations?**

Tenders are deemed confidential by the Public Procurement Law/Utilities Procurement Law until the award procedure report is published by the contracting authority/contracting entity in SEAP-SICAP. Access to the information available in a contract award procedure is open and transparent to all interested tenderers, except where the tenderer expressly states in the tender the information and documents considered confidential, including commercial secrets or elements of the tender, and attach evidence that the information is confidential. For instance, a tenderer is granted access to the entire contract documents, to the answers given by the contracting authority/contracting entity to requests for clarification addressed by other tenderer, and to the public procurement file. The contracting authority/contracting entity must inform the interested participants on the decisions on the outcome of the procedure; the information must be communicated in writing, no later than three days from taking the decision. Each tenderer shall be informed in detail of the reasons for rejecting its tender. Contracting authorities/contracting entities must secure the protection of any information that the tenderers state and prove as being confidential, insofar as the disclosure of such information would objectively damage the legitimate interests of the

tenderers (especially with regard to commercial secrecy and intellectual property). The disclosure of such information may be made only with the prior written approval of the tenderer.

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## **15. Which are the rules for amending a public procurement contract?**

The concept of “substantial modification” of a contract is introduced as a benchmark for the amendment thereof, in the sense that only those modifications that are not substantial are allowed. Also, the cases and requirements that must be fulfilled in order to amend a public procurement contract without organising a new award procedure are expressly set out, including the cases where the replacement of the initial contractor is allowed. Another novelty is the possibility to increase the value of a public procurement contract up to a certain limit, without assessing whether such modification could be deemed substantial, provided that the cumulative net value of the successive modifications is below the thresholds which trigger the obligation to carry out regular award procedures.

Moreover, the concept of “review clauses” was introduced for the first time in order to avoid the need for a new tender by mentioning from the outset the events which may trigger changes in existing contracts

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## **16. Which are the award criteria to be applied for the award of public procurement contracts?**

Unlike the previous procurement legislation which regulated the “most economically advantageous tender” as a distinct award criterion alternative to the “lowest-price” award criterion, the Public Procurement Law regulates the “most economically advantageous tender” as a general concept which may be implemented using several award criteria, namely “the lowest price”, “the lowest cost”, “the best price-quality ratio”, “the best cost-quality ratio”.

A series of evaluation factors have been established to achieve an outcome of the procurement which is based on relevant quality criteria.

One of the amendments to the Public Procurement Law/Utilities Procurement Law clarified and set out that the “the lowest price” criterion is applicable exclusively upon awarding contracts with an estimated value lower than the thresholds which would require a regular award procedures, while “the lowest cost”, “the best price-quality ratio” and “the best cost-quality ratio” criteria shall be applied to the award of contracts

of an estimated value equal to, or greater than such thresholds.

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### **17. What are the novelties regarding subcontractors?**

As a novelty in the field of public procurement, the national enactments introduce the possibility for the contracting authority/contracting entity to make direct payments to subcontractors for the corresponding part executed by such subcontractors.

The Norms for the application of the Public Procurement Law/Utilities Procurement Law regulate the payment method which will be used for the corresponding part executed by the subcontractors and clearly define the conditions for appointing a new subcontractor or replacing a subcontractor during the performance of a public procurement contract.

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### **18. Does the Public Procurement Law/Utilities Procurement Law regulate the termination of public procurement contracts?**

For the first time in the European legal framework in the public procurement sector, certain mandatory cases where a contracting authority/contracting entity may unilaterally terminate a public procurement contract were regulated and thus transposed into the Public Procurement Law/Sectoral Procurement Law, as follows:

- If a material change to the public procurement contract has occurred;
- If the contractor was, at the time of the award, in one of the cases that, if discovered at that time, would have triggered its exclusion from the award procedure;
- If a decision was enacted by the Court of Justice against the contractor in relation to a serious infringement of the obligations under the EU Treaties and EU legislation on public procurement.

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### **19. What are the novelties brought by the Utilities Procurement Law?**

The Utilities Procurement Law regulate the procurement by entities operating in the water, electricity, heat, gas, transport and postal services sectors, ports and airports, as well as in the exploitation of a geographical area.

The law defines the concept of “utilities procurement”, as well as the concept of “contracting entity” and the categories of entities which are required to apply the Utilities Procurement Law by organising the relevant award procedures.

## 20. Which are the changes brought by the Concessions Law?

In addition to public procurement issues, the Concessions Law introduces a series of novelties with respect to the legal structuring of concession projects. For the first time in the concessions legislation, the operating risk has been defined by identifying its characteristics. The requirement that a concession contract always implies a significant transfer of the operating risk to the concessionaire was also clarified.

Also, for any contract exceeding five years, the duration of the concession is determined by taking into account the period necessary to recoup the investments made by the concessionaire, to recover the costs incurred with the operation of works or services, and to achieve a reasonable return on the invested capital.

In addition, with respect to the award procedures, the contracting entities shall apply, as a rule, the open tender procedure or the competitive dialogue procedure. As a novelty, a second stage consisting in the negotiation of admissible tenders may also be applied in an open tender procedure. By way of exception from the two procedures mentioned above, and in the cases expressly stipulated by the law, negotiation without prior contract notice may also apply.

As regards the award criteria, concession contracts are awarded based on the most cost-effective offer, assessed based on objective criteria to ensure effective competition. The objective criteria may relate to the degree to which certain risks are undertaken by the concessionaire, the level of the net present value of the payments made by the contracting authority, the level of user charges, the duration of the concession, and innovation.

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## 21. Does the subject-matter of the Public-Private Partnership Law overlap with the Concessions Law?

The Public-Private Partnerships Law only applies to projects where the pre-feasibility study shows that most part of the income derived from the use of the asset(s) or operation of the public service envisaged by the project (i.e., the income from which the private partner will recover its investment and will generate profit) will come from payments made by the public partner or other public entities to the benefit of the public partner.

A public-private partnership agreement may take the form of a concession or public procurement/utilities procurement contract, depending on the risk allocation structure.

Unlike the projects described above, projects generating the most part of their income

from the fees paid by the end-users of the relevant assets or services are not to be considered public-private partnerships.

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## 22. Which are the characteristics of the Public-Private Partnership mechanism?

The requirements for a mechanism of cooperation between the public and the private sector to qualify as a public-private partnership are the following:

- The cooperation between a public partner and a private partner for the implementation of a public project;
- The relatively lengthy duration of contract performance, allowing the private partner to recover its investment and to derive a reasonable profit;
- Financing the project mainly from private funds, including, if the case, from both private and public funds;
- The distribution of risks between the private partner and the public partner, depending on each contracting party's capacity to evaluate, manage and control a certain risk;
- The achievement of the purpose that the public partner and the private partner pursue in the implementation of the project.

It should be noted that in an attempt to render the financing of public-private partnership projects more flexible and attractive, by a recent legislative amendment the sovereign development and investment funds and the private pension funds were included in the category of potential financiers of the public-private partnership contract, together with the natural or legal persons who provide the project company with the financial means necessary to fulfil the obligations undertaken pursuant to the public-private partnership contract.

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## 23. Which are the stages of preparation of a project in Public-Private Partnership project?

The conclusion of a public-private partnership contract requires several stages:

- *Preparation of the pre-feasibility study:* the prefeasibility study is the basis of the decision to implement a public-private partnership project;
- *Public partner's preparation of the study serving as basis for the public-private partnership project decision:* the study substantiating the decision to implement the project as a public-private partnership will be prepared by the public partner;
- *Approval of the study serving as basis for the public-private partnership project decision,*

*by the Government or the local deliberative authorities, as the case may be: if the Government (in the case of central projects) or the local deliberative authorities (in the case of local projects) agree to the conclusions of the study serving as basis for the public-private partnership project decision, the Romanian Government or the local deliberative authority, as appropriate, will issue a decision approving that the relevant public project is to be structured as a public-private partnership;*

- *Commencement and conduct of the public-private partnership contract award procedure:* after the publication and entry into force of the Government Decision/decision of the local deliberative authorities approving the implementation of the public project as a public-private partnership, the public partner will prepare the tender documentation and will commence and conduct the public procedure for awarding the public-private partnership contract;
- *Selection of the winning tenderer and execution of the public-private partnership contract:* if a tender is declared as the winning tender as a result of the award procedure carried out by the public partner, the public partner and the private partner may execute and implement the public-private partnership contract;
- *Submission of a copy of the public-private partnership contract to the National Institute of Statistics:* the public partner shall submit a copy of the public-private partnership contract, within 30 days from the execution date, to the National Institute of Statistics; any amendment to the public-private partnership contract during the implementation thereof will require prior approval from the Government or the local deliberative authority that approved the conclusion of the contract.

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## **24. Can the private partner be replaced during the performance of the Public-Private Partnership contract?**

For the first time, the national legislation on public-private partnerships allows for the replacement of the private partner, should such private partner or the project company fail to fulfil their contractual obligations. The replacement can be made at the public partner's initiative or upon the financing entity's recommendation, in order to ensure the carrying on of the public-private partnership project. However, this is subject to the potential to replace the private partner having been mentioned in the award documentation and in the public-private partnership contract, in the form of a review clause.

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## **25. Are there specific rules set forth by the Defence Procurement Law?**

Defence Procurement Law applies to the award of contracts for the supply of military products and/or sensitive products, works, products and services directly related to

the said products, and works and services specifically intended for military purposes or sensitive works and services.

The scope of the Defence Procurement Law has been clarified by a recent legislative amendment that includes the supply of sensitive products/works/services on critical IT infrastructure of national interest, given the sensitivity of the information conveyed through it. However, the disclosure of information related to the critical IT infrastructure involved in the supply of any e-Government public services was considered contrary to the essential interests of State security and has been included in the list of exceptions to the application of the Defence Procurement Law. To define the legal framework applicable to contracts having as subject-matter the critical IT infrastructure of national interest, additions were made to the Defence Procurement Law setting out in detail the manner of their procurement by introducing the framework-agreement as an adequate means to procure the said infrastructure.

As regards the applicable award procedures, the Defence Procurement Law regulates the restricted procedure, the competitive dialogue, the competitive negotiation procedure and the request for tenders which is a simplified procedure.

As regards the award criteria, the contracts are awarded based on “the lowest price” or “the most cost-effective offer” criteria, assessed based on objective factors to ensure effective competition.

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**26. Which are the mechanisms enabling the challenge of an awarding procedure?**

The disputes arising during the procedures for awarding a public procurement contract, utilities procurement contract, public-private partnership contract or a concession contract shall be settled by administrative and jurisdictional means, in front of the National Council for Solving Complaints (Council) or in court, pursuant to the Remedies Law.

The person considering itself harmed in its right or a legitimate interest by an act of a contracting authority or by the latter’s failure to solve a claim within a certain period, can file a complaint with the Council or the court of law, requesting the annulment of the act, the issuance of an order compelling the contracting authority to issue an act or to adopt remedial measures, or recognition of the claimed right or legitimate interest. If complaints are filed with both the Council and the court, they shall be joined and resolved in court.

Considering the multitude of complaints and appeals that hindered and slowed

down the procurement award procedures, a requirement to set a preliminary bond as mandatory condition for resolving complaints filed with the Council was introduced by an amendment to the Remedies Law. The bond shall be returned upon request by a final decision after the settlement of the complaint or after termination of suspension of the award procedure and / or the contract.

Decisions of the Council may be challenged by appeal with the competent court of law, where no new claims may be added. The court decision in appeal is final. Where the applicant chooses to file the complaint directly with the court, it has the obligation to pay a judicial stamp fee. The judgment of the tribunal ruling on the challenge on its merits is subject to final appeal.

In well-grounded cases and to prevent impending damage, both the Council and the court may order the suspension of the award procedure, with no obligation to set any deposit in addition to the bond/judicial stamp fee presented upon filing the complaint.

The Remedies Law provides for the right of any interested person to seek in court cancellation of the contract/addendum concluded in breach of the conditions required under the public procurement legislation, the utilities procurement legislation, the public-private partnership legislation or the concession contracts legislation. The cases in which the court may declare the nullity of the contract/addendum and order *restitutio in integrum* are expressly identified.

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## **27. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?**

The state of emergency due to the COVID-19 crisis was instituted by Decree of the President of Romania No. 195/2020 for an initial period of 30 days, later extended by 30 days by Decree of the President of Romania No. 240/2020. Subsequently, a state of alert has been instituted in Romania, and periodically extended to date.

Although it has generated a number of well-grounded criticisms regarding the terminology used and establishment of exceptions to the manner of purchasing medical products regulated by the Public Procurement Law, the above-mentioned presidential decrees granted certain categories of contracting authorities the right to resort to direct procurements of an estimated value above the relevant threshold requiring a regular award procedure, and without establishing a maximum value of the procurement. In this context, the European Commission issued guidelines on using the public procurement framework in the emergency situation related to the COVID-19 crisis, providing that a negotiation procedure without the publication of a prior procurement notice may generally apply in the situation of extreme urgency generated

by the COVID-19 crisis. Thus, the exceptions established by the above-mentioned decrees were not necessary, as a legal framework providing for such exceptions was already in place.

However, after the state of emergency ceased and the state of alert was declared, the legal framework on public procurement continued to be applied as before the COVID-19 crisis.

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## **28. Outlook**

Further to the adoption of the existing legislative framework on public procurement, utilities procurement, concessions, and public-private partnerships that repealed the entire former legislation, significant changes occurred and are further expected to occur to ensure compliance with the objectives of the new European directives and the priorities of Europe 2020 Strategy, namely to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds.

Although the reform brought by the existing legislative package, including the recent amendments was expected to simplify the award procedures by allowing more flexibility, in practice both contracting authorities/contracting entities and economic operators still face various difficulties in applying the new regulations.

As regards the complaint mechanism, even though a more effective process is ensured by the removal of the prior notification, which used to be required before filing a complaint, the mandatory condition to set up the preliminary bond when filing a complaint hampers the process to a certain extent.

# Competition

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## 1. What are the competition rules applicable in Romania?

Competition Law No. 21/1996 (Competition Law) stands at the core of competition legislation in Romania. The provisions on competition set forth in Articles 101 and 102 of the Treaty on the Functioning of the European Union (Treaty/TFEU) also apply directly. As provided by Article 5(6) of Competition Law, when applying national competition rules, the Romanian Competition Council will also apply Articles 101 and 102 of the Treaty where there is an effect (or a potential effect) on trade between Member States.

Second-tier norms issued by the RCC for the application of Competition Law, together with EU guidelines and regulations, are relevant as well.

In addition, Government Emergency Ordinance No. 170 of 16 October 2020 on actions for damages in case of breach of competition law (GEO 39/2017) sets forth an extensive procedure with regards to claims for damages arising from anticompetitive behaviour.

## 2. Are there any notable recent updates of the Romanian competition legislation?

As a matter of principle, the Romanian competition rules are mirroring, to a significant extent, the legislation applicable at the European Commission level.

An important, relatively recent legal amendment is the coming into force of GEO 170/2020 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union that is part of the EU package legislation aimed at encouraging civil damages cases for breach of competition law.

Another important recent amendment of the secondary legislation consists in ensuring the proportionality of the fine by offering a deduction from the level of the fine that can go to up to 90% if the turnover on the relevant market related to the infringement is

very low.

The RCC is currently focused on updating and fine-tuning the second-tier norms. This project is ongoing.

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### **3. Given that Romania is part of the EU, how is competence split between the national authority and the European Commission?**

The system of parallel competences of the European Commission and the national competition authorities, instituted at the EU level, is directly applicable in Romania. While the European Commission usually intervenes to investigate anti-competitive practices affecting more Member States or justifying an EU-wide interest (i.e. where the practice affects the internal markets' freedoms, or where the case has a novelty character at EU-level), the RCC remains competent to examine practices affecting mainly the Romanian market.

Likewise, in cases of economic concentration, the RCC reviews mergers that would normally have a local impact (country-level), while the European Commission intervenes and removes local jurisdiction in case of transactions where the parties have a significant turnover world-wide and EU-wide and, thus, might have a larger impact on the Single Market (EU-level).

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### **4. What are the main concerns of the Romanian competition authority in terms of agreements between undertakings? How about the sanctioning record of the authority?**

Agreements between competitors aimed at distorting market competition (commonly known as "cartels") are top targets for the RCC, as well as for the European Commission, being severely sanctioned.

Even though the RCC has historically sanctioned a significantly larger number of vertical anticompetitive agreements than merely cartels (agreements between non-competing undertakings acting on different levels of trade, such as distribution agreements, supply agreements, outsourcing agreements), its more recent practice includes a growing number of cartel cases, as well as cases on abuse of dominance. The cartel cases are now the main focus of the authority.

The RCC has also increased its focus on bid rigging and market sharing in public procurement procedures. The RCC established a special division to deal with

complaints from authorities or bidders affected by anticompetitive bidding practices.

Last but not least, the RCC develops a jurisprudence on the concept of facilitator. For instance, although itself victim of a cartel, the organiser of a tender may also be found in breach of competition law and punished as such where its employees support a transfer of sensitive information between the members of the cartel. Associations are also a key candidate for the facilitator role in case of cartel investigations.

Also, in recent practice the RCC has been showing predilection for reaching a settlement with the parties involved in the investigation, consisting of a reduction in the fine in exchange for admission of guilt. The potential reduction varies from 10% to 30% (details are presented below).

The RCC record of enforcements on agreements between undertakings covers various industries. Some examples are detailed below:

- **Cartels (selections):**

- 2020 - 31 companies operating on the Romanian wood trading market were sanctioned with a fine amounting to EUR 26,600,000 for participation in anti-competitive agreements and / or concerted practices;
- 2020 - The Confederation of Romanian Authorised Operators and Carriers (COTAR) and 18 undertakings active in the passenger transport market were sanctioned for concluding an agreement to limit /suspend public road passenger transport;
- 2018 - 9 insurance companies were sanctioned for price increase signalling on the MTPL (the total amount of fines applied was EUR 53,000,000);
- 2018 - 15 companies and 1 association were sanctioned for concerted practice consisting of fixing minimum prices on the market for package holidays;
- 2017 - 34 companies and four associations were sanctioned for fixing the minimum prices on the market for security services;
- 2016 - Five companies were sanctioned for bid-rigging arrangements in connection with a high-profile governmental support project "the milk and the croissant" for school pupils;
- 2015 - The RCC sanctioned 3 motor gas wholesalers with approximately EUR 3.7 million for a price fixing and client sharing cartel. The companies admitted guilt and got a fine reduction;
- 2014 - The RCC sanctioned 11 media companies with a fine of RON 14.567.555 (approximately EUR 3,200,000) for agreeing to eliminate a competitor from the market;
- 2012 - The National Union of Bailiffs in Romania was sanctioned with a fine of RON 593.089 (approximately EUR 131,798) for fixing tariffs and setting barriers to entering the profession;

- 2011 - Six oil companies were fined with RON 891.729.966 (approximately EUR 200,000,000), the largest fine ever applied by the RCC, for a cartel having as object the removal of a type of gas (Eco Premium) from the market;
- 2010 - Market allocation (based on a 50-50% principle) between the 14 administrators of mandatory private pension funds during the initial sales window upon market set-up (total fine of EUR 1,220,000);
- 2010 - Minimum price fixing by the members of the Romanian Body of Expert and Authorised Accountants (RBEAA) (total fine of EUR 950,000).
- **Vertical agreements (selections):**
  - 2017 - The RCC sanctioned manufacturers, importers and distributors of car batteries for vertical price fixing arrangements;
  - 2015-2016 - The RCC sanctioned various vertical price fixing arrangements on the decorative coating/painting sector;
  - 2015 - The RCC sanctioned Hidroelectrica, the main hydro power producer and 10 energy wholesalers with approximately EUR 37,000,000 for concluding long-term agreements of power supply;
  - 2014 - The RCC sanctioned 25 companies active on the retail market (4 retailers and 21 food products suppliers) with fines totalling RON 154.029.538 (approximately EUR 35,000,000) for direct (minimum) price fixing during certain promotions. The RCC sanctioned the suppliers and retailers for indirect price fixing, identifying promotional forms bearing a so-called "promotions clause" providing that the supplier shall not offer promotional reduced supplier prices to competitor chains (in certain cases such competitors were expressly identified by name) for the period when the respective promotion was available with that retailer;
  - 2011 - Total fines of RON 51.522.130 (approximately EUR 11,500,000) imposed on Bayer and its distributors for entering into anticompetitive limiting parallel trade;
  - 2011 - Total fines of RON 5.993.657 (approximately EUR 1,350,000) imposed on Baxter and its distributors for entering into anticompetitive limiting parallel trade;
  - 2011 - Vertical agreement between Interfruct S.R.L., Albinuța Shops S.R.L. and Profi Rom Food S.R.L. fruits on resale price maintenance sanctioned with fines of RON 16.700.000 (approximately EUR 3,700,000).
- **Bid rigging (selections):**
  - 2020 - Four companies (Vesta Investment S.R.L., Helvespid S.R.L., Loial Impex S.R.L., Girod Semnalizare Rutieră S.R.L.) were sanctioned for bid rigging on the market of vertical and horizontal road signs/markings with a total fine of EUR 667,000. The case included a component of transfer of sensitive commercial information;
  - 2020 - Five companies were sanctioned with fines amounting approximately EUR 468,000 for agreeing to participate with a joint bid in a public tender and to

share the afferent contracts

- 2018 – Six companies (Japan Radio Co. Ltd, Navtron SRL, Alphatrom Marine, Alhoutyam Ltd, Space Eletronics Ltd and Polar DenizcilickVe Deniz Malzemeleri A.S were sanctioned for bid rigging, vertical and horizontal agreements on the market of marine electronics maintenance system with fines of approximately RON 16.700.000 (approximately EUR 3,600,000);
- 2017 - Five companies were sanctioned for market sharing arrangements on the market for the sale of electric meters during public tenders organised by operators of power distribution networks Electrica SA, Delgaz Grid SA, E-Distribuție Muntenia SA. An element of novelty was that Electrica was sanctioned as facilitator of the practice by supporting an illicit exchange of information;
- 2016 - The RCC sanctioned the Romanian Chamber of Auditors for restricting competition by setting a minimum fee value. Apart from the EUR 182,000 fine, the RCC also imposed the Romanian Chamber of Auditors the obligation to eliminate the norms triggering the minimum fee value for services;
- 2014 - Four companies active in the oil and gas drilling industry were sanctioned for bid-rigging arrangements regarding bids organised by Romgaz. The fine amounted to RON 12.968.298 (approximately EUR 2,890,000). RCC's investigation was triggered following the submission of a leniency request by one of the participants in the cartel. The leniency applicant was granted full immunity;
- 2013 - Bid rigging by sharing the tendered products in public procurement procedures organised by the Ministry of National Defence. The highest fine imposed by the RCC amounted to approximately EUR 1,569,700;
- 2012 - Bid rigging in public procurement procedures organised by the National Company for Highways and National Roads for the installation of markings on the national roads. Two consortia of companies acting in the road works sector were sanctioned with more than EUR 660,000 in fines;
- 2012 - Bid rigging in public procurement procedures organised by Transgaz S.A. The case also included a component of transfer of sensitive commercial information;
- 2008 - Bid rigging between distributors on the dialysis market (total fine amounting to EUR 1,600,000): three distributors participated in a bid rigging in the context of the national tender organised by the Ministry of Health in 2003.

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## 5. Which competition law requirements should companies consider when entering into agreements concerning their activities on the Romanian territory?

Article 5(1) of Competition Law, in line with Article 101(1) of the TFEU, prohibits any

explicit or tacit agreements between undertakings or associations of undertakings, any decisions of associations or any concerted practices between them, pursuing among others (i) price fixing, (ii) customers or markets allocation or (iii) bid rigging. Such agreements include cartels and anticompetitive vertical agreements.

Cartels are illegal secret agreements concluded between competitors intended to fix prices, restrict supply and/or divide up markets. The agreements may take a wide variety of forms (tacitly agreed practices included), but often relate to sale prices or increases in such prices, restrictions on sales or production capacities, sharing out product or geographic markets or customers, and collusion on the other commercial conditions for the sale of products or services.

Although generally considered less restrictive than cartels, vertical agreements also require careful consideration as severe sanctions may apply as well, should competition norms be breached.

Several types of agreements are qualified as hardcore restrictions and consequently banned irrespective of the parties' market share. Such agreements mainly consist of (i) resale price fixing (setting a fixed or minimum resale price), (ii) market or clientele allocation; (iii) parallel trade restrictions and (iv) bid rigging.

Other restrictions included in vertical agreements may be exempted, either by the application of specific block exemptions (the EU block exemption regulations, namely Regulation No. 330/2010 are directly applicable), or following an individual examination undertaken on a case-by-case basis. In this latter case, the individual exemption requires a balance between the negative effects of the vertical agreements (e.g. raising the artificial market entry barriers, restriction on inter-brand and intra-brand competition, etc.) and the expected positive effects (e.g. product quality improvement, investments for entering new markets, better distribution services, etc.).

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## **6. Does the leniency policy apply in Romania?**

In line with the EU legal framework, the RCC issued guidelines providing for different types of incentives for companies that voluntarily disclose the existence of a cartel, or of restrictive vertical agreements, and bring evidence to prove the infringement or cooperate during the procedure. Exemptions and reductions of the fine vary widely depending on the timing and significant added value of the information and evidence provided by cartel members.

Unlike the EU, where leniency is available only in cartel cases, the RCC broadened the scope of the leniency policy and opened the procedure to distributors or suppliers to

report hardcore vertical anticompetitive agreements. The leniency regime does not apply to horizontal or vertical agreements which may be exempted under Article 101 (3) TFEU.

The first leniency case finalised before the RCC (2010) was a local cartel formed by the taxi drivers in Timiș County. In 2014, the RCC granted a new immunity under a leniency procedure in the oil and gas drilling services cartel finalised. Since then, the RCC took every opportunity to reaffirm clearly that “whistle blowers” are warmly welcomed at the RCC and provided full immunity in a number of cases such as the financial leasing market (2020), the MTLP insurance cartel (2018), electrical meters bid rigging practice (2017).

The RCC operates an on-line platform where, under the protection of anonymity, any person or company may provide information to the authority in connection with anticompetitive practices.

In order to obtain full immunity under the leniency policy, a company that participated in a cartel or a vertical RPM anticompetitive practice must be the first to inform the RCC of the undetected illegal activity, providing sufficient information to allow the authority to open an investigation and launch an inspection at the premises of the companies allegedly involved in the anticompetitive practice. If the RCC is already in possession of enough information to launch an investigation, or has already opened one, the company must provide evidence that enables the RCC to prove the infringement. In all cases, the company must also fully cooperate with the RCC throughout the procedure, provide the authority with all the evidence in its possession and put an end to the infringement immediately.

Companies that do not qualify for full immunity may benefit from a reduction of fines if they provide evidence that constitutes “significant added value” to that already in the RCC’s possession and if they have ceased involvement in the anticompetitive practice.

Evidence is considered to be of a “significant added value” for the RCC when it reinforces RCC’s ability to prove the infringement.

The first company to meet these conditions may receive 30% to 50% reduction, the second 20% to 30% and subsequent companies up to 20%. Companies that admit guilt during the hearings before the RCC Plenum at the latest may benefit of 10% to 30% fine reduction. This form of cooperation is deemed as special mitigating circumstance which may even trigger a reduction of the fine to 0.2% of the turnover obtained in the year preceding the sanctioning decision.

## 7. How unilateral conduct is treated under Romanian competition rules?

Unilateral conduct is not relevant for Competition Law unless the undertaking concerned holds a dominant position. Below the level of dominance, unfair commercial practices unilaterally applied by companies may be subject to consumer protection rules, which are in line with EU Directives and are generally investigated by the consumer protection agency.

Dominant players on the market could also infringe the antitrust rules, both national (Article 6 of Competition Law) and European provisions (Article 102 of the Treaty), by adopting unilateral market strategies which could harm consumers and/ or competitors.

Dominance is traditionally defined as the ability of a company to act to a large extent independently from its competitors (actual and potential) and its clients in that particular market.

However, under the Competition Law, firms which hold more than 40% of the relevant market in question are presumed to be dominant, should other factors not prove the contrary. The market share is, however, just one factor in assessing dominance. The structure of the relevant market, position of the main competitors, entry barriers or specific advantages enjoyed by a company may also influence the dominance assessment.

Obviously holding a dominant position is not prohibited; it is abusing that position that falls within the scope of the antitrust rules. Abusive behaviour may consist of: (i) exploitative practices by abusing market power in trading relationships with customers or suppliers (e.g. unfair purchase or selling prices, tying arrangements, price discrimination) and (ii) exclusionary practices, i.e. abusing market power with an aim to harm competitors (e.g. refusal to deal, predatory pricing, etc.).

Article 6 of the Competition Law provides a demonstrative list of behaviours that are deemed as abuse of a dominant position:

- Imposing, directly or indirectly, of selling and buying prices, price lists or other inequitable contractual clauses and refusing to negotiate with certain suppliers or beneficiaries (the practice relates mainly to excessive pricing against customers and predatory prices aimed at eliminating competitors);
- Limiting production, distribution, technological development to the disadvantage of the consumers;
- Applying to commercial partners dissimilar conditions for equivalent performances,

to the effect of creating disadvantages in the competitive position of some of them (discrimination);

- Conditioning the conclusion of certain contracts on the commercial partner's acceptance of clauses stipulating supplementary performances which, neither by their nature nor according to commercial practices, have any connection with the object of such contracts.

## 8. Are there any recent local abuse cases of relevance?

The number of cases on abuse of dominance instrumented by the RCC is increasing. Some notable examples include:

- Dante International (Emag) was sanctioned for abuse of a dominant position on the market for intermediation services through online platforms. The fine was of approximately EUR 6,700,000. In addition, the RCC imposed a series of corrective measures.
- The natural gas distributor Premier Energy was sanctioned with a fine of approximately EUR 1,300,000 for imposing discriminatory tariffs. The company benefited of a 15% reduction of the fine as it admitted guilt. At the same time, Premier Energy SRL awarded damages to the victims of infringements in a total value of RON 88.347,74.
- The telecom company Orange was sanctioned for having abused its dominant position on the SMS bulk termination market in relation to an SMS bulk and payment services independent provider. Also, Orange and Vodafone were sanctioned with fines of approximately EUR 34,800,000 and EUR 28,300,000, respectively, for actions related to restriction of access to essential facilities.
- The national post-office operator Poșta Română was sanctioned with a fine of approximately EUR 24,060,000.

It should be noted that companies may undertake, during the investigation procedure, that they will comply with a certain set of rules as to end the alleged infringement (commitment procedure) and avoid the application of fines. The RCC is however ostensibly reluctant in making extensive use of the undertaking tool.

## 9. What are the consequences of a competition law infringement?

The sanctions for violations of the Competition Law may amount to up to 10% of turnover obtained in the year prior to the issuance of the sanctioning decision.

The minimum fine that could be applied by the RCC as per Competition Law cannot be lower than 0.5% of the incomes achieved in Romania in the year prior to the issuance of the sanctioning decision.

Other sanctions include invalidation of contract terms, claims for damages submitted in court by the affected competitors, and restrictions imposed by the RCC or the courts on the business activity. The Competition Law also provides cases of criminal liability of the individuals responsible for the violation. So far, based on public information, the RCC has only once remitted a case to criminal prosecution.

Throughout its practice, the RCC applied significant fines, which place the local competition authority among the most active in Europe. The fine level, as well as the number of cases, increased in the last few years, where the RCC accelerated the investigation process in key sectors identified as priorities (retail, financial sector, telecom, oil, public procurement, etc.).

Independently from the sanctions applied under the Competition Law, natural and legal persons have the right to file claim for the recovery in full of the damages resulting from the anticompetitive practice prohibited by the Competition Law under the private enforcement principles.

Private enforcement relates to legal actions that can be brought before a national court by one private party against an undertaking that infringed competition regulations. Private enforcement of competition rules can take different forms, including claims for compensation for damages, actions for injunctive relief (to stop the behaviour that contravenes competition rules), actions for nullity, etc.

Companies having blown the whistle in cartel cases or hardcore vertical agreements which benefit from leniency are also exonerated from the joint liability resulting from claims for compensation for damages, which bears on all participants to the infringement.

As regards the quantum of damages, the Romanian legal system acknowledges the full compensation principle in case of tort liability. Thus, the author of the anticompetitive practice could be compelled to reimburse both the actual damage and the loss of benefit.

To date, there is little practice concerning the private enforcement actions in case of breach of competition norms, but considering the international trend, we could expect an increase in actions for damages in the near future.

In addition, managers, legal representatives, or any other person in a management

position who intentionally conceive or organise one of the prohibited practices under the Competition Law are subject to criminal liability.

## 10. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Romanian market?

The merger of two or more previously independent parties, or the direct or indirect control brought about by share capital/assets acquisition, by contract or by other means qualifies as an economic concentration and may trigger a notification obligation in the competent jurisdiction. In merger cases, a division of competence between the European Commission and the RCC applies.

The Commission has exclusive power to examine concentrations with a Community dimension determined on the basis of very high turnover thresholds set under EU Merger Regulation No. 139/2004, while the RCC assess concentrations with a national dimension.

Should the merger not fall within the jurisdiction of the European Commission, it would require clearance by the RCC if the following thresholds are **cumulatively** met in the fiscal year preceding the transaction:

- The parties' combined worldwide turnover exceeds EUR 10,000,000; and
- At least two of the parties involved in the transaction have a turnover in Romania exceeding EUR 4,000,000.

The concept of parties is rather complex and not limited to only the entities signing the transaction documents, but also includes group structures. The turnover thresholds should be verified on a case-by-case basis.

The business environment considers the turnover thresholds triggering the notification obligation to be low. Further to recent amendments, the Competition Law allows the RCC to adjust the turnover thresholds triggering the notification requirement. However, based on recent statements of the competition authority, there is no short or medium-term plan to adjust the notification thresholds.

Romania is considered a "suspensive jurisdiction", where a transaction may not be implemented prior to clearance issued by the RCC.

For justified cases, the buyer may obtain derogation from the above rule from the RCC (however, derogation decisions were issued on few occasions).

The RCC can impose fines of up to 10% of the turnover achieved by the buyer for completing a notified merger before the mandatory clearance.

Apart from the merger-related procedures in front of the RCC, economic concentrations occurring in Romania in certain key sectors (i.e. (i) security of citizens and collectivities; (ii) security of borders; (iii) energy; (iv) transportation; (v) security of vital resource supply systems; (vi) critical infrastructure; (vii) IT and communications; (viii) financial, fiscal, banking, insurance activities; (ix) arms, ammunition, explosives, toxic substances; (x) industrial security; (xi) the protection against disasters; (xii) the protection of agriculture and of the environment; (xiii) privatisations) should be notified to the Superior Council of State Defence for verifying compliance with the state defence rules.

Also, it is expected that a new government ordinance will be issued to implement locally the procedures necessary for the application of the EU Foreign Direct Investment Regulation (i.e. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union). An increase in the scrutiny of mergers & acquisitions from the perspective of their compatibility with state defence is expected.

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## 11. What is the normal merger review period?

The RCC shall issue a decision to either authorise a merger or open an in-depth investigation within 45 days after the submission becomes effective (upon registration at the RCC or, upon submission of additional required information).

In practice, the review period (phase I) is likely to take up to 60-90 days, since the authority usually takes 15-25 days before it declares the submission complete and the statutory time starts to run. In certain cases, a simplified procedure is available.

If an investigation is opened (phase II), the RCC shall issue a decision of refusal/authorisation/conditional authorisation within a 5-month term after the notification becomes effective.

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## 12. Are there any fees applicable where transactions are subject to local competition review?

Where prior RCC clearance is required, the notifying party/parties must pay an initial review fee of RON 4.775 (approximately EUR 1,000).

If the authorisation of the economic concentration is granted, an authorisation fee ranging from EUR 10,000 up to EUR 25,000 shall be paid.

In addition, in case of transactions triggering phase II assessment (i.e. an investigation is opened in view of performing the merger assessment), the authorisation fee is set from EUR 25,001 to EUR 50,000.

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### **13. Is there any possibility for companies to obtain State Aid in Romania?**

The Treaty rules and principles on State aid are directly applicable in Romania (in particular Article 107-109 of the Treaty). The European Commission has sole competence in State aid matters, while the RCC acts as contact authority for the Romanian State. In Romania, there are aid schemes in place for different sectors of activity (a list is available at [www.ajutordestat.ro](http://www.ajutordestat.ro)). Such were either subject to prior authorisation from the Commission or issued under an EU exemption regulation or *de minimis* aid principles. Also, the Commission authorised, in certain cases, individual aid for companies located in Romania.

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### **14. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?**

In order to manage the economic impact of the COVID-19 outbreak, the European Commission adopted a new Temporary Framework which enabled various types of aid, i.e direct grants, subsidised public loans, tax advantages etc., Member States having the possibility to design measures in line with existing EU State aid rules.

At national level, multiple stated aid schemes were adopted, such as individual aid, state aid scheme to support SMEs, aid to support the activity of regional airports etc.

With regard to the activity of the RCC during the COVID-19 crisis, the competition authority provided assistance to other national authorities in the field of state aid and also issued various recommendations for the companies to assure the maintenance of correct market behaviour in line with the Competition Law.

Thus, even in the exceptional circumstances of the COVID-19 pandemic, the application of the Competition Law is not suspended and the RCC is vigilant to the protection of the market and consumers.

# Energy

## LEGAL FRAMEWORK AND REGULATORY AUTHORITY

### 1. Which are the main legal enactments governing the Romanian power sector?

The power sector is regulated mainly by Title I of the Power and Gas Law No. 123/2012 (Energy Law).<sup>1</sup> The Energy Law implements Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Power Directive).<sup>2</sup>

The Energy Law was significantly amended by Law No. 155/2020.<sup>3</sup> Part of these changes are aimed at implementing the regulatory framework necessary for the development of an integrated EU energy market through common energy market rules and a cross-border infrastructure, as per Regulation 2019/943<sup>4</sup> and Directive 2019/944.<sup>5</sup>

### 2. What authority regulates the power sector?

The Romanian power sector is regulated by the National Authority Regulating the Energy Field (ANRE), an independent authority, under the control of the Parliament, which operates based on its own organisation and operation regulations.

ANRE is entirely financed from its own income deriving from fees (charged when issuing authorisations and licenses), annual contributions of the participants to the power market and funds granted by international bodies.

<sup>1</sup> The Energy Law was published in the Official Gazette of Romania, Part I, No. 485 of 16 July 2012, and was subsequently amended and supplemented.

<sup>2</sup> The Power Directive was published in the EU Official Journal L 211 of 14 August 2009.

<sup>3</sup> Law No. 155/2020 for amending and supplementing Power and Gas Law No. 123/2012 and amending and supplementing other normative acts, published in the Official Gazette of Romania, Part I, No. 665 of 27 July 2020.

<sup>4</sup> Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity was published in the EU Official Journal L 158 of 14 June 2019.

<sup>5</sup> Directive (EU) 2019/944 on common rules for the internal market for electricity was published in the EU Official Journal L 158 of 14 June 2019.

## **POWER MARKET**

### **1. Who can perform activities in the power sector and which licensing requirements should be observed?**

The participants in the power sector are the operators licensed by ANRE to carry out the activities specific to such sector as briefly described below:

- Generation is carried out by legal entities licensed by ANRE, through the operation of generation capacities the construction of which was also authorised by ANRE (if the capacity is above 1 MW). The producers are permitted to trade the power they generate on the wholesale market, as well as to supply it to final consumers directly connected to their generation capacities. The main power producers on the Romanian market are Hidroelectrica, Nuclearelectrica and CE Oltenia.
- Transmission is a natural monopoly activity carried out by Transelectrica, the Romanian Transmission and System Operator (TSO). Based on the concession granted by the Ministry of Economy, Transelectrica operates the entire power transmission grid (i.e. the grid having a voltage exceeding 110 kv) belonging to the public property of the State.
- Distribution entails the transportation of power through the high, medium and low voltage grid having a voltage of up to 110 kv. Similarly to transmission, distribution is, as a rule, a natural monopoly activity carried out by eight entities holding (i) the concession awarded by the Ministry of Economy over the distribution service in a certain area and (ii) the distribution license issued by ANRE. Nevertheless, Law No. 155/2020 provides for the possibility to distribute power without holding a license issued by ANRE for (i) distribution system operators of closed distribution systems (based on a decision issued by ANRE confirming the qualification as closed distribution system), (ii) distribution system operators or administrators of industrial parks within the industrial parks created according to Law No. 186/2013 on the setting-up and the functioning of the industrial parks, (iii) distribution system operators or administrators of free zones within the free zones created according to Law No. 84/1992 on the free zones regime, all of the above irrespective of the power, as well as for (iv) other economic operators holding distribution networks that supply places of consumption, outside the industrial parks, respectively the free zones indicated above, with approved powers of less than 3MW in aggregate. The license is also not required in case of electrical networks located outside the limits of the industrial park, the free zone respectively, up to the delimitation point from the distribution network of the distribution operator holding the concession or from the transmission network, provided that the approved powers of the consumption places located outside the limits of the industrial park, the free zone respectively, are below 3MW in aggregate and written notice was given to the distribution operator holding

the concession in the region where such industrial park or free zone is located, with respect to the provision of the distribution service through such electrical networks. ANRE may also grant a distribution license to operators holding distribution networks within an area subject to concession by another operator, provided the first has obtained the written approval of the distribution operator holding the concession, within the same period of concession. The distribution operator holding the concession may withhold the approval provided such is technically and economically justified, in which case it also has the obligation to ensure the connection of the users of the rejected distribution operator, in economic conditions at least equal with those of the connection solution part of the rejected application.

- Trading entails power sale or acquisition exclusively on the wholesale power market and may be carried out by entities which hold a specific trading license issued by ANRE.
- Supply can be carried out by entities holding the power supply license issued by ANRE.<sup>6</sup> As a general rule, the suppliers can sell the power on the competitive market at negotiated prices. However, ANRE appoints several last resort suppliers, from among the licensed suppliers, which are under an obligation to supply power, under terms regulated by ANRE, to certain categories of consumers.

## 2. Are there any unbundling and independency requirements imposed on the activities in the power sector?

In line with the principles laid down by the Power Directive, the Energy Law imposes unbundling of distribution and supply activities, as well as measures for ensuring the independency of the TSO from the power generation and supply activities.

Unbundling is required of vertically integrated undertakings carrying out both distribution and supply activities, except for vertically integrated undertakings serving less than 100,000 connected customers, or small isolated systems.

Distribution operators part of vertically integrated undertakings, are required to become independent from activities not connected to power distribution, at least in terms of legal form (legal unbundling), organisation and decision making process (functional unbundling).

All eight distribution and supply operators have completed the unbundling of distribution and supply activities through a spin-off into two separate entities, one for each activity.<sup>7</sup>

<sup>6</sup> The holders of an existing supply license may currently carry out both supply and trading activities.

<sup>7</sup> Similar provisions were also reflected in the former Energy Law which relied on now repealed Directive 2003/54/EC and which imposed the unbundling of the distribution and supply activities by 30 June 2007.

As regards the TSO, the Energy Law imposes criteria to be observed for ensuring its independency from the power generation and supply activities in line with relevant EU legislation. As such, while initially (in August 2014), Transelectrica was certified as an “independent system operator”, further to a reassessment carried out in 2015 by the European Commission, Transelectrica was certified as a transmission and system operator, as per the property separation model.

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### **3. To what extent is the power market liberalised?**

In line with EU regulations, further to its progressive liberalisation, the power supply market was fully liberalised for non-household customers as of 1 January 2014 and for household customers as of 1 January 2021.

At the same time, there are also other categories of consumers that may be supplied with power by last resort suppliers, based on regulated agreements and prices endorsed by ANRE (e.g. non-household customers with less than 50 employees and an annual turnover/accounting value of assets not exceeding EUR 10 million). Also, ANRE continues to regulate the natural monopoly activities in the power sector (i.e. transmission and distribution) which are carried out based on agreements and tariffs established by the regulatory authority.

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### **4. Which are the applicable rules for trading power?**

Power transactions are performed (i) under a wholesale system (for suppliers’/traders’ acquisitions of power from producers or from other suppliers/traders for re-selling purposes) or (ii) under a retail system (for acquisition of power by end customers for their own consumption). While the former energy law (in force until 19 July 2012) allowed for wholesale power transactions both by means of bilateral agreements concluded through direct negotiations (including import/export agreements), as well as on the centralised markets operated by the Power Market Operator OPCOM S.A. (OPCOM), the current Energy Law requires transactions to be concluded in a transparent, public, centralised and nondiscriminatory manner. Thus, as a rule, wholesale trading can only be performed on the centralised markets operated by OPCOM, based on specific rules approved by ANRE.

By way of exemption:

- Certain categories of renewable producers benefiting from the support system are allowed to conclude bilateral agreements (as presented herein below);

- Government Emergency Ordinance No. 74/2020<sup>8</sup> established a derogation from the ban set out by article 23 of the Energy Law, with respect to power generation projects commissioned after 1 June 2020. Thus, the operators of these projects may conclude bilateral agreements through direct negotiations, outside the centralised markets.
- Law No. 155/2020 provided two new exceptions from trading on the centralised markets, whereby: (i) a market participant combining electricity from several energy sources may enter into bilateral contracts with the owners of those sources; (ii) a market participant combining the loads of several customers may enter into bilateral contracts with them and their suppliers.

On the retail market, suppliers sell power to end customers based on bilateral agreements, either at negotiated prices or at prices endorsed by ANRE.

**PROMOTION OF GENERATION OF POWER FROM RENEWABLE ENERGY SOURCES THROUGH THE SYSTEM OF MANDATORY QUOTAS COMBINED WITH GREEN CERTIFICATES TRADING**

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**1. Has Romania implemented any support scheme for promoting the generation of power from renewable energy sources? If so, what type of support scheme is currently implemented?**

Romania undertook towards the EU the obligation to reach certain percentages of power generated from renewable energy sources out of the total final power consumption, namely 35% in 2015 and 38% in 2020. In view of encouraging the investments in the renewable energy sectors (which are essential for fulfilling such targets), Romania implemented the system of mandatory quotas for green certificates acquisition combined with green certificates trading.

However, only renewable projects which were commissioned or refurbished by the end of 2016 were eligible to benefit from the green certificates support scheme.

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**2. What is the legal framework governing the green certificates support scheme?**

The main piece of legislation regulating the support scheme is Law No. 220/2008

<sup>8</sup> Government Emergency Ordinance No. 74/2020 for amending and supplementing Power and Gas Law No. 123/2012 was published in the Official Gazette, Part I, No. 416 of 19 May 2020.

establishing the system for promoting the power produced from renewable sources of energy, as further amended and supplemented (Renewable Energy Law).<sup>9</sup>

The support scheme was notified to and approved by the European Commission in July 2011. However, during the authorisation process, the Romanian authorities undertook to bring some amendments to the then existing legal framework with the purpose of aligning it with the clearance to be obtained from the European Commission. Hence, the support scheme became applicable starting 1 November 2011 after the amendment of the Renewable Energy Law through Government Emergency Ordinance No. 88/2011 (GEO No. 88/2011)<sup>10</sup> and after the issuance by ANRE of secondary legislation for the implementation thereof.

The Renewable Energy Law has been amended by means of Government Emergency Ordinance No. 57/2013 (GEO No. 57/2013),<sup>11</sup> introducing severe limitations have been introduced to the support scheme effective as of 1 July 2013.

Whereas the limitations introduced by GEO No. 57/2013, as further approved by Law No. 23/2014,<sup>12</sup> have led to dysfunctionalities of the green certificates market (in principle, an excess of green certificates which caused financial difficulties for producers) and considering also the ongoing concern for the financial impact on the final consumers (who bear the costs of such scheme), further changes have been enacted through Government Emergency Ordinance No. 24/2017 (GEO No. 24/2017)<sup>13</sup>, as well as Law No. 184/2018 approving GEO No. 24/2017 (Law No. 184/2018).<sup>14</sup>

### 3. What is the applicability period of the support scheme?

The support scheme shall apply for a period of (i) 15 years for power generated by

<sup>9</sup> The Renewable Energy Law was republished in the Official Gazette of Romania, Part I, No. of 577 of 13 August 2010.

<sup>10</sup> Government Emergency Ordinance No. 88/2011 for amending and supplementing Law No. 220/2008 establishing the system for promoting the power produced from renewable sources of energy was published in the Official Gazette of Romania, Part I, No. 736 of 19 October 2011.

<sup>11</sup> Government Emergency Ordinance No. 57 of 4 June 2013 amending and supplementing Law No. 220/2008 for the establishment of the system for promoting the energy from renewable energy sources, was published in the Official Gazette of Romania, Part I, No. 335 of 7 June 2013 and is in force as of 1 July 2013.

<sup>12</sup> Law No. 23/2014 for the approval of Government Emergency Ordinance No. 57 of 4 June 2013 amending and supplementing Law No. 220/2008 for the establishment of the system for promoting the energy from renewable energy sources was published in the Official Gazette of Romania, Part I, No. 184 of 14 March 2014.

<sup>13</sup> Government Emergency Ordinance No. 24/2017 amending and supplementing Law No. 220/2008 for the establishment of the system for promoting the energy from renewable energy sources, was published in the Official Gazette of Romania, Part I, No. 224 of 31 March 2017.

<sup>14</sup> Law No. 184/2018 for the approval of Government Emergency Ordinance No. 24/2017 amending and supplementing Law No. 220/2008 for the establishment of the system for promoting the energy from renewable energy sources was published in the Official Gazette of Romania, Part I, No. 635 of 20 July 2018.

new units, (ii) 10 years for power generated by refurbished hydropower plants, with an installed capacity of no more than 10 MW, (iii) 7 years for wind power generated by units previously used on the territory of other states, if such units are used in the isolated energy systems or have been commissioned prior to application of the support scheme regulated by the Renewable Energy Law, (iv) 3 years for power generated by non-refurbished hydropower plants with a maximum installed capacity of no more than 10 MW.

These periods shall be diminished accordingly in the case of power producers that received green certificates prior to the entry into force of the Renewable Energy Law and shall also consider any periods during which the application of the support scheme was suspended or interrupted.

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#### **4. How many green certificates are issued to renewable power producers?**

The number of green certificates to be distributed by the TSO for each MWh of power generated by power plants using renewable sources of energy (with the exception of the power used for own technological consumption) varies depending on the renewable energy source, as follows: (i) three green certificates for each MWh of power generated in the new hydropower units having an installed capacity of maximum 10 MW, two green certificates for each MWh of power generated in the refurbished hydropower units having an installed capacity up to maximum 10 MW and one green certificate for each 2MWh of power generated in other hydropower units than the new and refurbished units mentioned above, having an installed capacity of maximum 10MW; (ii) two green certificates up to 2017 and one green certificate as of 2018 for each MWh of wind power; (iii) two green certificates for each MWh of power generated from geothermal energy, biomass, liquid biofuel, biogas (an additional green certificate/MWh is awarded for biomass resulting from energetic cultures), (iv) one green certificate for each MWh of power generated from landfill gas and sewage treatment plant gas; and (v) six green certificates for each MWh of solar power. During testing period, irrespective of the renewable source of energy used, TSO shall award one green certificate/MWh.

However, for the period 1 July 2013 – 31 March 2017, GEO No. 57/2013, as amended by Law No. 23/2014, postponed the allocation from trading of: (i) one green certificate for each MWh of power generated in wind power plants and in new hydro power plants with installed capacities not exceeding 10 MW and (ii) two green certificates for each MWh of photovoltaic energy. Subsequently, Law No. 184/2018 extended the postponement from trading of two green certificates for each MWh of photovoltaic energy until 31 December 2020.

The gradual recovery of the postponed green certificates should have started on 1 April 2017 (for photovoltaic and hydro energy) and 1 January 2018 (for wind energy), with finalisation planned not later than 31 December 2020. However, as per the latest amendments introduced by Law No. 184/2018, the recovery of the postponed certificates in the case of wind and hydro energy shall be made on monthly equal tranches starting 1 January 2018 until 31 December 2025, while for photovoltaic energy, the recovery process of the postponed green certificates shall be made on monthly equal tranches starting 1 January 2021 until 31 December 2030.

These postponement measures apply to all power producers already accredited for the support scheme by 31 December 2013.

In addition, ANRE had the obligation to monitor, on an annual basis, the producers benefiting from the support scheme to assess whether any overcompensation is registered for one or more technology(ies) and to propose to the Government that the number of green certificates for the respective technology(ies) be decreased by means of Government decision. The first monitoring report referred to the year 2012 and, based on its conclusions, the Government adopted Decision No. 994/2013 approving the measures for reducing the number of green certificates in the situations stipulated under Article 6, para (2) letters a), c) and f) of Law No. 220/2008 establishing the promotion system for the production of power from renewable energy sources.<sup>15</sup> According to this decision, the power producers in the wind, solar and hydro sectors, accredited after 1 January 2014, shall benefit from a reduced number of green certificates, as follows: (i) wind power plants - 1.5 green certificates/MWh until 2017 and 0.75 green certificates/MWh starting with 2018; (ii) solar power plants - 3 green certificates/MWh and (iii) new hydro power plants with installed capacities not exceeding 10 MW - 2.3 green certificates/MWh.

Subsequently, no other similar reduction measures due to overcompensation have been introduced.

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## **5. Is there any specific exclusion from the application of the support scheme?**

The main exclusion from the application of the support scheme was introduced by GEO No. 57/2013 and refers to the photovoltaic plants built on lands qualified as agricultural lands on 31 December 2013. No such restrictions apply to other types of renewable technologies.

Further amendments brought to the Renewable Energy Law in 2015 introduced a new

<sup>15</sup> Government Decision No. 994/2013 was published in the Official Gazette of Romania, Part I. No. 788 of 16 December 2013.

exclusion from the application of the green certificates promotion system in respect of the electricity generated from renewable sources sold at negative prices.

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## **6. How many green certificates are issued to power producers benefiting from State aid?**

In the case of power plants benefiting from one or several forms of State aid(s) (including EU grants), the number of green certificates awarded to such producers is reduced in order to maintain the internal rate of return considered during the authorisation process of the green certificate promotion system by the European Commission.

However, in this scenario, to the extent the reduction in the number of green certificates leads to a sub-unitary number of green certificates, the postponement measures are not applicable.

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## **7. Are there any market players under a legal obligation to purchase the green certificates?**

Power suppliers have the obligation to purchase a number of green certificates equal to the quantity of power purchased for end customers and for own consumption purposes (including the power produced in Romania and sold by suppliers by means of bilateral cross-border transactions to consumers/suppliers located on the territory of states with which Romania has bilateral agreements in this respect) multiplied by the mandatory quota of green certificates acquisition determined by ANRE for the respective year. Similarly, power producers have the obligation to purchase a number of green certificates equal to the quantity of power used for own consumption purposes (other than technological consumption and the consumption necessary for the extraction, preparation and manipulation of raw materials, in the case of producers that perform such activities in connection with raw materials used for power generation) and for supplying consumers connected directly to the power plant, multiplied by the mandatory quota of green certificates acquisition determined by ANRE for the respective year. Such acquisitions of green certificates should be made on a quarterly basis.

The mandatory quota of green certificates acquisition is first estimated by ANRE in December of the previous calendar year, while the final quota is determined by ANRE no later than 1 March of the subsequent year.

As per Law No. 184/2018, ANRE shall establish the mandatory quota of green

certificate acquisition so that the average impact on the final consumer's invoice does not exceed EUR 11.7/MWh in 2018, EUR 12.5/MWh in 2019, EUR 13/MWh in 2020 and 2021 and EUR 14.5/MWh as of 2022. As of 2023, such average impact on the consumer's invoice could be reduced by means of Government decision, further to ANRE's proposal in this respect. As per Law No. 184/2018, this calculation method of the mandatory quota of green certificate acquisition is aimed at ensuring that all green certificates estimated to be issued between 1 April 2017-31 December 2031 (including those postponed from trading) are sold by the beneficiaries, provided the annual power consumption does not fall below the average values registered between 2017-2022.

## 8. What are the sanctions for failing to meet the mandatory quotas for green certificates acquisition?

As of 2018, the amount to be paid by the power suppliers and producers failing to observe the annual mandatory quota of green certificates acquisition is EUR 70 for each green certificate that was not acquired. These amounts shall be collected by the Environmental Fund Administration<sup>16</sup> and shall be further allocated to natural persons for investments in renewable power generation units having an installed capacity up to 100 KW.

In addition, the electricity suppliers and producers failing to meet the annual acquisition quota for the previous quarter in a percentage of at least 90% compared to the annual mandatory quota are sanctioned as follows:

- For first breach - a written warning;
- For the second breach registered in the last five consecutive years following the first breach - a legal fine computed as the maximum value of the green certificates annually established by ANRE and the number of non-acquired green certificates (up to a percentage of 90% of the mandatory acquisition quota);
- For the third breach registered in the last five consecutive years following the first breach, a fine ranging between 1% and 5% of the turnover registered in the previous year and the suspension of the issuance of green certificates up to the number of green certificates that were not acquired.

## 9. Who bears the costs entailed by the application of the support scheme?

The value of the green certificates acquired by suppliers for meeting the mandatory green certificates acquisition quota is invoiced by suppliers to consumers.

<sup>16</sup> The Environmental Fund Administration is an economic-financial instrument targeted at supporting and performing environmental protection projects and programs, in accordance with the applicable laws in the environmental field.

The invoiced value is calculated as the mandatory green certificates acquisition quota estimated by ANRE for that year multiplied by the invoiced quantity of power and the price of green certificates (which is calculated as the weighted average price of the green certificates registered on the anonymous spot market in the previous month or such last available weighted average price).

By 1 September each year, the invoiced value for the previous year is settled based on the mandatory green certificates acquisition quota established by ANRE for the previous year, the supplied power and the weighted average price of the green certificates used by the supplier to comply with its acquisition quota in the previous year, which price cannot exceed the weighted average price of the certificates registered on the anonymous spot market in the previous year.

However, as per GEO No. 57/2013, as amended by Law No. 23/2014, certain final consumers may be exempted from the obligation to pay the green certificates value for part of their energy consumption. The requirements for qualifying for the exemption, as well as the exempted quantities were approved through Government decision and authorised by the European Commission on 15 October 2014.

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## 10. What rules apply to trading renewable power?

As a matter of principle, renewable power is traded following the general trading rules described above. Mention should be made that, further to GEO No. 24/2017, ANRE has issued specific regulations for the organisation and functioning of a new market, i.e. the centralised market for the power benefiting from the support system - an anonymous centralised market ensuring the competitive, transparent, public, non-discriminatory and centralised trading of renewable power associated with the green certificates corresponding to such power; on this market, the price of power is established in a competitive manner, while the price of the associated green certificates is the closing price of the last trading session which took place on the anonymous green certificates spot market.

By way of exemption from trading power on the centralised markets:

- In accordance with GEO No. 24/2017 (as amended by Law No. 184/2018 and Law No. 155/2020), power producers benefiting from the support scheme which operate power plants, the aggregated capacity whereof does not exceed 3 MW per producer, may conclude power sale purchase agreements by means of direct negotiations with the suppliers to the final consumers.
- Additionally, pursuant to Law No. 184/2018, in view of improving their financial and production performance, two or more producers may participate in the competitive

power market as a single aggregate entity, with the observance of the relevant competition regulations. The trading conditions were established by Order No. 160/2019<sup>17</sup> issued by ANRE and further detailed by the procedure published on the OPCOM website.

Until the fulfilment of the national targets regarding the percentage of power obtained from renewable energy sources out of the total final energy consumption, the power produced from renewable sources which benefits from the promotion system may be traded only with a view to covering the gross final consumption of power in Romania.

## 11. Which rules apply to green certificates trading?

GEO No. 57/2013 introduced the same principles as those imposed by the Energy Law in 2012 for power trading: green certificates must be traded in a transparent, centralised and non-discriminatory manner, on the centralised markets managed by OPCOM. Consequently, as of 1 July 2013, green certificates could no longer be traded through sale purchase agreements concluded by means of direct negotiations.

New trading rules have also been implemented by means of GEO No. 24/2017 and on 1 September 2017, a new ANRE regulation was enacted for the organisation and functioning of the green certificates market with a view to implement these new rules. Thus, green certificates shall be traded on the anonymous centralised green certificates market<sup>18</sup> administered by OPCOM, on any of its segments (either the anonymous spot market or the anonymous centralised market of bilateral agreements).<sup>19</sup>

In accordance with the current legal framework, green certificates may be sold solely by renewable power producers and a green certificate may be subject to a single transaction between the producer, as seller, and the supplier, as buyer; however, where it did not generate the contracted number of certificates, the producer may purchase the missing number of certificates on the centralised markets.

As a matter of principle, all operators which have the obligation to acquire a certain quota of green certificates should purchase annually and quarterly, on the spot market, at least 50% of the number of green certificates necessary to reach said quota.

<sup>17</sup> Order No. 160/2019 for the approval Regulation on the functioning of the centralized market for electricity from renewable sources supported by green certificates, was published in the Official Gazette of Romania, Part I, No. 582 of 16 July 2019.

<sup>18</sup> Such market entails a trading system which allows each participant to submit firm offers regarding quantity and price without having its identity revealed to the other market participants and, at the same time, know the quantities and prices proposed by the other participants.

<sup>19</sup> In addition, as abovementioned, they may also be traded on the centralised market for the electricity which benefits from the support system.

Exceptionally, the power producers operating power plants accredited for the green certificates support scheme, the aggregated capacity whereof does not exceed 3 MW per producer may conclude directly negotiated green certificate sale purchase agreements with the suppliers of final consumers (such transactions are also supervised by OPCOM).

While, initially, the trading value of the green certificates varied between EUR 27 (minimum legal value) and EUR 55 (maximum legal value) per green certificate, as of the entry into force of GEO No. 24/2017 and up to 31 March 2032, such legal trading value ranges from EUR 29.4 to EUR 35 (calculated at the average exchange rate set by the Romanian National Bank for the previous year).

Furthermore, all the green certificates issued as of 1 April 2017, as well as those postponed from trading shall be valid and may be traded until 31 March 2032<sup>20</sup> and they gain value only the moment they are traded.

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## **12. Are there any specific rules regarding renewable energy projects having an installed capacity exceeding a certain threshold?**

As per the 2011 form of the Renewable Energy Law, developers of power plants generating renewable energy which had an installed capacity of more than 125 MW had to obtain individual clearance from the European Commission before accessing the support scheme, further to which the number of green certificates to be awarded to such developer could be modified.

However, producers which on the date of entry into force of GEO No. 88/2011 (i.e. 19 October 2011) already operated or benefited from a connection agreement for power plants generating renewable energy that had an installed capacity of more than 125 MW were accredited by ANRE and received the number of green certificates provided by the Renewable Energy Law for a period of 24 months.

These producers had the obligation to notify the European Commission within three months as of accreditation, and any positive differences between the number of green certificates received during the 24-month period and that provided by the authorisation decision of the European Commission had to be settled within 24 months as of such decision.

Meanwhile, however, new EU guidelines have been issued which raised the 125 MW threshold to 250 MW and the Renewable Energy Law was aligned with such EU

<sup>20</sup> Prior to the entry into force of GEO No. 24/2017, green certificates had a validity of 12 months as of their issuance.

guidelines.

## PROMOTION OF THE PRODUCTION OF HIGH EFFICIENCY COGENERATION POWER

### 1. What is the legal framework governing the support scheme for the promotion of high efficiency cogeneration power?

The system for promoting high efficiency cogeneration of power and heat, was initially regulated at European level by Directive 2004/8/EC,<sup>21</sup> and has been implemented in Romania starting 2007 by Government Decision No. 219/2007.<sup>22</sup>

In order to implement the provisions of Government Decision No. 219/2007, Government Decision No. 1215/2009 for establishing the criteria and conditions required for implementing the support scheme for high efficiency cogeneration was enacted.<sup>23</sup>

After the high efficiency cogeneration support scheme was authorised by the European Commission, ANRE adopted, in 2010 and 2011, extensive secondary legislation for the implementation thereof, the scheme being applied as of 1 April 2011. At the end of 2012, Directive 2004/8/EC was repealed and the principles regarding the promotion of the production of high efficiency cogeneration power were taken over by Directive 2012/27/EU.<sup>24</sup> Consequently, in October 2015, the Government Decision No. 219/2007 was amended.

The high efficiency cogeneration bonus scheme applied only to producers which had their projects accredited by ANRE for such scheme until 31 December 2016. Exceptionally, the scheme shall apply to producers which replace, in the same location, existing cogeneration capacities which benefited from the bonus, after 31 December 2016, but within the limits of the capacity accredited by ANRE until such date.

It should be noted that producers of power and heat from cogeneration which use

<sup>21</sup> Directive 2004/8/EC on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC has been published in the Official Journal of the European Union No. L 52 of 21 February 2004.

<sup>22</sup> Government Decision No. 219/2007 on the promotion of cogeneration based on the demand of useful heat, published in the Official Gazette of Romania, Part I, No. 200 of 23 March 2007.

<sup>23</sup> Government Decision No. 1215/2009 was published in the Official Gazette, Part I, No. 748 of 3 November 2009, as subsequently amended and supplemented.

<sup>24</sup> Directive 2012/27/EU on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and Directive 2006/32/EC has been published in the Official Journal of the European Union No. L 315 of 14 November 2012.

renewable energy sources had the obligation to choose one of the support schemes, i.e. either the system of mandatory quotas combined with green certificates trading, or the bonus support scheme for high efficiency cogeneration.

Also, in the case of cogeneration capacities exceeding 300MW, the application of the system was conditional upon obtaining prior individual clearance from the European Commission.

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## 2. Which are the main features of the support scheme?

The support scheme for high efficiency cogeneration is administered by Transelectrica and entails the awarding of bonuses to qualified power producers, on a monthly basis, for each MWh of power produced from high efficiency cogeneration and delivered into the grid, irrespective of whether the power is sold on the competitive or on the regulated market.

ANRE establishes, on an annual basis, the list of producers who benefit from the support scheme, the amount of the bonus to which each is entitled, and the quantities of high efficiency power benefiting from the support scheme. The bonus to be awarded to each producer may not exceed the annual reference bonus which has been approved by the regulatory authority for the entire applicability period of the scheme depending on the type of fuel used in the cogeneration process (i.e. solid fuels, gas fuel taken over from the transmission system and gas fuel taken over from the distribution system). The bonuses are granted from the monthly contributions collected by Transelectrica (the value of which is established by ANRE) from all power consumers (through their suppliers). Suppliers which import power produced in high efficiency cogeneration, certified as such through guarantees of origin, and deliver it directly to consumers in Romania are entitled to the reimbursement of the contributions they paid.

ANRE analyses the costs and revenues connected to the high efficiency cogeneration activity estimated for the following year by the producers benefiting from the support scheme. Should the analysis reveal overcompensation, ANRE shall diminish the value of the bonus to be granted for the respective period and, should the analysis prove that the cogeneration unit has been fully depreciated, no bonus shall be granted. Additionally, ANRE will assess in respect of each beneficiary whether the bonus granted in the previous year gave rise to overcompensation and, if so, the concerned beneficiary shall have to pay the amounts indicated by ANRE. The first period for which ANRE assessed the overcompensation was of three years (2011-2013), the analysis being completed at the beginning of 2014; starting 2014, overcompensation is analysed on an annual basis.

### 3. What is the applicability period of the support scheme?

The support scheme is applicable for the period 2011-2023, provided that no producer can benefit from it for more than 11 consecutive years. Should the aggregate capacity of combined heat and power units benefiting from the scheme reach 4,000 MW, then only high efficiency cogeneration units replacing the existing ones shall be eligible for the support scheme.

### 4. Are there any specific rules for the trading of power by the producers benefiting from the support scheme?

In view of benefiting from the bonus, producers have the obligation to trade the high efficiency power on the competitive power market.

## HEATING

### Legal framework and regulatory authority

#### 1. What is the legal framework governing the heating provision service?

The heating provision service is regulated mainly by Law No. 51/2006 on the municipal services of public utility and by Law No. 325/2006 on the heating provision public service.

#### 2. Which are the main regulatory authorities in the provision of heating services?

Until recently, the main authority regulating the provision of heating services was the National Authority for Regulating the Community Services of Public Utilities (ANRSC), a public body of national interest, subordinated to the Ministry of Regional Development, Public Administration and European Funds, while the production of heat in cogeneration fell under the exclusive regulatory competence of ANRE.

However, as of June 2018, the regulatory and licensing competence in the heat sector has been allocated exclusively to ANRE.

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## Organisation of the heating provision service

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### 1. Who is responsible for the management of the heating provision service?

The management for the provision of heating falls under the competence of the local public administration authorities or of the community development associations (i.e. associations established by two or several administrative territorial units for the purpose of jointly providing the community services of public utilities).

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### 2. What are the different systems for managing the heating provision service?

The local public administration authorities and the community development associations can decide to carry out the management either directly or by delegation to third parties.

The delegated management is awarded either through concession or through a public services procurement agreement.

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### 3. Can there be more operators involved in the performance of the heating provision service within the same territorial administrative unit?

All activities part of the heating provision service corresponding to a single territorial administrative unit (i.e. heat generation, distribution, transmission and supply) must be carried out by a single operator.

Exceptionally, based on the decision of the local public administration authorities or the community development associations, the heat generation activities may be carried out by several operators.

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### 4. Which licensing requirements apply to heating provision service activities?

As of June 2018, all activities in the heating sector (heat generation, transmission, distribution and supply) may be performed based on the license issued by ANRE.

## NATURAL GAS

### Legal framework and regulatory authority

#### 1. What is the legislation governing the Romanian gas sector?

The gas sector is regulated mainly by Title II of the Energy Law. This section of the Energy Law implements Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Gas Directive).<sup>25</sup>

In 2020, the Energy Law underwent substantial amendments due to Romania's efforts to implement Regulation (EU) 2017/1938<sup>26</sup> for developing liquid and competitive wholesale and retail gas markets, both by fostering market competition and by eliminating barriers to cross-border trade. Hence, GEO No. 1/2020<sup>27</sup> lifted the regulated price constraint for gas suppliers in relation to the household end-customers and heat suppliers starting with 1 July 2020.

Furthermore, GEO No. 106/2020<sup>28</sup> sets forth mechanisms concerning cross-border trade and neighbouring countries networks interconnection, as well as rules for competitive trade and free access of gas suppliers to gas distribution and transmission networks.

Finally, Law No. 155/2020<sup>29</sup> provides among others for various rules regarding the access to gas supply market and tariffs calculation rules in respect of gas supply, distribution and transmission.

In addition, secondary enactments (orders issued by ANRE) set forth applicable rules, regulations, and methodologies for the gas sector related operations.

<sup>25</sup> The Gas Directive was published in the EU Official Journal L 211 of 14 August 2009.

<sup>26</sup> Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 was published in the EU Official Journal L 280 of 28 October 2017.

<sup>27</sup> Government Emergency Ordinance No. 1/2020 regarding certain tax and budget related measures and for the amending and supplementing of some legal enactments was published in the Official Gazette of Romania, Part I, No. 11 and entered into force on 9 January 2020.

<sup>28</sup> Government Emergency Ordinance No. 106/2020 was published in the Official Gazette of Romania, Part I No. 572 and entered into force on 1 July 2020. It was later on approved by Law No. 290/2020 (published in the Official Gazette of Romania No. 1239 of 16 December 2020 and entered into force on 19 December 2020).

<sup>29</sup> Law No. 155/2020 for the amendment and supplementation of the Energy Law No. 123/2012 and for the amendment and supplementation of some other legal enactments was published in the Official Gazette of Romania, Part I No. 665 of 27 July 2020. It entered into force on 30 July 2020.

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## **2. Which is the authority regulating the natural gas sector?**

The Romanian natural gas sector is regulated mainly by ANRE. Limited competencies are also granted to the National Agency for Mineral Resources (ANRM) as regards the awarding and execution of oil concession agreements concerning exploration, development and exploitation activities and operation of the national transmission system and the underground storage facilities.

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### **Natural gas market**

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#### **1. Who can carry out activities in the natural gas sector and what are the licensing requirements?**

The participants in the natural gas sector are the operators licensed to perform the activities specific to such sector, as listed below.

Gas production can be carried out by legal entities (i) having concluded with ANRM a concession oil agreement in respect of a defined petroleum block, (ii) holding a setting-up authorisation and an operation license for the upstream pipelines related to the production activity and (iii) holding a gas supply license. The main producers of gas on the Romanian market are Romgaz and Petrom, which usually ensure more than 90% of the internal gas production.

Storage entails all activities and operations performed for or in connection with the reservation of storage capacities in underground storage and for the injection, storage and extraction of gas from these capacities. The gas storage is a natural monopoly activity which may be carried out subject to concluding a concession agreement for the underground storage facilities with ANRM, and to obtaining the corresponding license from ANRE. Currently, there are two operators of the gas storage service, namely Depogaz (a subsidiary of Romgaz) and Depomureş.

Transmission (i.e. transportation of gas through high pressure grids, with the exception of upstream pipelines and high pressure distribution grids for delivery to customers) is a natural monopoly activity carried out by Transgaz. Based on the concession agreement concluded with ANRM, Transgaz operates the national transmission system and related assets belonging to the public domain of the State.

Distribution entails the transportation of gas through a system of distribution pipelines for delivery to customers. Gas distribution is, as a rule, a monopoly of entities holding (i) the exclusive concession over the distribution service in a certain area based on a

concession agreement awarded by and concluded with the local public authorities<sup>30</sup> and (ii) a distribution license issued by ANRE. The main licensed operators of the distribution service are Distrigaz Sud Rețele and Delgaz Grid (former E.ON. Gaz Distribuție). However, under Law No. 155/2020 the distribution service may be provided without an ANRE-issued license by entities operating a closed distribution system, administrators of industrial parks created according to Law 186/2013 on the setting-up and the functioning of the industrial parks and administrators of free zones created according to Law no. 84/1992 on the free zones regime, such operators benefiting from the same rights and having the same obligations to observe the ANRE regulations as a licensee for that activity.

Trading entails natural gas transactions performed exclusively on the wholesale market and may be carried out by entities which hold a specific trading license issued by ANRE.

Supply is carried out by ANRE licensed operators. As a matter of principle, the suppliers have the right to carry out transactions on the competitive market under negotiated terms and conditions, except for last resort suppliers. In view of protecting end customers in case the supply license of their suppliers is withdrawn or in any other cases identified by ANRE where end customers no longer have any source of gas supply, the special category of last resort suppliers is established. Such last resort suppliers are nominated by ANRE and perform the gas supply activity based on regulated agreements and at regulated prices.

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## **2. Are there any unbundling and independency requirements imposed to the activities in the power sector?**

In line with the principles laid down by the Gas Directive, the Energy Law imposes the unbundling of gas distribution and supply activities, as well as independency criteria to be observed by Transgaz and underground storage operators. The unbundling requirements apply to the vertically integrated undertakings carrying out both distribution and supply activities, with the exception of gas distributors serving less than 100,000 connected end customers. Such undertakings are placed under the obligation to become independent from activities not connected to gas distribution, at least in terms of legal form (legal unbundling) and of the organisation and decision making process (functional unbundling). Following such legal requirements, each of the main distribution and supply companies (Distrigaz Nord and Distrigaz Sud) was divided into two separate companies, one of which carrying out gas distribution and the other carrying out gas supply (Distrigaz Sud Rețele and Engie (former GDF Suez Energy Romania), in the case of Distrigaz Sud, and Delgaz Grid (former E.ON. Gaz Distribuție)

<sup>30</sup> By way of exception, in case of privatised distribution operators, the competent authority was and remains the Ministry of Energy.

and E.ON. Energie România, in the case of Distrigaz Nord).<sup>31</sup> As regards Transgaz, the Energy Law imposes the organisation and operation thereof as per the model of the independent system operator, certified by ANRE, and establishes independence criteria to be observed in order to ensure an effective separation from distribution and supply activities. In August 2014, Transgaz was certified by ANRE as “independent system operator”.

Storage operators, part of vertically integrated undertakings, are bound to observe independence criteria in terms of legal form, organisation and decision making process from activities not connected with gas transmission, distribution and storage. Such limitation applies only as regards the storage facilities that are technically and/or economically necessary in order to ensure an efficient access to the system for the purpose of supplying customers.

### **3. To what extent is the natural gas market liberalised?**

In line with EU regulations, the natural gas supply market was progressively liberalised, for which purpose the Energy Law provided a gradual elimination of the regulated prices for end customers. As such, in respect of industrial customers, the market is fully liberalised as of 1 January 2015, while in respect of household customers, full liberalisation has occurred as of 1 July 2020.

Up until 30 June 2020, producers, including their subsidiaries and affiliates belonging to the same economic interest group carrying out both production activities and sale of natural gas extracted from Romania, had the obligation to maintain the price of the natural gas quantities resulting from the current domestic production activity sold to suppliers of household customers and of heat producers, only for quantities of natural gas used to generate heat in cogeneration/heat plants meant for the population, at a capped price of RON 68/MWh. In the context of natural gas market liberalisation implemented as of 1 July 2020, these provisions have been repealed as, in view of a fully liberalised market, the capping of purchase prices for the supply of natural gas for household customers and for household heating producers were incompatible with the very concept of market liberalisation.

The liberalisation process was consolidated by GEO No. 106/2020<sup>32</sup> which introduced mechanisms specific to the concept of gas release program, meant to ensure a

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31 Similar provisions were also reflected in the former Energy Law which relied on now repealed Directive 2003/55/EC and which imposed the unbundling of distribution and supply activities by 30 June 2007.

32 Government Emergency Ordinance No.106/2020 for amending and supplementing the Law on electricity and natural gas no. 123/2012, as well as for the modification of some normative acts published in the Official Gazette of Romania, Part I, No. 572 of 1 July 2020. The provisions were further amended by Law 290/2020 on the approval of the Government Emergency Ordinance no. 106/2020 for the amendment and completion of the Law on electricity and natural gas no. 123/2012, as well as for the amendment of some normative acts, published in the Official Gazette of Romania, Part I, No. 1239 of 16 December 2020.

transparent, competitive and non-discriminatory trading environment, corresponding to a free market. ANRE continues to regulate several segments of the gas market, as follows: (i) the natural monopoly activities (i.e. transmission, storage and distribution of gas) and ancillary activities, and (ii) the gas supply provided by the last resort suppliers.

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#### 4. Which rules apply to trading natural gas?

On the competitive market, transactions are performed (i) under a wholesale system or (ii) under a retail system (for acquisitions of gas by end customers for their own consumption). On the wholesale market, transactions are performed as follows: (i) bilateral agreements between operators in the gas sector, (ii) transactions on the centralised markets (currently there are two such markets, i.e. the Centralised Market of Bilateral Agreements operated by OPCOM and the one operated by the Romanian Commodities Exchange), (iii) other types of transactions/agreements. On the retail market, gas supply is performed (i) either based on negotiated agreements or (ii) on standard offers.

Since 2014, the Energy Law has been successively amended in terms of rules applicable to the trade of natural gas on the wholesale market. The most recent amendment in this respect was implemented by GEO No. 106/2020 whereby a gas-release programme is launched between 1 July 2020 and 31 December 2022. This programme is intended to replace the previous obligation for all market participants to contract a set quota on centralised trading platforms, with new obligations. Accordingly, wholesale market participants making acquisitions of natural gas are bound to place offers to buy natural gas on centralised markets during the same year when the natural gas delivery occurs. Equally, wholesale market participants contracting sales of natural gas are bound to place offers to sell natural gas on centralised markets during the same year when the natural gas delivery occurs. In both cases, the obligation to place offer to sell or to buy natural gas on centralized market is determined by reference to a percentage set by ANRE<sup>33</sup> of the annual quantity of natural gas contracted. As far as the natural gas producers are concerned, GEO No. 106/2020 requires only those recording more than 3,000,000 MWh annual production (minus technological consumption and internal consumption for years 2021 and 2022) to place sale offers for at least 40% of their annual production acquired in the previous year, subject to the rules set by ANRE.<sup>34</sup>

<sup>33</sup> According to Order No. 144/2020 regarding the obligation of the wholesale market participants to place offer on the centralised market, this percentage is 40% for the period between 1 July 2020 and 31 December 2022.

<sup>34</sup> Order No. 143/2020 on the obligation to supply natural gas on the centralised markets of natural gas producers whose annual production in the previous year exceeds 3,000,000 MWh, published in the Official Gazette of Romania, Part I, No. 631 of 17 July 2020.

# Capital Market

## LEGISLATIVE AND REGULATORY FRAMEWORK

### 1. What is the relevant legal framework? Are there any pending legislative amendment proposals?

The main local legal enactments governing capital markets in Romania and setting forth the key principles for the organisation and functioning of the capital markets and their key players and participants are: Law No. 24/2017 on financial instruments and market operations, Law No. 297/2004 on capital markets, Law No. 126/2018 on markets in financial instruments (transposing MiFID II), Law No. 243/2019 on the regulation of alternative investment funds, Government Emergency Ordinance No. 32/2012 (GEO No. 32/2012) on the organisation and functioning of undertakings for collective investment in traded securities (UCITS) and of investment management companies, Law No. 74/2015 on alternative investment fund managers (AIFM).<sup>1</sup>

The above-mentioned legal enactments are implemented by way of ample secondary legislation issued by the Financial Supervisory Authority (FSA), especially the so-called "Regulations" focusing on a particular capital markets-related area or matter. Besides the Regulations, there are other secondary norms (instructions, decisions, disposals of measures) governing specific capital market matters. The local regulator also issued various endorsements (Romanian: *avize*) meant to clarify and/or interpret the application of a specific norm.

The most important secondary legislation issued by the FSA comprises:<sup>2</sup> Regulation No. 15/2004 regarding the authorisation and functioning of investment management firms, collective investment undertaking and depositories, Regulation No. 13/2005 on the authorisation and functioning of the central depository, the clearing houses and central counterparties and Regulation No. 10/2017 regarding central depositories for the implementation of EU Regulation No. 909/2014, Regulation No. 5/2018 on issuers of financial instruments and market operations, Regulation No. 13/2018 on trading

<sup>1</sup> Romanian versions of such enactments (mostly not consolidated) can be accessed here <https://asfromania.ro/legislatie/legislatie-sectoriala/legislatie-capital/legislatie-primara-capital>.

<sup>2</sup> Romanian versions of such enactments (mostly not consolidated) can be accessed here <https://asfromania.ro/legislatie/legislatie-sectoriala/legislatie-capital/legislatie-secundara-capital/regulamente-capital>.

venues, Regulation No. 2/2017 on transfer or deregistration from trading of securities in case of closing of an alternative trading system, Regulation No. 5/2019 on provision of investment services and activities pursuant to Law No. 126/2018 regarding markets in financial instruments, Regulation No. 9/2014 on the authorisation and functioning of the asset management companies, of UCITS and of depositories of UCITS, Regulation No. 7/2020 on the authorisation and operation of alternative investment funds, Regulation No. 10/2015 on management of alternative investment funds, Regulation No. 10/2018 regarding protection of financial instruments and the funds pertaining to clients, product governance obligations and the norms applicable to paying or receiving fees, commissions or other types of pecuniary or non-pecuniary benefits, Regulation No. 1/2019 on the evaluation and approval of the members of the management structure and of the persons holding key positions within the entities regulated by FSA, Regulation No. 3/2016 on the applicable criteria and the procedure for the prudential assessment of acquisitions and increases of participations in entities regulated by the FSA, Regulation No. 13/2019 on the establishment of measures to prevent and combat money laundering and terrorist financing through the financial sectors, Regulation No. 5/2010 on the use of the system of global accounts, the mechanisms with and without the pre-validation of financial instruments, securities lending and security interests and short selling transactions, Norm 14/2017 on the application of the MAR Guide - Information on commodity markets or related spot markets for defining insider information on commodity derivative financial instruments, Norm No. 5/2017 for the application of the MAR Guide - people to whom the market sounding is addressed and the MAR Guide is addressed - postponement of the publication of privileged information, Norm No. 34/2017 for the application of ESMA Guidelines on transaction reporting, order record keeping and clock synchronisation under the Markets in Financial Instruments Directive (MiFID II), Norm No. 23/2017 for the application of ESMA Guidelines on CSDs' access to CCPs or trading venues' transaction feeds, Regulation No. 14/2018 regarding provision of investment services and activities on behalf of financial services companies and credit institutions, Norm No. 15/2019 regarding application of ESMA Guidelines on Internalised Settlement Reporting under Article 9 of CSDR, Norm No. 14/2019 on application of ESMA Guidelines on the management of conflicts of interest for central counterparties (CCPs) and ESMA Guidelines on Anti-Procyclicality Margin Measures for Central Counterparties, Norm No. 23/2019 on application of ESMA Guidelines on the application of C6 and C7 of Annex 1 of MiFID II, Norm no. 29/2019 for the application of the ESMA Guide on risk factors under the Prospectus Regulation.

All relevant Regulations issued at EU level are of direct local applicability in Romania, and EU Directives must be accordingly transposed; also ESMA Guidelines are taken into account by local market players and FSA.

In addition, the Rulebook of the Bursa de Valori Bucureşti S.A.<sup>3</sup> and the Rulebook of the local Depozitarul Central S.A.<sup>4</sup> are sets of rules drafted by these private entities relevant for the players on the local capital market.

## 2. Is the local legal framework fully harmonised with the EU legislation in the capital markets field?

Even before becoming a member of the European Union, Romania has strived to achieve the *acquis communautaire*, so as to ensure smooth accession. In the capital markets field, the harmonisation process started as early as 2004 and the local legal framework is, in principle, well harmonised with the EU legislation. We note that the customarily used implementation method was the “literal implementation” of the EU legislation (“as it is”), with quite limited local input.

Investment firms and investment management companies duly authorised in an EU Member State may provide financial services in Romania, directly or through local branches, their “original” authorisation/license being recognised by the local regulatory authority via a notification procedure. Also, listing on a local regulated market via EU passporting is also available to issuers already listed on a regulated market located in an EU Member State.

## 3. Which are the relevant capital markets institutions in Romania?

The main institutions on the Romanian capital market are:

- The regulatory authority – the Financial Supervisory Authority (FSA);<sup>5</sup>
- The market operator – Bursa de Valori Bucureşti S.A. (BVB);<sup>6</sup>
- The central depository, ensuring depository activities for securities, clearing and settlement of securities transactions (Depozitarul Central S.A.);<sup>7</sup>
- Investors’ Indemnification Fund,<sup>8</sup> ensuring investors’ indemnification, up to a certain threshold in case of a default by an investment firm/asset management company to

3 The Rulebook of the Bursa de Valori Bucureşti S.A. is available here in English [https://www.bvb.ro/Juridic/files/EN\\_%20Rulebook%20RMO%20\\_11032021\\_website.pdf](https://www.bvb.ro/Juridic/files/EN_%20Rulebook%20RMO%20_11032021_website.pdf).

4 The Rulebook of the local Depozitarul Central S.A. is available here in English <https://www.roclear.ro/Download?ID=6858&Lang=en-US>.

5 Note that following a reorganisation process conducted at the level of the local financial authorities, as of 30 April 2013 the FSA has taken over all prerogatives and obligations of the local capital markets regulator (i.e. the former National Securities Commission), the local insurance regulator (i.e. the former Insurance Supervisory Commission), as well as of the local pension regulator (i.e. the former Pension Supervisory Commission).

6 The official website of BVB is [www.bvb.ro](http://www.bvb.ro).

7 The official website of Depozitarul Central S.A. is [www.depozitarulcentral.ro](http://www.depozitarulcentral.ro).

8 The official website of the Investors’ Indemnification Fund is [www.fond-fci.ro](http://www.fond-fci.ro).

reimburse investors' money and/or financial instruments.

It is important to mention that the BVB, together with the Energy and Natural Gas Operator (OPCOM), Enel, Tinmar (energy suppliers) and several other companies activating in the financial/investment area have incorporated CCP.RO Bucharest, meant to be further licensed by the FSA as the first Romanian central counterparty (CCP). The CCP is expected to become operational at the end of 2021.

#### 4. Which are the key players/participants to the local capital market?

The key players/participants to the local capital market are:

- Issuers of financial instruments, consisting mainly of local (and very few foreign) commercial companies and undertakings for collective investments (UCITs),<sup>9</sup> local authorities (municipalities, city halls, county councils as issuers of bonds), and the State (for T-bills);
- Intermediaries/investment firms which may be either specialised financial investment services companies or credit institutions duly authorised in this respect;
- Investment management companies, whose main business object is the administration of investment portfolios (either of UCITs, AIF or of individual investment portfolios);
- Investors (other than those addressed under the items above), covering a full range of entities, from institutional ones (e.g. privately managed pension funds (Pillar II), optional pension funds (Pillar III) and insurance companies), to commercial companies and individuals, both local and foreign.

### LISTING AND ACQUISITION/ TRADING OF SECURITIES

#### 1. Which are the main local trading platforms?

Currently, Romania has one regulated market, namely the Bucharest Stock Exchange (BSE) operated by BVB, in existence since 1995; on the BSE are traded shares, bonds UCI units, warrants and certificates. BVB also operates a multilateral trading facility (MTF), the so-called "alternative trading systems" called "Aero".

<sup>9</sup> We hereby refer to both UCITS (as regulated by MiFiD II) and the so-called Non-UCITS/AIFs (including alternative investment funds, as regulated under AIFMD). Note that the most active players on the local markets are currently the five SIFs and The Property Fund (Romanian: Fondul Proprietatea) - investment companies organised as Non-UCITS/AIF.

## 2. Which are the main requirements for admission to trading of securities?

As a general rule, any admission to trading on regulated markets requires a listing prospectus to be issued on the instruments being listed and the issuer thereof, which must be approved by the FSA before publication; in a limited number of cases, a simplified prospectus or, as the case may be, an informative document (which does not require an approval from the FSA) is accepted.

There are certain minimum requirements referring to the issuer, set forth by Law No. 24/2017 for admission to trading of securities:

- To be incorporated and carry out operations in compliance with the law;
- To have a preliminary level of capitalisation of at least EUR 1,000,000 or, if capitalisation cannot be assessed, the value of the capital and the reserves (including the profit or the loss of the last financial year) to be of at least EUR 1,000,000;
- To have operated for at least three years prior to submitting the application for listing (special exemptions may be applicable with regards to this requirement).

As regards the requirements referring to securities, these are as follows:

- To be freely negotiable and fully paid;
- To have sufficient spread to the public (in principle, a free float of 25% of the subscribed share capital is acceptable; special exemptions may be granted by the FSA under certain conditions).

Nevertheless, each stock exchange has its own rules for admission to trading; the BSE Code sets different requirements for each BSE tier and type of financial instrument which in certain respects are stricter than the minimum listing requirements set forth under Law No. 24/2017.

Securities' listing on Aero (MTF operated by the BVB) also provide specific capitalisation requirements for admission to trading. However, no prospectus is needed for listing on Aero.

## 3. Which are the means to acquire listed securities? Are OTC transactions permitted?

The available acquisition modalities for listed securities are:

- On-market transactions conducted via the system of the relevant trading platform

(i.e. regulated market or MTF) through a financial intermediary/ investment firm which is a participant to such system, based on the delivery versus payment mechanism (DVP) - transaction's settlement being ensured via a system operated by a central depository having a contractual arrangement with the operator of the trading system; or

- Over the counter (OTC) transactions, conducted outside the system of the relevant trading platform.

OTC transactions for listed securities are currently allowed in specific regulated cases, such as intra-group transactions (based on prior FSA approval) and for the purpose of performing turnaround transactions (OTC Turnaround). Essentially, OTC Turnaround entails that a financial intermediary acquires the intended stake via an on-market transaction ("correspondent transaction") and, on the same day, said stake (or a lower stake) is further transferred by the respective intermediary to the client (OTC transaction). OTC Turnaround can be implemented subject to several specific requirements that need to be cumulatively met.

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#### **4. Are there any particularities to the local on-market transactions? Is the use of the "omnibus accounts system" permitted?**

As a general rule, all transactions made through the stock exchange entail an automatic pre-validation procedure aimed at ensuring that the shares exist in the seller's account both on the trade date and on the settlement date. Use of the "omnibus"/global accounts system with or without pre-validation is subject to the fulfilment of specific conditions.

Trading without pre-validation is currently allowed only through the "omnibus accounts" system and only for the issuers listed below:

- Issuers whose shares are registered with a Romanian central depository and which are listed both on the Romanian capital markets and on an EU Member State capital market;
- Issuers of T-bills listed on a Romanian regulated market;
- Issuers whose shares are registered with a Romanian central depository and which are object of a cross-border public offering;
- Issuers whose shares are registered with both a Romanian central depository and a central depository located in an EU Member State with whom the Romanian central depository cooperates with for the purpose of ensuring the cross-border transfer and the settlement of the shares;
- Issuers whose shares are registered with the Romanian central depository and are

subject to a cross-border public offer notified to the FSA by a supervisory authority from another EU Member State;

- In other cases, specifically indicated by the FSA, at the request of the local central depository or of the operator of the regulated market/MTF.<sup>10</sup>

Transactions with the financial instruments issued by the issuers listed above may be done only through the “omnibus/global” accounts system.

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## 5. Are security interests over listed financial instruments allowed? How does it work?

Setting-up security interests over financial instruments is possible. Such security interests become ostensible/perfected towards third parties and gain priority against competing security interests by registering the interest with the relevant central depository.

The owner is entitled to dispose of the financial instruments charged with the attached security interest, however only after the central depository has been notified of such intention. Following disposal, the financial instruments may be sold free of security interest, which will further be transferred upon and charge the sale proceeds (money) or, as the case may be, the financial instruments obtained in exchange (in the case of a swap). The former owner of the financial instruments must notify the creditor about such substitution; the creditor may request the supplementation of the substituted assets, in accordance with the provisions of the underlying security agreement.

The enforcement of the security interest is made by selling the respective financial instruments (by the creditor or the foreclosure officer – depending on whether the debtor agrees to the foreclosure or not) on the relevant market, through an intermediary. If the sale is not successful, the creditor itself may take possession of the respective financial instruments.

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## 6. Is financial instruments lending allowed? Subject to what conditions?

Financial instruments’ lending is only permitted (i) for performing short sale transactions; or (ii) for the physical settlement of derivatives; or (iii) for performing operations in the margin account; or (iv) for settlement of transactions, where the

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<sup>10</sup> Note that following such requests, the FSA has extended the “omnibus accounts system” and the mechanism without pre-validation to the issuers included in the BET index of BSE (top 10 most liquid issuers), as well as to the issuers listed on “Aero” (i.e. the MTF operated by BVV).

intermediary providing custody services did not communicate the transfer order - pertaining to the instructions of settlement of an allocation transaction, to the central depository; or (v) for settlement of transactions where at the date of settlement the financial instruments are not available; or (vi) for the exercise of the capacity of the authorised participant of tradable UCITS or the administration of tradable UCITS; or (vii) in the context of the market maker activities; or (viii) in any other situations - for ensuring completion of the transactions' settlement.

The law expressly prohibits financial instruments' lending with the exclusive purpose of obtaining dividends or exercising voting rights during shareholders' meetings.

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## **7. Is short selling allowed? Subject to what conditions?**

Generally, short sales are allowed in respect of any securities traded on a trading venue from Romania if are met the conditions provided by EU Regulation No. 236/2012 on short selling and certain aspects of credit risk swaps.

## **SALE OFFERS (SO)**

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### **1. Are there any price, minimum share stake or timing requirements?**

The share sale offers may be launched by the issuer or by shareholders.

SOs require the drafting of an offer prospectus to be approved by the FSA within 10 business days from the application. Also, the SO needs to be conducted through an investment firm/financial intermediary.

As a rule, the price of a SO can be set discretionarily, as no specific restrictions/ calculation rules are set forth in that respect. However, in case of an IPO, the share price should at least be equal to shares' face/nominal value.

Also, in principle, there are no specific restrictions/requirements on a minimum/ maximum number of shares that can be offered in a SO. However, in the case of admission to trading of securities, the offering of a minimum share stake might be required so as to ensure the free float requirements of the market on which the admission is sought.

The duration of a SO (as of its launching) must be of 12 months maximum.

Applications for amendment of the SO terms may be submitted to the FSA, in which case the FSA may extend the SO term; investors which subscribed under SO prior to such amendments may further withdraw their subscriptions.

## **PURCHASE OFFERS (PO). TAKEOVER OFFERS**

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### **1. Who can launch a purchase offer? Are there any price, minimum share stake or timing requirements?**

As a rule, the PO can be launched by any person, resident or non-resident entity, shareholder or unrelated to the respective issuer.

POs require the drafting of an offer document to be approved by the FSA within 10 business days from the application. Also, the PO needs to be conducted through an investment firm/financial intermediary.

The PO price must be at least equal to the highest of either (i) the weighted average shares trade price for the 12 months preceding the filing before the FSA of the PO application and (ii) the highest price paid by the offeror and the persons it acts jointly within the 12 months period preceding the filing with the FSA of the PO application. In case neither of the above applies, the price shall equal the net asset value of the shares computed by reference to the last financial statements of the issuer.

There are no specific requirements as regards the minimum share stake to be acquired under a PO.

The duration of a PO (as of its launching) must be between a minimum of 10 business days and a maximum of 50 business days.

Applications for amendment of the terms of the PO may be submitted to the FSA, in which case the FSA may extend the PO term.

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### **2. What is a mandatory takeover offer (MTO)? Are there any exceptions from the obligation to launch such offer? Are there any price, minimum share stake or timing requirements applicable in case of such offers?**

Once a person has acquired (directly or indirectly, either alone or jointly with the persons it acts "in concert" with) more than 33% of the voting rights in the issuer

company, that person is bound to launch, within two months, a public offer addressed to all the other shareholders for all their shares in the company called “mandatory takeover offer”.

The obligation to launch a MTO is not applicable where the 33% threshold is exceeded following acquisitions made: (i) under a privatisation process; (ii) from the Ministry of Public Finance or any other authorised entities under a budgetary debts foreclosure procedure; (iii) between affiliates/members of the same group of companies; (iv) under voluntary takeover/purchase offers addressed to all shareholders, for all their shareholdings.

Also, where the 33% threshold was exceeded following “unintentional operations” (i.e. shares buy-back by the company followed by their cancellation; pursuant to exercising shareholders’ preference right in subscribing new shares under share capital increase operations; merger/spin-off; inheritance), the shareholder may choose to either conduct the MTO, or sell the shares in excess of the 33% limit within three months.

As a general rule, the price under an MTO must be at least equal to the highest price paid for the issuer’s shares by the offeror or the persons it acts “in concert” with within the 12 months period preceding the filing before the FSA of the MTO application, if the MTO documentation is filed with the FSA within the legally prescribed 2-month term. Note, however, that special and distinct rules for establishing the offer’s price will apply in specific circumstances (i.e. if the legally prescribed term for documentation filing is not complied with, if the offeror and the persons it acts in concert with did not acquire shares within the 12 months preceding period to the filing before FSA; if, despite the shares being acquired within the 12-month period mentioned above, FSA would still find that said acquisitions would be likely to influence the correct pricing).

The rest of the requirements applicable to a PO (as described herein above) shall apply accordingly to the case of an MTO.

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### **3. Conditions and price for a voluntary takeover offering (VTO)**

A “voluntary takeover offering” (VTO) is a type of PO, where the offeror (existing shareholder or not) voluntarily targets the acquisition of more than 33% of the voting rights in an issuer.

Launching a VTO requires the takeover intention be communicated to the management of the target and the regulated market where the securities are traded (as well as published in the media publication) by way of a notice/ announcement approved by

the FSA.

Also, the target company's board of directors (BoD) shall send the FSA, the offeror and the regulated market a document setting out its opinion on the bid, the reasons on which it is based and the effects of the implementation of the bid on the company's interests and employees, and on the offeror's strategic plans for the company and their likely repercussions on the employees and the locations of the company's places of business. It may also convene the general meeting of the shareholders (GMS) in order to inform the shareholders on its position on the prospective takeover.

After being informed of the takeover intention, the management of the target is banned from taking new measures involving operations outside the ordinary course of business unless specifically approved by the extraordinary GMS (the misuse of a takeover intention notice solely for the purpose of ensuring a stand-still obligation to an issuer is sanctioned by law).

The price of the VTO should be at least equal to the highest among: (i) the highest price paid by the offeror/the persons it acts "in concert" with for shares in the target company in the 12 month-period preceding the submission to the FSA of the offer application; (ii) the average weighted trading share price pertaining to the past 12 months preceding the VTO; and (iii) the price resulting from dividing the company's net assets value (as per the latest financial statements) to the number of shares in issue.

The offeror and the persons it acts "in concert" with may not launch a new VTO for the same target for one year after the closing of one VTO.

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#### **4. Is counter-bidding allowed? If yes, subject to what conditions?**

Counterbids may be launched within 10 business days as of the launching of any type of PO, provided that the counterbid targets at least the same quantity of securities/ reaching the same equity quota and its price is at least 5% higher than the price of the initial bid.

A competing procedure is further conducted by the FSA in order to select the winning bid that will ultimately stand for due subscription; the selection involves an "auction type" procedure, where the competing bidders submit bids for an increased offer price, with an "auction tick" of minimum 5% (i.e. by reference to the highest price offered in a previous auction round).

## MINORITY SHAREHOLDERS' EXIT/ ISSUER'S DE-LISTING

### 1. How can minorities exit a listed company other than by regular on-market share sale?

Minority shareholders may be forced by the majority shareholder to exit the company (squeeze-out) or, as the case may be, they may force the majority shareholder to buy out their holdings (sell-out), once the majority shareholder has reached 95% of the shares having attached voting rights or has acquired 90% of the shares having attached voting rights targeted under a public purchase offering addressed to all the shareholders for all their shares.

Both operations (squeeze-out/sell-out) are to be made against a "fair price" determined in a manner regulated by law.

Minorities have the right to withdraw from a listed company (i.e. to request the respective company to buy-back their stakes) in the following limited cases:

- Certain specific corporate events (i.e. company's merger or spin-off, change of the company's main business object, change of the company's headquarters abroad, change of the company's legal form); or
- GMS decision on the company's de-listing; or
- In specific cases prescribed by Regulation No. 2/2017 (for companies listed on ATS) – for instance in the case where (a) an (extraordinary) GMS resolution deciding that in the context of the ATS operators' merger, the shares shall be delisted from the ATS operated by the absorbing operator is passed; or (b) the ATS absorbing operator refuses the trading of the shares on the ATS it operates.

In all the scenarios above, the price to be paid to the withdrawing shareholder(s) is to be established by an independent expert

### 2. How can a company be de-listed?

Issuer's de-listing can be achieved in either of the following ways:

- Pursuant to conducting a squeeze-out/sell-out procedure (as described herein above);
- Pursuant to an (extraordinary) GMS resolution on the withdrawal of the company from public trade; notably, such de-listing can be conducted subject to very restrictive conditions being met, which mainly require that in the past 12 months

preceding such, GMS shares' liquidity on the market was extremely low and the on-market transactions regarded a very small stake of company's shares, further approved by the FSA;

- Pursuant to the decision of the FSA, if such deems that, due to exceptional circumstances, an orderly market for the securities subject to deregistration cannot be maintained;
- Pursuant to the delisting procedure set forth by Regulation No. 2/2017 (for companies listed on ATS) – if (a) an (extraordinary) GMS resolution deciding that, in the context of the ATS operators' merger, the shares shall be delisted from the ATS operated by the absorbing operator is passed; (b) the ATS absorbing operator refuses the trading of the shares on the ATS it operates; (c) the (extraordinary) GMS although convened within the legally required timeframe, takes place without compliance with the statutory / legal quorum requirements or a decision is not passed due to unfulfilling of the legal or statutory requirements for passing a decision; or (d) the (extraordinary) GMS is not convened so as to take place within maximum 90 days as of the moment when the merger between the ATS operators becomes effective.

**CORPORATE SPECIFICS**

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**1. Are there any special rules for the appointment of the management in listed companies?**

BoD members may be appointed under a special procedure, the so-called “cumulative voting method”, in which case the company’s BoD should consist of at least five members. Subject to certain special requirements being met, the shareholders may request the election of BoD members by using this special method (which entails the allocation by a shareholder of its voting rights to the existing BoD candidates, the candidates with the higher number of allocated votes being thus elected). The cumulative voting method does not have to be implemented by foreign issuers listed on the local market, which must observe their national corporate governance rules.

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**2. Are there mechanisms for protecting the shareholders (and in particular the minorities)? What are the key minorities’ rights in listed companies?**

One of the main goals of the capital market regulations is the protection of shareholders’ interests; to this end, two main principles are stated by Law No. 24/2017, i.e. equal treatment of shareholders, and market transparency.

Protection of (minority) shareholders is ensured mainly through:

- Reporting/disclosure obligations imposed on issuers upon listing (via the listing/offer prospectus) and also on periodical (quarterly/half-yearly/yearly) and ad-hoc bases (on events with potential significant impact on the market price);
- The issuer's obligation to reply to shareholders' inquiries (save for confidential/business-sensitive data);
- Rules on GMS decision making;
- The shareholders' right to challenge the GMS resolutions for which they did not vote in favour;
- The shareholders' option to oppose certain major corporate events so as to have their shares bought back;
- Strict rules for company de-listing;
- Reporting transactions with company shares made by company insiders;
- Sanctioning insider trading and market manipulation.

Shareholders with a higher equity quota (above 5% or 10% respectively) have some additional rights, as detailed below.

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### **3. How can the minorities avoid dilution?**

As a general rule, share capital increases can be implemented only by granting the existing shareholders a preference right in subscribing (via an intermediary/investment firm) the newly issued shares; the GMS may decide to lift such preference right on exceptional basis only, i.e. by justifying the measure and in the presence of the shareholders representing at least 85% of the share capital and based on the votes of the shareholders holding at least  $\frac{3}{4}$  of the voting rights. The observance of such preference right requires the drafting by the company of a FSA-approved prospectus/proportionate prospectus in accordance with Regulation (EU) 2017/1129.

The newly issued shares not entirely subscribed by the existing shareholder may be either offered for subscription to the public or cancelled.

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### **4. What are the key percentages/ thresholds that investors should know about?**

- 5%, 10%, 15%, 20%, 25%, 33%, 50%, or 75% - exceeding or falling below such threshold triggers the reporting obligation of the shareholder;
- 5% - the shareholder may (i) request for the convening of the GMS or supplementing the agenda of an already convened GMS; (ii) request special reports

- from the company's financial auditors and (iii) directly request in court the liability of the directors/BoD members (in its own name and on behalf of the company);
- 10% - the shareholder may (i) request the election of the BoD via the "cumulative voting method" and (ii) ask the court to appoint an expert to prepare a report on certain company operations;
  - 33% - exceeding this threshold requires shareholders to observe the mandatory takeover rules (i.e. launching a MTO);
  - 50%+1 - it allows in principle, *inter alia*, control upon general decision making (if no higher thresh-old is provided in the company's articles of association);
  - Over 95% - allows the exercise of the minority squeeze-out and sell-out rights.

# Financial Institutions & Security Interests

## OVERVIEW

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### **1. What is the legal framework applicable to financial institutions and security interests in Romania?**

The activity of credit institutions is regulated by Government Emergency Ordinance No. 99/2006 (Banking Law), which is aligned to the Capital Requirements Directive (CRD) IV package.

Non-banking financial institutions benefit of special regulation under Law 93/2009 on non-banking financial institutions, while payment institutions and electronic money institutions are also regulated under specific legal enactments duly implementing the provisions of Directive (EU) 2015/2366 on payment services (PSD 2) in the Romanian legislation.

The main legal framework for credit agreements and security interest consists in the Romanian Civil Code. Consumers benefit of additional protection under special regulations.

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### **2. Which are the regulatory authorities in the areas of financial institutions and money market services?**

The National Bank of Romania (the NBR) acts as central state bank, having mainly supervisory and control powers over financial entities within its jurisdiction, irrespective of whether they are credit institutions, non-banking financial institutions, payment services institutions or electronic money institutions. The powers of the NBR do not extend to the capital market and its institutions (e.g., the financial investment services companies), which are placed under the supervision and control of the

Financial Supervisory Authority (the FSA).<sup>1</sup>

The NBR has exclusive powers in authorising and supervising the credit institutions, the non-banking financial institutions, the payment institutions and the electronic money institutions, Romanian entities, which are set up and operate in Romania. In this respect, the NBR issues mandatory regulations, applies sanctions and is entitled to controlling and reviewing the books of accounts and any other documents of the mentioned entities. To the extent that they are authorised and operate under the supervision of financial regulatory authorities in an EU or European Economic Area (EEA) country, foreign entities may directly operate on the Romanian financial market through the passporting procedure, without being required to follow a local authorisation procedure and observe the capital requirements applicable to Romanian entities.

## CREDIT INSTITUTIONS

### 1. What is the general procedure for the authorisation of credit institutions?

Romanian credit institutions and branches of foreign credit institutions headquartered in non-EU member states may operate in Romania based on a banking license issued by the NBR.

The authorisation of credit institutions by the NBR involves a two-step procedure:

- The preliminary authorisation, whereby the NBR approves the setting up of credit institutions. The application for a preliminary authorisation should be accompanied by information and documents concerning their share capital, shareholders and managing bodies, and also a business plan including, inter alia, a description of the targets, policies and strategies of the future credit institution, including information regarding the clients and the target market segment, the products and services, pricing policies, capitalisation policies, the financing sources and asset structure, personnel policies, a description of the internal control system and IT system (including any adjustments). The NBR shall issue a decision on the preliminary authorisation within four months. The issue of the preliminary authorisation by the NBR does not guarantee that the subsequent banking license shall be granted;

and

<sup>1</sup> As regards the supervision of other categories of financial institutions, for further details please refer to the "Capital Market" chapter.

- The banking license, whereby the NBR authorises the operation of credit institutions. Based on the preliminary authorisation, the shareholders proceed with the incorporation of the credit institution or registration of the branch with the Trade Registry, as the case may be. After the credit institution/branch is duly incorporated and registered, a number of additional documents should be filed with the NBR, within two months from the issuance of the preliminary authorisation. The NBR shall issue the banking license within four months as of receipt of the application and complete documentation. The relevant credit institution is subsequently registered with the banking register held by the NBR.

Credit institutions headquartered, authorised and supervised in EU member states may operate in Romania either directly, by passporting their services based on the freedom to provide services within the EU, or through branches, in both cases upon a notification to the NBR. No authorisation is required in this case.

## 2. Which are the most relevant corporate requirements applicable to credit institutions?

Under the Banking Law, credit institutions, as well as housing banks and mortgage banks may be incorporated only as joint stock companies.

The initial share capital or own funds of credit institutions must be of at least EUR 5,000,000.

## 3. Are there any specific rules regarding the business purpose of credit institutions?

Under the Banking Law, credit institutions may perform various financial activities, such as: taking deposits and performing lending operations (including consumer loans, mortgage loans, etc.), financial leasing, payment operations, issue and management of payment instruments, issue of guarantees and undertaking of commitments, transactions with money market instruments, intermediation on the interbank market, financial investment services and financial consulting, etc. Credit institutions may also perform, within the limits of their authorisation and subject to compatibility with the requirement of the banking business, the following operations:

- Non-financial mandate or commission operations, especially on behalf of other entities within their group;
- Asset management operations in respect of the movable and/or immovable assets owned by the credit institution, but not for the purpose of performing financial

operations;

- Services for their own clients which, although not related to the core business, are an extension of the banking operations;
- Except for those referred above, credit institutions may undertake transactions with movable assets and real estate property under the following circumstances: (i) when such transactions are necessary for the authorised operations of the credit institution, (ii) the movable assets and real estate property are necessary for the employees' training, or for setting-up leisure facilities or housing for employees and their families; and (iii) when the transactions involve movable assets and real estate property acquired following foreclosure proceedings.

The following transactions are forbidden in the case of credit institutions:

- Pledging its own shares against the credit institution's debts;
- Granting loans secured with shares, other equity securities or bonds issued by the credit institution itself or by other credit institution within the same group;
- Taking of deposits or other reimbursable funds, equity securities or other valuables when the credit institution is in insolvency.

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#### **4. Are credit institutions subject to specific rules on capital adequacy?**

The provisions of the Banking Law have implemented CRD IV and comply with the principles of the Basel III framework on capital adequacy requirements.

Thus, under these regulations, credit institutions must comply with minimum capital requirements, establishing, *inter alia*, rules on Tier I and Tier II capital of credit institutions. In addition, under these regulations, credit institutions must comply with capital requirements *inter alia* for risk covering, on individual and consolidated basis, and for monitoring and control of large exposures.

According to the NBR Regulation No. 6/2002, all categories of Romanian credit institutions are obliged to create and maintain minimum mandatory reserves with the NBR, in national and in foreign currencies, receiving interest at such rates as periodically determined by the NBR norms.

Currently, the minimum mandatory reserves rate for RON is of 8%, and of 5% for foreign currency liabilities, in both cases for liabilities having a residual maturity limited to two years as of the expiry of the observation period or, in case it exceeds two years, the liabilities have attached a reimbursement, transfer or an anticipated withdrawal clause.

In all other cases, for liabilities exceeding two years and without having attached a reimbursement, transfer or an anticipated withdrawal clause, the minimum mandatory reserves rate is zero. The minimum mandatory reserves applicable to mortgage and housing banks are zero.

## 5. Do credit institutions have specific reporting obligations?

Pursuant to the Banking Law, the NBR secondary regulations and the Regulation (EU) No. 575/2013, Romanian credit institutions are compelled to periodically file specific reports with the NBR, containing, *inter alia*, information in respect of:

- Tier I and Tier II capital levels and other capital adequacy compliance indices;
- Net assets;
- Individual and aggregate large exposures;
- Solvency indices, on individual and consolidated basis;
- Yearly financial statements and certain biannual financial data;
- Classification of the loan portfolio and related credit risk provisions;
- Banking fees for cashing in and payment operations, etc.

## OTHER FINANCIAL INSTITUTIONS

### 1. Are there any other categories of regulated financial institutions active on the Romanian money market?

Mortgage banks, assimilated to credit institutions under the Banking Law, are established as joint stock companies operating under the authorisation issued by the NBR. The main business of mortgage banks consists of (i) providing mortgage loans for real estate investments (dwellings, industrial/commercial constructions) and (ii) issuing mortgage bonds. Mortgage banks are not allowed to take deposits.

Non-banking financial institutions (NBFI), which act as professional lenders, are regulated by Law No. 93/2009 and operate under NBR authorisation and supervision.

Payment institutions are regulated by Law No. 209/2019 on payment services, while electronic money institutions are regulated by Law No. 210/2019 on the activity of electronic money issuance and ancillary NBR regulations.

The NBR acts as regulatory and supervising authority in respect of these financial institutions, as well.

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## **2. Do non-banking financial institutions need to comply with specific capital requirements?**

Non-banking financial institutions are required to have a share capital amounting to the equivalent in RON of EUR 200,000, except for those granting mortgage loans, to which a minimum EUR 3,000,000 threshold applies.

For non-banking financial institutions registered in the special register the level of own funds<sup>2</sup> must be at all times equal to the level of the minimum share capital.

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## **3. Are there any rules applicable to the business purpose of non-banking financial institutions?**

According to Law No. 93/2009, non-banking financial institutions are allowed to carry out various lending activities, such as financial leasing and consumer credits. Non-banking financial institutions are entitled to grant mortgage loans as well.

In addition, non-banking financial institutions can also undertake financing and guarantee commitments, issue and manage credit cards, perform payment services and any connected or ancillary activities to credit operations, as well as mandate and consultancy activities. Nevertheless, they cannot receive money in deposit and cannot, as a rule, issue bonds, nor perform other activities unless in relation to their lending activities.

Non-banking financial institutions are allowed to carry out payment services operations as well, in accordance with the applicable legal framework.

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## **4. Are non-banking financial institutions subject to an authorisation procedure?**

According to Law No. 93/2009, non-banking financial institutions must apply for registration with the NBR within 30 days as of their incorporation.

They can start lending activities only after being registered in the NBR's general registry for non-banking financial institutions.

The NBR should issue the license within 30 days as of receipt of the application and relevant documentation.

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<sup>2</sup> The own funds of a non-banking financial institution includes its own capita and the additional capital.

## 5. Do non-banking financial institutions need to comply with prudential and reporting obligations?

According to Law No. 93/2009 and the ancillary NBR norms, non-banking financial institutions must comply with specific prudential and reporting requirements, *inter alia* concerning exposures, credit portfolio structure and corporate changes. Also, non-banking financial institutions must report to the NBR statistical data regarding: (i) the status of outstanding assets and liabilities, (ii) the status of the main assets and liabilities in RON equivalent; and (iii) the criteria for registration in the special register of non-banking financial institutions.

## 6. Do payment institutions need to comply with specific corporate requirements for incorporation?

Payment institutions can be incorporated only as Romanian legal entities and are subject to an authorisation procedure before commencing their operations. The payment institutions from EU-member states may operate in Romania using the EU passporting procedure, based on a notification sent to the NBR by the competent authority in their home member state.

Payment institutions are required to have a share capital which may vary according to the payment services envisaged: the equivalent in RON of EUR 20,000 (for cash remittance operations only); EUR 50,000 (for payment initiation services only) or respectively EUR 125,000 (for all the payment services provided under Law No. 209/2019, except for account information services, with respect to which there is no share capital requirement).

## 7. Are there any rules applicable to the business purpose of payment institutions?

According to Law No. 209/2019, payment institutions are allowed to carry out various payment operations, to take cash deposits/withdrawals to/from payment accounts, to perform specific transfers, issuing and accepting payment instruments, cash remittance, payment initiation services or account information services. Payment institutions are permitted to grant credits, but only in connection with the payment services that it provides and subject to specific conditions or in compliance with the legislation applicable to non-banking financial institutions. They can also perform operational and other connected services, management of payment systems and other commercial activities, subject to the applicable laws.

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## 8. Are payment institutions subject to an authorisation procedure?

According to Law No. 209/2019, payment institutions are allowed to start payment operations only after obtaining approval from the NBR, which should be issued within three months as of the submission of the complete relevant documentation. Such documentation includes, *inter alia*, information on the initial capital, business object, significant shareholders, managers, business and activity plans, management and internal control mechanisms and procedures, mechanism for the protection of the funds received from the payment services users, etc.

Within five days as of the initiation of the authorised operations, the payment institutions must submit to the NBR a notification in this respect, together with a statement of the management in respect of the IT system, the identity of the persons responsible for the management of the organisational structures within the payment institution, the identity of the auditors who provide the payment institution with services other than statutory audit, the identity and functions of the persons responsible for monitoring the externalised activities and copies of specific agreements concluded by the payment institutions as a requirement for authorisation (e.g. the insurance policy).

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## 9. Do payment institutions need to comply with prudential and reporting obligations?

According to Law No. 209/2019 and the ancillary NBR Regulation, payment institutions must comply with specific prudential and reporting requirements, *inter alia* concerning their agents, the Tier I and Tier II capital requirements, measures to protect the received funds.

Changes in the status of the payment institutions are subject to either authorisation or notification to the NBR, depending on the degree of risk entailed by such changes. The payment institutions are subject to specific regulatory requirements, aimed at protecting consumers and their funds deposited with the payment institutions.

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## 10. What credit reporting institutions exist in Romania?

The Credit Information Bureau is established as a private structure, operating as an intermediation centre that manages credit risk information and card fraud information. The system collects from, and provides to financial and credit institutions, as well as to insurance companies for credit-type products, information on the individuals,

debtors of the participants who register payment arrears exceeding 30 days, on the frauds related to the participants (ascertained by final court decisions or uncontested enforceable administrative acts) and on the statements of individuals containing inconsistencies.

The Central Credit Register is a structure created and operating within the NBR, specialised in collecting, storing and centralising information on the exposures of the declaring entities (in principle, the institutions supervised by the NBR) towards the debtors whose aggregate indebtedness exceeds RON 20.000. The system collects, stores and centralises information on: (i) the bank's exposures (loans/commitments) which exceed the reporting threshold and the identification details of the debtors, (ii) the details of such exposures (for instance, type of credit, maturity, debt service, etc.), (iii) the groups of entities representing a single debtor (the group name and its members which are acting jointly as borrowers), as well as (iv) information on card frauds committed by cardholders.

The Payment Incidents Bureau is created and operating within the NBR as a centre for intermediation and management of information specific to payment incidents, in connection with paper instruments (e.g., cheques, bills of exchange and promissory notes). Information to the Bureau is conveyed by a computerised system through the Interbank Communication Network, which links the head office of the NBR to the head offices of all credit institutions.

## SECURITY INTERESTS

### 1. Which is the legal framework for security interests in Romania? Which are the main categories of such security interests?

Under the New Civil Code, the legal regime of personal and real security interests has received a uniform regulation and certain new categories of security interests.

The main categories of security interest are as follows:

- **Movable hypothecs**, formerly known as security interests on movable property, are regulated by the New Civil Code as of its entry into force on the 1 October 2011 (Title VI of Law No. 99/1999 on the legal regime of security interests was repealed). The New Civil Code provides a flexible and uniform framework, more efficient and adequate to the current economic environment, as well as additional security enforcement procedures, as an alternative to the "classical" procedures provided by

the Civil Procedure Code;

- **Pledges** (Romanian: *gaj*) are now regulated by the New Civil Code as a security where the secured creditor takes possession of the pledged assets. Only tangible movable assets or materialised commercial titles may be subject to pledge. In relation to tangible movable assets, the publicity of pledges is ensured either by the mere fact of possession over the pledged assets, or by registration with the National Register for Movable Assets Publicity (Publicity Register); however, the publicity of a pledge over an amount of money is ensured only by holding such amount. With respect to materialised commercial titles, publicity is ensured by their remittance or, as the case may be, by their endorsement. If no specific rules are provided under the New Civil Code on pledges, those applicable to movable hypothecs shall apply;
- **Immovable hypothecs** (mortgages) which continue to be preferred by professional lenders as security instruments, are frequently used in various types of commercial and retail transactions. Under the New Civil Code, immovable mortgages may be created on existing property such as land and buildings, but also (differently from the previous regulation) on future immovable assets. Following the creation of an immovable hypothec, the security provider will continue to own and use the hypothecated asset. The immovable hypothec will be preserved despite any ownership transfer, being enforceable against any subsequent acquirer;
- **Suretyship** (*fidejussio*) is a personal guarantee, based on which the secured creditor is granted the right to pursue the assets of the guarantor in case the debtor fails to perform the secured obligation. The suretyship is not subject to any registration procedure and does not give a priority ranking to the secured creditor;
- **Independent guarantees** are for the first time regulated under the New Civil Code, which sets out regulations regarding the letters of guarantee and the letters of comfort.

## 2. How are movable hypothecs created and perfected?

Movable hypothecs are created by way of written agreement (either as a private agreement or as an authenticated deed) between the secured creditor and the security provider (either the debtor or a third party providing security for the benefit of the debtor). The perfection of the movable hypothecs, which is relevant for establishing the priority ranking of the hypothec, is obtained as of the moment when (cumulatively): (i) the secured obligation is effective, (ii) the security provider gains rights on the secured asset, (iii) the movable hypothec agreement is signed and (iv) the registration formalities of the movable hypothec have been duly performed. The New Civil Code provides the categories of movable assets which can be charged by movable hypothec, and these include: intangible assets, universalities of movable assets (including goodwill) - but only to the extent they are assigned to the operations of a company, products of the secured asset (e.g. proceeds from the sale or any movable asset

replacing the secured asset), future movable assets, etc.

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### **3. Are there any publicity requirements in connection with movable hypothecs?**

The New Civil Code requires the registration of movable hypothecs with the Publicity Register for ensuring a priority order among creditors holding movable hypothecs on the same assets, as well as publicity towards third parties. The Publicity Register can be easily accessed through a tax-free Internet database, ensuring rapid verification of the records (available in Romanian only). The general rule is that the priority rank is given by the date of the registration of the movable hypothec with the Publicity Register. The creditor is bound to request the movable hypothec be removed from the Publicity Register within 10 days following the fulfilment of the secured obligation.

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### **4. Are there any specific rules applicable to movable hypothec agreements?**

The movable hypothec agreement must provide a determinable value of the secured obligation, as a threshold limiting the amounts that may be recovered by the secured creditor in case of enforcement. The agreement must describe the secured assets in sufficient detail as to reasonably allow identification of the secured assets, general descriptions for category of assets being no longer permitted (for example, "all the debtor's present and future movable assets" does not represent a sufficient description anymore). The security provider is allowed to sell or otherwise dispose of the asset throughout the entire duration of the movable hypothec agreement. As a general rule, a movable hypothec agreement cannot prevent the security provider from disposing of the hypothecated asset. Also, the New Civil Code prohibits negative pledges clauses in movable hypothec agreements.

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### **5. Do movable hypothecs enjoy specific enforcement procedures?**

The movable hypothec agreements are deemed enforceable titles, which provide a procedural advantage in case of enforcement, as the secured creditor would not be required to file a claim on the merits of the case. Throughout the enforcement procedure, before the sale of the secured assets, the debtor or any other interested person is entitled by law to pay the outstanding debt and to thus put an end to the enforcement procedure.

The parties to a movable hypothec agreement may agree on methods of sale to be used in case of enforcement. If the movable hypothec agreement is silent in this regard, the creditor may capitalise on the hypothecated assets through reasonable commercial conditions. Under a certain procedure, the secured creditor may appropriate the hypothecated assets for the settlement of its claim.

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**6. Are there any specific rules for immovable hypothec agreements?**

An immovable hypothec is created by agreement of the parties and by registration thereof with the relevant land book (under the New Civil Code, the registration has become a validity condition, however, this provision is not effective, yet). The immovable hypothec agreement must be notarised as a condition for its validity. Under the sanction of nullity, the immovable hypothec agreement must provide a proper description of the mortgaged property and details of the secured obligations. The security provider is allowed to sell or otherwise dispose of the hypothecated asset throughout the entire duration of the immovable hypothec agreement and as a general principle, an immovable hypothec agreement cannot prevent the security provider from disposing of the hypothecated asset.

The New Civil Code explicitly prohibits the negative pledges clauses in immovable hypothec agreements.

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**7. Are there any publicity requirements in connection with immovable hypothecs?**

The Cadastre Law No. 7/1996 sets out the legal framework for the registration of immovable hypothecs with the land books kept by the offices for cadastre and real estate publicity. The immovable hypothec registration system is aimed at ensuring the validity thereof and also the priority rank among secured creditors and the publicity against third parties. Thus, by reviewing the registrations in a land book, a third party would be informed about the existence of any immovable hypothecs encumbering the property. The land books can be relatively easy accessed. An internet database is also available for the verification of the real estate records.

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**8. Do immovable hypothecs enjoy specific enforcement procedures?**

If the debtor failed to discharge the debt on the due date, the secured creditor is

entitled to enforce the immovable hypothec and satisfy its receivable against the debtor by selling the hypothecated real estate following the procedure under the Civil Procedure Code (which procedure in many cases proves to be lengthy and bureaucratic). A properly notarised immovable hypothec agreement is an enforceable title on the basis of which the secured creditor can submit a formal request to the court, within a non-contentious procedure, in order to obtain approval to start the enforcement procedure.

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## 9. Does the suretyship (*fidejussio*) have certain specific traits, compared to the other security interests?

One particularity of the suretyship is that, when pursued by the creditor, the guarantor may use the specific defences, as follows:

- The benefit of discussion (Romanian: *beneficiul de discuțiune*), whereby the guarantor asks the secured creditor to first exhaust its remedies against the debtor before pursuing the guarantor; and
- The benefit of division (Romanian: *beneficiul de diviziune*), available where there are multiple guarantors for the same debt; should one guarantor uphold the benefit of division, the creditor would be obliged to pursue each of the guarantors' pro-rata with their undertakings.

Either of these types of defence may be contractually waived by the guarantors.

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## 10. Which are the main features of the letter of guarantee under Romanian law?

The letter of guarantee is a type of personal guarantee whereby the issuer irrevocably undertakes to pay an amount of money to a beneficiary, on its first demand and such obligation to pay is independent from the underlying obligation in relation to which the letter of guarantee was issued.

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## 11. Do letters of comfort have specific characteristics under Romanian law?

The letter of comfort is regulated by the New Civil Code as an irrevocable undertaking of the issuer to perform or abstain from performing an action, for the purpose of supporting the debtor in the performance of its obligations towards its creditor (such creditor being the beneficiary of the letter of comfort). The issuer of a comfort letter

may only be held liable for damages caused to the creditor, upon the latter providing evidence of the issuer's breach of the obligations undertaken by the comfort letter and only to the extent the principal debtor defaults towards the creditor. The issuer has a right of recourse against the principal debtor if it paid damages to the creditor.

# Intellectual Property

## 1. What does the Romanian intellectual property law protect?

Intellectual property rights are protected in Romania by various legal enactments applying specifically to each category of IP rights: patents, utility models, trademarks and geographic indications, industrial designs, topographies of semiconductor products, copyrights. The Romanian legal framework on IP rights has been gradually harmonised with the corresponding European legislation and, generally, with the principles provided in international treaties and conventions.<sup>1</sup>

## 2. Which are the relevant authorities in the field of intellectual property?

The public authorities invested with competence in the protection of intellectual property rights are the State Office for Inventions and Trademarks (OSIM) (in relation to industrial property i.e. inventions, trademarks, geographic indications, industrial designs, topographies of semiconductor products) and the Romanian Office for Copyright (ORDA) (relevant for copyright protected works).

## PATENTS

### 1. Who can apply for a patent?

The right to patent belongs to the inventor or to his/her rightful successor.

<sup>1</sup> Romania is a party to the main international treaties and conventions on intellectual property, among which: the Paris Convention for the Protection of Industrial Property (1883), including its subsequent revisions; the Convention establishing the World Intellectual Property Organisation (1967); the Marrakech Agreement establishing the World Trade Organisation (1994); the Madrid Arrangement (1967) and the Protocol related to the Madrid Arrangement (1989); the Trademarks Treaty (Geneva, 1994); the Nice Arrangement on trademarks classification (1957); the Treaty on Trademarks Law (Singapore, 2006); the Patent Cooperation Treaty (Washington, 1970); European Patent Convention (Munich, 1973); the Strasbourg Agreement concerning the International Patent Classification (1971); the Locarno Agreement on the classification of industrial designs (1968); the Hague Arrangement on the international deposit for industrial designs (1925); the Berne Convention on the protection of literary and artistic works (1886).

For inventor-employees, the right to patent belongs to the employer whenever the relevant inventions are made by the employee under a labour agreement which expressly provides that inventions are within the employee's specific duties. For inventions made with the use of the employer's experience, information or resources, the right to obtain the patent is vested in the employee, but the employer has the possibility to claim the rights over those inventions in return of a fair compensation paid to the inventor-employee.

In order to obtain protection at national level, applications for patent are submitted to OSIM. The invention shall be disclosed in the description, drawings and claims in a manner which is clear and complete as well as scientifically and technically correct. The applicant may invoke priority rights. The information comprised in the patent application will be kept confidential until the application is published by OSIM. The patent applications are published immediately after the expiry of a 18-month term from the date of the regular national filing or from the claimed date of priority. Published patent applications benefit from provisional protection until the patent is issued. Any person may submit to OSIM a cancellation application against the decision granting the patent within six months from the publication of such decision.

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## **2. Which are the conditions of patentability?**

Patentability conditions are harmonised with international regulations. An invention (for a product or a procedure in any technological field) is patentable in Romania if it is new worldwide, involves an inventive step (i.e. it does not follow evidently for a trained individual from the knowledge incorporated in the existing technical development stage) and is susceptible of industrial application.

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## **3. For how long is protection granted?**

The patent enjoying protection on the territory of Romania is valid for 20 years from the date the regular national application is filed, and is subject to yearly fees for maintenance.

## **UTILITY MODELS**

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## **4. What are the protection requisites?**

The protection of utility models is mainly regulated in Romania by Law No. 350/2007,

concerned with such technical inventions that cannot be protected by patent according to the Patent Law as they do not involve inventive activity. Utility models refer to any technical inventions provided that they are new (they are not already included in the current development stage of the technique), that they exceed the level of mere professional skill, and that they are applicable in the industrial field.

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## **5. Who can apply for protection of a utility model?**

The right to the utility model belongs to the inventor or his/her rightful successor. Utility models acquire protection in Romania by registration with the OSIM. The law permits international registration of utility models. International applications may be filed with foreign receiving offices and may indicate Romania as a designated country. Failure to open the national phase renders the application ineffective in Romania. The requests for international registration may also be filed with the OSIM, as receiving office. Applicants at the OSIM may re-qualify their request from patent to utility model and, conversely, from utility model to patent, without thereby causing the examination procedure to be automatically closed. Re-qualifications are only admitted once and are not available for international requests where the national phase has already commenced. The right to the utility model may be transferred, wholly or partially, by assignment or by exclusive/non-exclusive licensing. Utility models can be encumbered and pursued in enforcement procedures.

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## **6. For how long is protection granted?**

The duration of the protection of the utility model is of 6 years, available for extension for two 2-year each, successive periods, and may not, extensions included, exceed the maximum of 10 years.

## **TRADEMARKS**

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### **1. What are the protection requisites?**

According to the Trademark Law No. 84/1998, exclusive rights to use a trademark in Romania are granted by registration with the OSIM, either directly or by way of an international (WIPO) application based on the Madrid System.

In order to be registered, a trademark must not be identical or confusingly similar to a previous trademark belonging to a different owner and registered for identical or

similar products or services. Whenever the previous trademarks are notorious (either in Romania or in the European Union), the risk of confusion is analysed even if the new trademark is for products or services that are not identical or similar, if registration risks to cause damage to the notorious trademark. The applicant may invoke priority rights.

Trademark Law No. 84/1998 was significantly amended and supplemented in 2020.<sup>2</sup> Changes were made, *inter alia*, as regards the relative grounds for refusal. For instance, while under the previous regulation a relative ground for refusal was the fact that the trademark was liable to be confused with a trademark used abroad at the date of the application and which continued to be used there (and the application was submitted in bad faith by the applicant), currently a trademark is not to be registered where, and to the extent that, the trademark is liable to be confused with an earlier trademark protected (not necessarily used) abroad, provided that, at the date of the application, the applicant was acting in bad faith.

Furthermore, in accordance with the newly-enacted regulation, a trademark shall not be registered/declared invalid where an application for a designation of origin or a geographical indication had already been submitted in accordance with national laws or with the European Union legislation prior to the date of application for registration of the trademark, subject to its subsequent registration, and that designation of origin or geographical indication confers on the person authorised under the relevant law to use it the right to prohibit the use of a subsequent trademark in Romania.

Another important change is that the requirement for trademarks to have a graphic representation was removed from the trademark registration requirements. While previously registered trademarks had to have a graphic representation, now it is enough for the sign to be represented in a manner which enables a clear and precise determination of the subject matter of the protection afforded to its proprietor. This means that certain signs that could only be represented electronically may now be registered as trademarks – for instance, multimedia marks or hologram marks.

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## **2. Does Romanian law recognise exhaustion of a trademark?**

The concept of Community exhaustion of trademarks is statutorily recognised under the Trademark Law. According to this concept, the first sale of a trademark-protected product within the European Economic Space by the owner, or with the owner's consent, exhausts the trademark rights over these given products not only domestically, but also within the whole European Economic Space.

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<sup>2</sup> Law No. 112/2020 amending and supplementing Law No. 84/1998 on trademarks and geographical indications, in force as of 12 July 2020.

The direct consequence is that resellers within this region cannot be prevented from undertaking parallel imports, unless a legitimate interest related to the alteration of the respective products could be raised.

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### **3. For how long is protection granted?**

National trademarks are protected for 10 years counting from the date the application for registration has been filed. The protection may be further extended for additional periods of 10 years without any overall limitation

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### **4. Are European Union Trademarks protected in Romania?**

According to the rules applicable following Romania's accession to the European Union, European Union trademarks shall automatically enjoy protection on the Romanian territory. This mechanism operates ipso jure, without the need for the holder to fulfil any formalities or procedures at the OSIM. A potential conflict with a domestic trademark shall be solved based on the priority rules.

The holder of a national trademark previously registered in good faith is allowed to oppose the use of the European Union trademark only on Romanian territory. Oppositions may be raised to the competent Romanian courts in compliance with Regulation No. 2017/1001 on the European Union trademark. However, since the automatic extension of protection is not reciprocal (i.e. national trademarks do not automatically benefit from protection in the Member States) holders of national trademarks cannot substantiate, at the European Union level, a motion to annul or to obtain withdrawal of rights for lack of use against the owner of a subsequently registered European Union trademark.

## **INDUSTRIAL DESIGNS**

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### **1. What are the protection requisites?**

Based on the provisions of the Industrial Design Law No. 129/1992, the new external appearance of a product in two or three dimensions having a practical function may be registered as industrial design. Novelty and distinctive character are the registration conditions for an industrial design. A form is novel if it is practically unknown in the territory of Romania, and has not been disclosed for the same category of goods in Romania or abroad.

An industrial design is deemed to be distinctive (have an individual character) if the overall impression it has on the experienced user differs from the impression made by any industrial design made publicly available before the date of filing the application for registration, or before the priority date if priority was claimed.

The industrial design the appearance of which is determined by a technical function cannot be registered. Several industrial designs may be submitted for registration in the same application, in a multiple deposit comprising industrial designs intended to be incorporated in articles of the same category of goods as per the Locarno Agreement classification. Industrial designs subject to a multiple deposit should meet the condition of unity of design, unity of production or unity of use, or should belong to the same set or composition of items.

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**2. For how long is protection granted?**

The industrial design is valid for 10 years from constituting the national deposit and may be renewed for three successive 5-year periods upon payment of the legal fees.

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**3. Are Community Designs protected in Romania?**

According to the rules applicable following accession, EU designs automatically enjoy protection on the Romanian territory. This mechanism operates ipso jure, without the need for the holder to fulfil any formalities or procedures with OSIM. A potential conflict with a domestic design shall be solved based on the priority rules, the holder/applicant of an earlier local design registered/applied for in good faith being entitled to oppose the use of a Community design on Romanian territory.

**TOPOGRAPHIES OF SEMICONDUCTOR PRODUCTS**

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**1. What are the protection requisites?**

Only original topographies are protected. By topography of a semiconductor product it is understood a series of interconnected images, no matter how they are fixed or encrypted, representing the three-dimensional configuration of the layers of which a semiconductor product consists and where each image reproduces the design or a part of a design of a surface of the semiconductor product, at any stage of its production. The topographies of semiconductor products are protected in Romania through the registration with OSIM.

## 2. For how long is protection granted?

The exclusive rights granted to the owner by a registered topography expire 10 years after the first commercial exploitation anywhere in the world or 10 years after the registration was filed with the competent authority, whichever occurs first.

## COPYRIGHT

### 1. Which works can be protected under copyright rules?

The Copyright Law No. 8/1996 provides protection to all literary, artistic or scientific works, as well as to other intellectual creation works, provided that they are original, take a concrete form of expression, and are susceptible of being made known to the public. The protection granted under the Copyright Law applies to the following:

- Works authored by Romanian citizens, even prior to being made known to the public;
- Works authored by natural or legal persons domiciled or headquartered in Romania, even prior to being made known to the public;
- Architectural works located on the Romanian territory;
- Artists' interpretations or performances taking place on the Romanian territory;
- Artists' interpretations or performances which are fixed in sound recordings protected by the Copyright Law;
- Artists' interpretations or performances which are not fixed in sound recordings, but are transmitted by television or radio broadcastings protected under the Copyright Law;
- Sound or video recordings produced by natural or legal persons residing in Romania;
- Sound or video recordings fixed on any material for the first time in Romania;
- Radio/television programs broadcast by entities headquartered in Romania;
- Radio/television programs transmitted by entities headquartered in Romania.

Such works benefit from protection under the Copyright Law without registration or any other formality being required. Non-residents, individuals or legal entities, benefit from copyright protection as per the terms of the international treaties Romania is a party to or, absent such treaties, under the same terms as Romanian residents, on a reciprocity basis. Authors of such work have the moral right to retract it, indemnifying, if the case, the holders of the right to use the work should they incur damage by retraction. Individuals or legal entities that became copyright holders by succession or assignment, under the law, as well as editors of musical works and written works benefitting from rights which were transferred to them under individual agreements and who are entitled to at least a part of the revenues arising from the rights, are

recognised and protected as copyright holders.

A concept that was introduced by the Copyright Law and that applies to all types of intellectual creations in the literary, artistic or scientific field is the concept of “orphan work”. Orphan work refers to intellectual creative work for which the holder of the right has not been identified or located, although a diligent search has been carried out and the entity conducting the search maintained records of such diligent searches. The orphan work status does not apply to anonymous works or to works created under a pseudonym. Orphan works that have been considered as such in another Member State shall be considered as having the same status on the territory of Romania.

The publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions and public-service broadcasting organisations are entitled, under the law, to use the orphan works, provided that such use is exclusively intended for the purpose of achieving aims related to their public-interest mission.

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## **2. For how long is protection granted?**

The Romanian copyrights last for the lifetime of the author plus other subsequent 70 years after their death, being transmitted to lawful successors, irrespective of the date when the work was brought to public knowledge. The same applies to software works. The person who, after the expiry of the copyright protection period, lawfully brings to public knowledge, for the first time, a previously unknown work, benefits from protection similar to that offered to authors for a period of 25 years from the date the work was first made public. As a general rule, protection for artists’ interpretations or performances is valid 50 years from the date of such interpretation or performance. However, if such were fixed on a material during this period of time (except for phonograms), and were legally published or communicated to the public, the 50-year protection period starts from the date of such publication or communication, whichever occurs first.

The same applies to the rights of video recordings producers. In the case of performances fixed on a phonogram, the protection period is of 70 years as of the date of the publication or communication thereof, whichever occurs first.

The same applies to the rights of phonogram producers. For the purpose of this law, a phonogram is deemed as published for a commercial purpose when it is made available to the public by sale or by wired or wireless means, so that anyone may have access to it when and where they please.

### 3. What are the main terms of a copyright licensing agreement?

Copyrights are classified in moral rights and economic or patrimonial rights. While moral rights (e.g. the right to decide whether and how the work is going to be published; the right to decide the name under which the work shall be published, etc.) may not be transferred by the author, economic rights may be assigned to third parties by way of copyright licensing. The author or, as the case may be, the holder of the economic copyright, may license the patrimonial copyrights, in whole or in part, as well as restrict the use of the work by the licensees to certain territories and/or to certain time limits.

The licensing agreement must identify the patrimonial rights that are transferred thereby and must provide, for each right, the permitted methods of use, the term and scope of the licensing, as well as the payments due to the holder of the copyright. If any of these provisions is missing, the interested party may request the termination of the agreement. The licensing agreement concerning all the future works of the author, whether or not such works are named, is null and void.

If the licensor is also the author of the work and the licensee uses the work in a manner that may be found insufficient and conflicting with the licensor's legitimate interests, the author has the possibility to claim invalidity of the copyright license agreement after two years from the entry into force of the license. The term is of three months in case the work was to be published in a daily publication and of one year if the work was supposed to be published in periodicals. The author may not waive in advance such right to seek termination.

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### 4. Who owns copyrights over works for hire?

In the case of agreements for creation of future works, in the absence of a clause to the contrary, the economic rights belong to the author.

The person contracting the creation of a future work is entitled to terminate the agreement if the work fails to comply with the agreed conditions. In case of termination, the author keeps the amount which he/she has already received. In the absence of a contractual clause to the contrary, for the works created by employees while fulfilling their professional duties under an individual labour agreement, the patrimonial rights belong to the author. In this case, the author may authorise third parties to use the work only with the employer's consent and subject to compensation for the employer's contribution to covering the costs of creation. The employer may utilise the work in its business without authorisation from the author-employee.

Conversely, contractual clauses may provide that, for works created for the fulfilment of professional duties stipulated in the individual labour agreement, the patrimonial rights do not belong to the author of the work. If such clauses do not set forth the duration of the assignment of patrimonial rights, the term shall be of three years as of the work delivery date. Upon expiry, the patrimonial rights are transferred to the author and, absent a clause to the contrary, the employer is entitled to request the author to pay a reasonable quota from the income obtained from utilisation, in order to compensate costs borne by the employer for the creation.

In the case of copyright on computer programs, unless otherwise agreed, the patrimonial rights in such programs created by one or more employees in the course of their duties or following the instructions from their employer shall belong to the latter.

The economic rights on photographic work performed under an individual labour agreement, or further to an order, are presumed to belong, for a period of three years, to the employer or the person that placed the order, if not otherwise provided in the agreement.

The photograph of a person, when it is made further to an order, may be published, reproduced by the photographed person or its successors, without the consent of the author, if not otherwise agreed.

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## **5. Is licensing permitted through collective management bodies?**

The holders of copyrights and related rights may exercise their legal rights individually or, based on a mandate granted directly, through collective management bodies.

Collective management is mandatory for certain rights (i.e. the right to compensatory remuneration for the private copy; the right to a fair remuneration for public loan in certain cases; the right of resale-droit de suite; the right of broadcasting for musical works; the right of public release of musical works, except for the public screening of cinematographic works; the right to fair remuneration acknowledged to performing artists and producers of phonograms for public communication and radio broadcasting of phonograms published for commercial purposes or the reproduction thereof; the right to cable retransmission; the right to a fair compensatory remuneration for orphan works; the online multi-territorial licensing right of use of musical works), for which the collective management bodies also represent holders of rights that did not grant them a mandate, and is optional for other rights (i.e. the right to reproduce musical works on phonograms or videograms; the right to publicly communicate works, except for musical works and artistic performances in the audio-video sector; the right of loan,

except for certain cases provided by law; the right to radio broadcast the works and artistic performances in the audio-visual sector; the right to fair remuneration resulting from the assignment of lease rights).

## 6. How can imports of goods suspected of infringing intellectual property rights be banned?

The customs authorities are enabled to fight against the import of goods suspected of infringing intellectual property rights, including by retaining goods and verifying their authenticity. The customs authorities collaborate closely with holders of intellectual property rights in order to facilitate a quick authenticity check on suspect products imported in Romania. Goods that are found to violate intellectual property rights are in most cases destroyed, or - if the holder of the breached intellectual property right agrees - offered free of charge for humanitarian purposes.

In practice, the customs authorities are active in retaining goods that are suspect of infringing intellectual property rights, being especially focused on excisable goods (e.g. cigarettes). However, destroying the goods proven to be counterfeited is a lengthy and cumbersome process.

## COVID-19

### 1. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?

The effects of the COVID-19 pandemic have been felt worldwide and across all business sectors. Romania took restrictive measures against the spread of the COVID-19 pandemic and declared a state of emergency from 16 March 2020 to 15 May 2020. In this context, OSIM issued a statement by which all time limits set to expire between 16 March 2020 and 15 May 2020 were suspended for the whole period of the emergency state. Public relations at OSIM's headquarters, including hearings, have also been suspended and documents could only be submitted via electronic means. These measures have been in place only during the state of emergency. OSIM is currently operating under normal conditions.

The pandemic may also leave an impact on the protection of existing IP rights. Whilst in normal circumstances IP rights holders are granted protection over their IP against third-party use (e.g. patent gives a drugmaker exclusive rights to manufacture a vaccine it developed, also providing it the power to charge a price that covers the costs of

research and development), the pandemic has created an unprecedented situation. In the context of the discussions at European level on sharing intellectual property rights over critical technologies in such times of crisis as the COVID-19 pandemic, intellectual property rights holders may be forced, even temporarily, to allow third-parties to use their rights, for example patents for medicinal products, for the public interest.

Law No. 64/1991 on patents provides for the possibility of obtaining a compulsory license for the use of an invention registered with OSIM without the consent of the holder in situations of national emergency or extreme urgency or in situations of public use for non-commercial purposes. An equitable remuneration to the invention holder would be fixed by the court. The purpose of the compulsory licensing is to supply the market in extreme situations. Hence, the court, at the request of the holder, can withdraw the compulsory license when the circumstances leading to the grant of the license no longer exist.

# Pharmaceuticals

## LEGISLATION AND AGENCIES

### 1. What are the main regulations on medicinal products?

In line with European regulations and practice, the regime of medicinal products in Romania is highly regulated.

Law No. 95/2006 on the healthcare system reform - Title XVIII (Health Law) is the main regulation in this field while detailed substantive provisions are included in secondary legislation issued by the Government or competent public authorities. The main secondary enactments on medicinal products include Minister of Health Order No. 368/2017 on pricing, Government Decision No. 140/2018 approving the services packages and Framework contract regulating the conditions for granting medical assistance within the social health insurance system for 2018-2019 (extended for 2020 - March 2021), and Government Decision No. 720/2008 on the list of INNs corresponding to reimbursed medicinal products.

Essentially, the Romanian legislation in the pharmaceutical area observes the European one, with which it has been properly harmonised during the past 14 years. There are, however, specific requirements set forth by the Romanian regulatory authorities in certain domains, such as reimbursement and pricing of prescription-based medicinal products, clawback tax applied to the marketing authorisation holders or the health technology assessment (HTA). Notably, these special regulations may be subject to unpredictable changes, depending on variations in economic policies and budgetary constraints.

### 2. Which are the primary government agencies responsible for the enforcement of regulations related to medicinal products?

The Ministry of Health is the public authority that establishes and monitors the implementation of general policies, strategies and regulations in the healthcare system, including the pharmaceutical area. Among other important attributions, the Ministry

of Health approves the prices of prescription-based medicinal products, coordinates the national health programs concerning the treatment of major diseases with specific products and approves the relevant HTA criteria and methodology.

The National Health Insurance House (CNAS) is the public institution that issues secondary legislation within the social health insurance system, monitors allocations made from the National Fund for Social Health Insurance and oversees the release and payment of the reimbursed medicinal products. CNAS also has attributions in establishing the consumption data on reimbursed medicinal products, which are quarterly notified to the marketing authorisation holders in view of determining the amount of clawback tax they owe.

The National Agency for Medicines and Medical Devices of Romania (Agency), subordinated to the Ministry of Health, is the specialised public institution empowered to issue certain regulations concerning authorisation, marketing, manufacturing, import and distribution of medicinal products, to oversee the activities of wholesale distributors, manufacturers or brokers, and to monitor compliance with pharmacovigilance-related requirements. The Agency also authorises and regulates the performance of the clinical trials and endorses the advertising materials used for the promotion of medicinal products.

In 2014, the Agency was empowered to implement the HTA mechanism used for having the medicinal products included in or excluded from the list of medicines reimbursed in the social health insurance system (DCI List), as well as a means of proposing to the Ministry of Health the draft of such list (to be further approved by Government decision).

## AUTHORISATION

### **1. How can a medicinal product be placed on the local market?**

According to the Health Law, medicinal products may only be marketed in Romania based on a valid marketing authorisation issued by the Agency or an authorisation issued under the EU centralised procedure. Applicants not headquartered in Romania or in another EU member state may not receive marketing authorisations for the Romanian market.

The Agency issues authorisations for medicines to be marketed in Romania only (the national procedure) or in several EU Member States, including Romania,

simultaneously (the decentralised procedure). Likewise, a valid authorisation for marketing medicines in one or more EU Member States may be recognised for Romania by the Agency (the mutual recognition procedure). Finally, the marketing authorisation may be issued directly by the European Medicines Agency in accordance with Regulation (EC) No. 726/2004 (the centralised procedure).

The marketing authorisation procedure in Romania is generally in line with the one set forth under the European regulations. The marketing authorisation application form to be filed with the Agency is similar to the application form required by the European Medicines Agency in the centralised procedure, while the procedures carried out before the Agency entirely transpose the requirements laid down under Directive 2001/83/EC.

The initial validity period of the marketing authorisation issued by the Agency is of five years. The authorisation may not be denied, suspended or withdrawn for reasons other than the ones set forth in the Health Law. As regards the exclusivity data period set forth under Directive 2001/83/EC, Romania decided to grant a 10-year period of protection.

## **PRICING**

### **1. Are there any price restrictions to be observed?**

The Ministry of Health establishes and approves, by order of the Minister, the maximum prices for prescription-based medicines and reimbursed non-prescription medicines (OTCs) to be marketed in Romania. The pricing of all other OTCs is not subject to specific approval and needs only to be notified to the Ministry of Health.

The legal regime of prescription medicines pricing is set forth in Minister of Health Order No. 368/2017, as further amended and supplemented (Pricing Order). According to it, the order for approval of the manufacturer price proposed by the marketing authorisation holder or its local representative is to be issued by the Ministry of Health within 90 days after the complete application is lodged.

In order to obtain approval, the proposed manufacturer price must be lower or equal at most to the lowest price of the same product available in twelve reference countries provided in the Pricing Order. As an exception, the maximum price of immunological and blood/plasma-based products must be lower or equal at most to the average of the lowest three prices of the same product in the said reference countries). Another special rule, aimed at reducing the allowed manufacturer price threshold for

reimbursed medicines, states that the maximum manufacturer reference price for generic medicines or biosimilar ones cannot exceed 65% (80% in case of biosimilars) of the manufacturer price of the correspondent innovative product.

The prices of the innovative medicines which lose their patent protection after the entry into force of Pricing Order (29 March 2017) must be proposed by their marketing authorisation holders at a level that may not exceed the generic/biosimilar reference price established at the time of the first generic/biosimilar market entry. As for the innovative medicines that have lost their patent before said date and for which generic/biosimilar medicinal products are available at that date, the manufacturer price proposed may not exceed 65%/80% of the approved price of relevant medicine valid at the moment of approval of the first/biosimilar generic medicine price, updated with the official inflation rate until 31 December 2016.

The maximum wholesale and retail (pharmacy) distribution prices of medicines are computed in accordance with a specific formula that takes into account the approved manufacturer price and the maximum wholesale and pharmacy margins, which are also regulated by the Pricing Order.

Once determined, the manufacturer prices as well as the wholesale and pharmacy prices for medicines subject to reimbursement are included in the National Catalogue of Medicine Prices (CANAMED), which is periodically approved by order of the Minister of Health, and may not be exceeded.

The prices thus approved are valid for a maximum one-year period and are subject to an annual correction procedure undertaken by the Ministry of Health.

There is also a National Public Catalogue of Prices, which provides the maximal prices of all medicines authorised in Romania and is approved annually by the Ministry of Health. The level of the prices within said catalogue is set by a more relaxed method (i.e. the maximum price is lower or equal at most to the average of the lowest three prices of the same product available in the said 12 reference countries), however there are no detailed rules on the actual applicability of such prices (they may not be used for medicinal products sold to be reimbursed from public funds).

**REIMBURSEMENT**

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**1. How can a medicinal product be reimbursed?**

Medicinal products may be reimbursed only if included in the reimbursed DCI

(INN) List, which is approved by Government decision (amending and completing Government Decision No. 720/2008). The DCI List provides for the international non-proprietary name (DCI) of the medicines which are subject to reimbursement by the State in the social health insurance system or within national health programs.

In order to be included in the DCI List, new medicinal products must first be evaluated and endorsed by the Agency in accordance with the HTA criteria and methodology set forth under the Minister of Health Order No. 861/2014, as further amended and supplemented. The HTA rules also apply to the INNs already included in the DCI List, for which an extension of the therapeutic indications is sought.

Depending on the score obtained following the HTA process, the INNs may be unconditionally included on the DCI List, or included based upon a conditional decision, or denied inclusion. A decision for conditional inclusion may be taken should the marketing authorisation holders and the health authorities (i.e. Ministry of Health and CNAS) conclude cost-volume or cost-volume-outcome agreements concerning the medicines in question. The medicines conditionally included on the DCI List and thus reimbursed are subject to a special tax burden (i.e., percentage of the aggregate costs of the consumed medicines, contractually undertaken by marketing authorization holder), higher than the customary clawback tax applied to medicines already on the list.

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## **2. Are there any special coverage and pricing rules applicable to reimbursed products?**

The products included on the DCI List are reimbursed by the State in accordance with specific rules highly regulated by secondary legislation. Essentially, medicinal products are reimbursed according to a specific reference price, which is lower or, as an exception, equal to the approved price set out in CANAMED.

The DCI List includes three main sub-lists (A, B and C), with sub-list C including three sections (C1, C2 and C3). The percentage of reimbursement is of 90% for medicines on Sub-list A, 50% for medicines on Sub-list B and 100% for medicines on Sub-list C (sections C1 and C3), and applies to the reference price. Medicines within Section C2 of Sub-list C are covered at the value of the reimbursement price. CNAS and its county branches reimburse the value of the medicines on the DCI List (save for medicines within Sub-list C, section C2) in accordance with the rules set forth in the bi-annual framework contract regarding the conditions for granting medical assistance in the social health insurance system (approved by Government decision) and in the secondary legislation issued by CNAS and/or the Ministry of Health.

With regard to determining the reference price used in the social health insurance system for medicines included on Sub-lists A and B, the secondary legislation issued by CNAS provides for a formula based on a breakdown of the DCIs into therapeutic clusters as per the relevant ATC codes and the defined daily dosage. The reimbursement reference price will be determined at the value of the medicinal product with the lowest price in the relevant cluster. Determining the reference price of medicines included on Sub-list C, sections C1 and C3 takes into account the ATC classification per each DCI, assimilated pharmaceutical form, and strength. The reference price will be computed as per said elements, by applying a specific percentage to the lowest price per therapeutic unit.

For the medicines within section C2 of Sub-list C, which are used in the national health programs, the secondary legislation issued by the Ministry of Health provides that the reimbursement price is determined by applying a specific percentage (120%) to the lowest retail price per therapeutic unit, per each DCI, assimilated pharmaceutical form and strength.

## **DISTRIBUTION**

### **1. Is any special authorisation required for medicine wholesalers?**

According to the Health Law and secondary legislation issued by the Ministry of Health, a wholesale distributor involved in any activities of sale, purchase, warehousing, handling, transportation, delivery or export of medicinal products must hold a wholesale distribution authorisation. Authorised manufacturers of medicines are deemed authorised as wholesale distributors of the manufactured products.

The wholesale distribution authorisation is issued by the Agency within maximum 90 days as of the date when the applicant files complete and valid documentation, subject to a favourable result of the inspection carried out by the Agency's representatives to the warehouses and headquarters of the applicant. The authorisation is valid for an indefinite period of time and may be revoked by the Agency should the holder fail to comply with the conditions for authorisation or operation requirements. The wholesale distributors must also obtain from the Agency and maintain a good distribution practice certificate.

The applicant should not necessarily be the owner of the warehouse but may not use such an authorised warehouse other than based on a contract concluded with the authorised owner of the warehouse. The secondary legislation permits certain

activities such as handling, transportation or delivery to be contracted from third party wholesalers.

In line with European regulations and practice, Romanian legislation imposes on wholesale distributors a public service obligation to properly and continuously supply the Romanian market with adequate quantities of medicines in order to cover the needs of patients to be covered.

## **ADVERTISING**

### **1. Which are the forms of advertising and promotion set forth under the local regulations?**

Advertising of medicinal products must be performed with strict observance of the rules laid down in the Health Law and the Minister of Health Order No. 194/2015 on the Rules for assessment and approval of advertising of medicinal products (Rules). Under the law, advertising includes any form of information disseminated through direct contact (door-to-door system) and any form of promotion aimed at stimulating prescription, distribution, sale or consumption of medicines.

The Health Law expressly identifies the following forms of advertisement:

- Advertisement of medicines addressed to the wide public;
- Advertisement of medicines addressed to persons qualified to prescribe or distribute them;
- Visits of medical sales representatives to persons qualified to prescribe medicines;
- Supply of medicine samples;
- Stimulation of prescription or distribution of medicines, by offering, promising or granting pecuniary advantages, unless such have a symbolic value;
- Sponsorship of promotional meetings attended by persons qualified to prescribe or distribute medicines;
- Sponsorship of scientific congresses attended by persons qualified to prescribe or distribute medicines, especially by way of paying for travelling and accommodation expenses.

### **2. Are there any restrictions and prohibitions imposed on advertising activities?**

Advertisement addressed to the wide public is allowed only for medicines that may

be used without a prescription from the physician and is forbidden for prescription-only medicines, medicines reimbursed in the health insurance system, and medicines containing psychotropic or narcotic substances.

Advertisements addressed to persons qualified to prescribe or distribute medicines must provide at least the essential information compatible with the summary of product characteristics and its classification for release. The law expressly forbids the advertiser from offering or promising any gifts or any other advantages, pecuniary or in kind, while carrying out advertising activities to persons qualified to prescribe or release medicines, except where such advantages are inexpensive and relevant for medical or pharmaceutical practice.

Hospitality within promotion events is allowed should it be strictly limited to its main scope and be not extended to persons other than healthcare professionals.

The competent authority to oversee the advertising of medicines is the Agency, which endorses the advertising materials and applies sanctions for failure to observe the relevant legal requirements. The Rules apply not only to pharmaceutical companies, their subsidiaries and representation offices, but also to any other partners (agents, agencies, representatives of marketing authorisation holders) contracted in connection with the performance of any form of advertisement for medicines. Pharmaceutical companies are held liable to observe the obligations set forth in the Guide even if they assigned the promotion or advertising activities to specialised third parties.

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### **3. Is there any special disclosure requirement in respect of the interactions with healthcare providers?**

On February 2014, the Health Law has been supplemented to regulate special disclosure obligations related to certain interactions between pharmaceutical companies and healthcare providers.

Thus, medicine manufacturers, marketing authorisations holders or local representatives thereof as well as wholesale or retail distributors have to annually declare to the Agency all sponsorship activities and any other expenses borne for physicians, nurses, professional organisations, patient organisations or other organisations within the healthcare field; the same obligation is also incumbent upon the beneficiaries of said sponsorships and expenses.

Once disclosed, the information is posted on the websites of the Agency, sponsors and beneficiaries.

## TAXATION

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### **1. Is there any special tax burden related to medicinal products?**

In order to control medicine consumption and to ensure financing for increased consumption, the Romanian Government imposed a special tax on marketing authorisation holders, or their local representatives, in connection with medicines subject to reimbursement from public funds. The so-called “clawback tax” was introduced in October 2009 and was subject to several legislative changes due to enforceability and transparency flaws. The clawback tax is still being challenged by the entire pharmaceutical industry demanding a more transparent taxation mechanism.

The current tax, which applies with certain variations starting October 2011, is computed by applying a specific percentage to the value of the quarterly consumption of reimbursed medicines that belong to each marketing authorisation holder. Starting with 2020, said percentage, which was previously variable and determined by CNAS, became fix and differentiated per type of the relevant medicinal products (innovative, generic/biosimilar or locally manufactured ones); medicinal products are classified by a quarterly order issued by the Ministry of Health.

A higher level of tax burden, whose computation formula uses certain elements set forth in the price-volume or price-volume-outcome agreements, applies in respect of the medicines conditionally included in the DCI List.

Based upon the consumption data unilaterally issued and notified by CNAS, the taxpayers must determine the amount of tax owed, declare it to the competent fiscal bodies and pay it by the 25th of the second month following the end of the relevant quarter. The tax is collected by the fiscal bodies under the rules set forth in the Fiscal Procedure Code.

## COVID-19

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### **1. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?**

The state of emergency and subsequent state of alert instituted against the background of the Covid-19 crisis entailed certain exceptional and derogatory measures in the health field, which were regulated through normative acts of an exceptional

nature (decree-laws or military ordinances) as well as through or usual enactments (Government ordinances and decisions or Minister of Health orders).

Among others, the duration of the normative acts on the provision of medical services and medical products within the social insurance system (especially the Framework Contract and the legislation of national health programs) was successively extended; the prescription of “off-label” treatments for patients infected with SARS-CoV-2 virus was allowed (based on the endorsement given by the medicine policy committee within the healthcare unit); the export/distribution abroad of medicinal products and medical devices used to treat COVID-19-associated diseases was suspended for a determined period (6/12 months).

The above measures have an exceptional and temporary nature and derogate from the common legal regime, hence they should cease at the stipulated deadline or at the end of the state of alert, respectively.

# Personal Data Protection

## LEGISLATIVE AND REGULATORY FRAMEWORK

### 1. What is the relevant legal framework? Are there any pending legislative amendment proposals?

#### Primary legislation

The general legal framework governing data privacy has changed substantially once Regulation (EU) 2016/679 (GDPR) came into force on 25 May 2018.

In consideration of the so-called GDPR “opening clauses”, Romania has enacted implementation legislation, namely:

- Law No. 190/2018 on measures to implement GDPR, setting forth special rules for the processing of certain categories of personal data, certain derogations from GDPR, certain special rules regarding the data protection officer and certification bodies, as well as certain derogations from sanctions applicable with respect to public and private entities. Law No. 190/2018 has been amended by Law No. 233/2019 introducing statistical purposes on the list of derogations from Articles 15, 16, 18 and 21 of GDPR;
- Law No. 129/2018 amending and supplementing Law No. 102/2005 regarding the setting up, organisation and functioning of the National Supervisory Authority for Personal Data Processing (DPA), comprising the rules on the organisation and functioning of the DPA;
- Law No. 284/2018 on the use of PNR (passenger name records) data for the prevention, detection, investigation and prosecution of terrorism offenses and serious crime, as well as for the prevention and elimination of threats to national security;
- Law No. 363/2018 on the implementation of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such

- data, and repealing Council Framework Decision 2008/977/JHA;
- Law No. 362/2018 on the implementation of NIS Directive 2016/1148 ensuring a high common level of security of computer networks and systems with regard to preventing, detecting and reacting to cyber-security breaches and the list of entities considered “operators of essential services” and subsequent methodological norms. Law No. 362/2018 has been amended by the Government Emergency Ordinance No. 119/2020 transferring the power to establish and submit to the Government’s approval (i) the threshold values for determining the significant disruptive effect of incidents on the networks and computer systems of essential service operators and the (ii) the technical rules for determining the impact of incidents from the Ministry of Communications and Information Society to the National Cyber Security Incident Response Center (CERT-RO) and the Interinstitutional Working Group;
  - Law No. 209/2019 on payment services and the amendment of other enactments, implementing the Payment Services Directive (‘PSD2’), regulation the conditions of access to the activity of providing payment services, the prudential supervision of payment institutions and specialised providers of information services regarding accounts, the transparency regime for conditions and information requirements regarding payment services, as well as the corresponding rights and obligations of payment service users and payment service providers;
  - Law No. 129/2019 implementing the AML Directive ((EU) No. 849/2015), regulating know-your-customer measures.

Aside from this new legislation, there are still some relatively old data privacy legal norms governing specific sectors, such as Law No. 365/2002 on electronic commerce and Law No. 506/2004 on the processing of personal data and protection of private life in the sector of electronic communications.<sup>1</sup>

Furthermore, as of 26 June 2020, Romania had signed the Council of Europe Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+).

## **Secondary legislation**

The DPA has issued the following secondary enactments addressing essential GDPR aspects:

- DPA Decision No. 128/2018 on the approval of the form of the notification of a personal data breach in accordance with GDPR;<sup>2</sup>
- DPA Decision No. 133/2018 on the approval of the procedure for receiving and

<sup>1</sup> The E-Privacy Law implements Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

<sup>2</sup> <http://www.dataprotection.ro/servlet/ViewDocument?id=1516>.

handling complaints;<sup>3</sup>

- DPA Decision No. 161/2018 on the approval of the procedure for conducting investigations;<sup>4</sup>
- DPA Decision No. 174/2018 on the approval of the cases in which a data privacy impact assessment is mandatory;<sup>5</sup>
- Methodological Norms implementing Law No. 362/2018;
- Government Decision No. 963/2020 for the approval of the List of essential services;
- Government Decision No. 976/2020 on the approval of threshold values for establishing the significant disruptive effect of incidents on the networks and computer systems of essential service operators.

## **Upcoming national legislation in data privacy sector**

As for pending proposals of enactments, we note the following draft regulations:

- E-Privacy Regulation;
- Draft law on electronic identification and trust services for electronic transactions in the internal market, sent for report to the Permanent Commissions of the Parliament;
- Draft law on repealing Articles 6 and 9 of Law No. 190/2018. Article 6 of Law No. 190/2018 covers the processing of personal data and special categories of personal data in the context of a public service task. Article 9 of Law No. 190/2018 covers the safeguards for the processing of personal data by political parties and citizens' organizations belonging to national minorities and non-governmental organizations. This draft law enjoys the support of the Romanian DPA, according to its annual report for 2019;<sup>6</sup>
- Draft law on enforcing public authorities' obligation to provide personal data processed in respect to the data subject making the request, adopted by the Senate but not yet promulgated;
- Draft law on amending Law No. 362/2018 on the implementation of NIS Directive 2016/1148 ensuring a high common level of security of computer networks and systems with a view to preventing, detecting and reacting to cyber-security breaches and the list of entities considered "operators of essential services" and subsequent methodological norms, adopted by the Senate but not yet promulgated;
- Romanian DPA Draft Decision establishing additional requirements for the accreditation of certification bodies pursuant to Article 43 of the GDPR.<sup>7</sup>

3 <http://www.dataprotection.ro/servlet/ViewDocument?id=1517>.

4 <http://www.dataprotection.ro/index.jsp?page=control&lang=en>.

5 <http://www.dataprotection.ro/servlet/ViewDocument?id=1556>.

6 Such is available at: <https://www.dataprotection.ro/?page=Rapoarte%20anuale&lang=ro>.

7 Such is available in Romanian or English at: [https://www.dataprotection.ro/index.jsp?page=Proiect\\_decizie\\_criterii\\_certificare\\_ANS&lang=en](https://www.dataprotection.ro/index.jsp?page=Proiect_decizie_criterii_certificare_ANS&lang=en).

## Guidelines

The Romanian DPA issued a Guideline comprising punctual clarifications for controllers, processors and natural persons regarding the application of the provisions of GDPR, of Law No. 190/2018 and of the decisions issued by the Romanian DPA<sup>8</sup>.

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### **2. Which is the relevant authority in data protection field?**

The local authority with overall competences in data protection field is the Romanian Authority for Personal Data Protection and Supervision – DPA.<sup>9</sup>

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### **3. Which entity is the national accreditation body named in accordance with Regulation (EC) No. 765/2008 of the European Parliament and of the Council (1) in accordance with EN-ISO/IEC 17065/2012?**

Currently, the national accreditation body recognised by Law 190/2018 is the Romanian Accreditation Association – RENAR.

Certification Bodies will be accredited according to applicable legal regulations in accordance with EN-ISO / IEC 17065 and with the additional requirements set by the DPA, as well as with the provisions of Article 43 of GDPR.

## LOCAL PARTICULARITIES

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### **1. What are the DPA's investigation powers in Romania?**

The DPA's inspection staff is entitled to:

- Carry out investigations, including on-the-spot;
- Request and obtain from the controller and the person authorised thereby and, where appropriate, from their representative, on the spot and/or within a specific time frame, any information and documents, regardless of the storage medium;
- Retrieve copies of any requested information;
- Have access to any premises of the controller and the person authorised by the

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<sup>8</sup> Such is available in Romanian only at: [https://www.dataprotection.ro/?page=Comunicat\\_lansare\\_ghid\\_intrebari\\_si\\_raspunsuri&lang=ro](https://www.dataprotection.ro/?page=Comunicat_lansare_ghid_intrebari_si_raspunsuri&lang=ro).

<sup>9</sup> The official website of the DPA is <http://www.dataprotection.ro>.

controller;

- Have access to and verify any equipment, medium or data storage medium, necessary for carrying out the investigation, according to the law;
- Conduct audits and hearings of persons whose statements are considered relevant and necessary for the investigation; and
- Conduct audits onsite, at the headquarters of the DPA or via written correspondence.

Where its access to information is not granted or otherwise hindered, the DPA may obtain judicial authorisation to proceed with the control.

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## 2. How can a complaint be submitted with the DPA?

Complaints can be filed by any person who considers that the processing of his/her personal data is unlawful, particularly if their habitual residence, place of work or place of the alleged violation is located, or occurs within the territory of Romania.

The following key rules should be considered when filing complaints with the DPA:<sup>10</sup>

- Form and content:
  - Must be written in Romanian or English;
  - Must provide the full identification data of the petitioner and, where the case, of the person authorised by the petitioner;
  - Must provide full identification data of the controller or its proxies;
  - Shall be signed in physical or electronic form, and in the case of petitions sent electronically that cannot be signed, the DPA may request confirmation of the accuracy of the electronically transmitted data;<sup>11</sup>
  - Must indicate a detailed description of the object of the complaint, actions taken by the petitioner in relation to the controller or its representatives, the state of facts and arguments supporting the allegations, as well as all related supporting documentation.
- Rules for submission:
  - May be submitted either to the general registry at the DPA or may be sent by post, including electronic mail, or by use of the electronic form available on the DPA website;
  - May be filed by the petitioner or its legal/ authorised representative or via a body, an organisation, association or non-profit foundation active in the field of protection of the rights and freedoms of data subjects.

<sup>10</sup> Either by using the standard form provided within Annex 2 of DPA Decision No. 133/2018 or by filling a separate form.

<sup>11</sup> The complaints may be sent in electronic form at [plangere@dataprotection.ro](mailto:plangere@dataprotection.ro).

The petitioners may expressly request the confidentiality of personal data, except where, for the proper settlement of the lodged complaints, the petitioner’s identification data must be disclosed to the defendant.

As a rule, submission of complaints is free of charge. By exception, the DPA might apply a reasonable administrative fee or even refuse to assess the complaint where such is clearly unfounded or excessive.

Where a legal action is brought before the court in respect of the same subject matter, the DPA may order the suspension and / or quash the complaint, as appropriate. Legal actions before courts are free of any stamp duties.

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### **3. Are there any national rules governing the security breach topic?**

Currently, the national legislation does not address any specific rules on the security breach matter. Therefore, the general rules prescribed by GDPR shall apply accordingly.

Nevertheless, the DPA has published on its website a template form for security breach notifications. The form can be signed and lodged electronically with the DPA, to a dedicated e-mail address - *brese@dataprotection.ro* or submitted in physical counterpart to the DPA.

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### **4. Are there any special requirements for being a local DPO?**

The DPO must have appropriate knowledge to fulfil the data privacy tasks specific to such position within the organisation. In this respect, the DPA has ruled that the DPO must:

- Have expertise in data protection legislation and practices at national and EU level;
- Have the necessary level of knowledge in the field of data protection, depending *inter alia* on the type of data processing operations performed within the organisation and the level of protection required for processed personal data;
- Understand the processing operations carried out, as well as information systems and security and data protection needs;
- In the case of a public authority or institution, it must also have knowledge of the legal regulations of organisation and their activity, as well as the internal administrative procedures for the deployment activity.

The DPO may hold another position within the controller and thus carry out other

tasks than those in relation to his/her position, provided that such do not generate any conflict of interest. For instance, the DPO cannot hold the position of executive director, operational director, Chief Financial Officer, Head of Medical Service, Head of Marketing, Head of the Human Resources department or Head of the IT department within the organisation.

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## 5. How do you notify the DPO with the DPA?

The DPA has made available on its website a standard form for DPOs notification. The notification must be filled in and submitted via the DPA website (at [https://www.dataprotection.ro/formulare/formularRpd.do?action=view\\_action&newFormular=true](https://www.dataprotection.ro/formulare/formularRpd.do?action=view_action&newFormular=true)).

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## 6. Are there any local rules addressing the processing of employees' personal data?

Local legislation provides for special rules to be observed when monitoring the employees by electronic communication means or via CCTV at the workplace based on the *legitimate interest* of the controller.

As per such rules, the monitoring may occur only where:

- The *legitimate interests* pursued by the controller (employer) are well grounded and override the interests, rights and freedoms of targeted data subjects (employees);
  - The employer provided the employees with comprehensive and overt information before the surveillance occurred;
  - The employer consulted the trade union or the employees' representatives before introducing the means of surveillance;
  - Other less intrusive forms and modalities did not prove their efficiency, considering the envisaged purpose of the surveillance;
  - The data resulted from surveillance may be kept for a maximum of 30 days, except where the law provides otherwise, or a well-grounded reason justifies such processing.
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## 7. Are there any local rules on data protection impact assessments (DPIA)?

As per the local legislation, performing a DPIA is mandatory when:

- Processing has as purpose a systematic and comprehensive assessment of personal

information relating to individuals, which is based on automatic processing, including the creation of profiles, and which is the basis for decisions that produce legal effects on the individuals or have significant similar effects on the latter;

- There is a large-scale processing of data revealing racial or ethnic origin, political opinions, faith denomination or philosophical beliefs or membership to trade unions, genetic data, biometric data for the sole identification of an individual, health data, sexual life or sexual orientation of an individual or personal data related to criminal convictions and offenses;
- Processing has as purpose the systematic surveillance on a large scale in an area accessible to the public, such as CCTV surveillance in public areas (shopping centers, stadiums, markets, parks or other such areas);
- There is a large-scale processing of personal data of vulnerable persons, particularly minors and employees, via automated means and/or systematic recording of behavior, including for advertising and marketing purposes;
- There is a large-scale processing of personal data via innovative use or implementation of new technological solutions, particularly where the processing operations limit the ability of data subjects to exercise their rights, such as the use of facial recognition techniques to facilitate access to different spaces;
- There is a large-scale processing of data generated by devices with sensors that transmit data over the Internet or other means (“the Internet of Things”, such as smart TV, connected vehicles, smart meters, smart toys, intelligent cities or other such applications);
- There is a large-scale and/or systematic processing of location or tracking data of individuals (such as Wi-Fi tracking, geographic location data processing of public transport passengers or other such situations) where processing is not necessary for the provision of a service requested by the data subject.

By exception, the DPIA is not mandatory where the processing carried out under Article 6 (1) (c) or (e) GDPR is based on EU or national law, and an impact assessment on data protection has already been carried out as part of a general impact evaluation in the context of the approval of normative enactments.

The DPA has not yet issued a list of activities that are not subject to DPIA.

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## **8. How can a DPA decision be challenged and what deadlines are applicable in this respect?**

DPA sanctioning minutes or decisions providing for corrective measures may be challenged at the administrative section of the competent tribunal within 15 days as of receipt of the minutes or communication of the decisions.

The decision on the challenge is also subject to appeal.

The challenging of DPA enactments only leads to automatic suspension with regards to the payment of the fine.

Where the controller also wants to suspend the corrective measures (data erasure, the suspension of the processing operations), a specific application for suspension must be filed with the court.

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## 9. Is there a local statutory time bar applicable in case of data protection misdemeanours?

The DPA may apply a fine or a warning within three years as of the date the misdemeanour takes place. Where the misdemeanour takes place over a prolonged period of time, the limitation period starts as of the end of the last act or fact, if such occurs after the moment when the misdemeanour is ascertained.

The limitation period can be interrupted by undertaking any procedural act, without exceeding four years as of the occurrence of the misdemeanour.

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## 10. Are there any local special derogations from GDPR?

Main local derogations from GDPR:

- Data processing for journalistic purposes or for academic, artistic or literary expression, provided that it refers to personal data that were expressly made public by the data subject or which are strictly related to the status of public figure of the data subject or to the public character of the facts that person is involved in, may be undertaken by derogation from the following chapters of the GDPR: Chapter II - Principles; Chapter III - Rights of the data subject; Chapter IV - Controller and processor; Chapter V - Transfers of personal data to third countries or international organisations; Chapter VI - Independent supervisory authorities; Chapter VII - Cooperation and consistency; and Chapter IX - Provisions relating to specific processing situations;
- Processing personal data for scientific, historical research or statistical purposes are exempted from the provisions of Articles 15, 16, 18 and 21 of the GDPR, in so far as such rights mentioned in these articles, given their nature, render impossible or seriously impair the achievement of the specific purposes and those derogations are required for the fulfilment of these purposes;
- Processing of personal data for archiving purposes in the public interest are

exempted from the provisions of Articles 15, 16, 18, 19, 20 and 21 of the GDPR, in so far as such rights mentioned in these articles, given their nature, render impossible or seriously impair the achievement of the specific purposes and those derogations are required for the fulfilment of these purposes.

In the latter two mentioned derogation cases, appropriate guarantees for the rights and freedoms of data subjects should be considered as provided under Article 89 para. (1) of GDPR.

- Under Law No. 284/2018: (i) particular technical measures are imposed to air carriers; (ii) supplementary requirements are provided for the DPO of the national information unit (UNIP) handling PNR data; (iii) derogations are made for limited purposes for third countries transfers; (iv) processing PNR data by processors is forbidden; (v) the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, data concerning health, sex life or sexual orientation is prohibited and if UNIP receives these categories of data, such will be erased; (vi) the PNR data is stored for a period of 5 years in the national data records system and depersonalized after 6 months from submission to such system; (v) particular traceability rules are provided; (vi) UNIP must notify any security breaches susceptible of risks for data subjects within 24 hours as of acknowledgement, and if not possible, within 72 hours with justification for the delay in notification (under GDPR, the rule is the 72-hours time frame).
- Under Law No. 362/2018 and subsequent enactments, supplementary obligations are regulated for the operators of essential services and digital services providers<sup>12</sup>, such as: (i) need to implement particular security and technical measures and audit controls for the network and information systems and the digital data within, including for personal data processing; (ii) need to also notify, without delay, the breaches that have a significant impact on network security, to CERT RO (national cyber security and incident response team);
- Under Law No. 363/2018, when personal data are processed by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, particular derogations from GDPR are applicable (with the mention that GDPR does not apply to the processing undertaken under such framework), such as: (i) the use of automated individual decision-making, including profiling is allowed only where the law expressly provides such, including the adequate safeguard for such type of operations; (ii) the time limit for replying to the data subjects requests is 60 calendar days; (iii) joint controllers are designated by law (which also establishes the purposes and means of such processing); (iv) appointment of a sub processor

<sup>12</sup> Determined in accordance with the provisions of Ministry of Communications and Information Society Order No. 599/2019 regarding the approval of the Methodological Norms for the identification of the essential service operators and digital service providers and Order No. 601/2019 for the approval of the Methodology for establishing the significant disruptive effect of incidents on the networks and information systems of the essential service operators.

is allowed only with the prior written approval of the competent authority; (v) the competent authorities and their processors are obliged to keep adequate pre-defined logs for all data processing operations; (vi) the prior consultation of the Romanian DPA is mandatory when the envisaged processing operations entail a high risk in respect of the rights and freedoms of data subjects; (vii) where the security breaches present high risks, competent authorities must notify concerned data subjects within a maximum of 10 calendar days as of the moment they notify the Romanian DPA about such incidents (under GDPR, no such time limit is provided).

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## 11. Local practice

The Romanian DPA has published its activity report for 2019<sup>13</sup> and a summary of its activity in 2020.<sup>14</sup> Such documents refer, *inter alia*, to the opinions of the Romanian DPA on specific data processing operations, its audit and sanctioning activity and its regulatory activity.

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13 Such is available only in Romanian at: <https://www.dataprotection.ro/?page=Rapoarte%20anuale&lang=ro>.

14 Such is available only in Romanian at: [https://www.dataprotection.ro/index.jsp?page=Comunicat\\_Presa\\_11\\_02\\_2021&lang=ro](https://www.dataprotection.ro/index.jsp?page=Comunicat_Presa_11_02_2021&lang=ro).

# Environment

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## 1. Are the Romanian environmental laws aligned with the European Directives?

In anticipation of Romania's accession to the European Union, Romanian authorities made serious efforts in order to transpose the principles of EU Directives in the field of environmental law and, at the time of this report, the most important EU Directives have already been implemented.

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## 2. Which are the authorities entrusted with the application of environmental laws?

The Ministry of Environment, Waters and Forests (Ministry EWF) is the authority in charge of the environmental protection strategy and the general coordination of the authorities entrusted with the application of environmental laws. At the same time, the Ministry EWF is responsible for the national strategy in the fields of water management, fishing, forests, management of floods, as well as the coordination of the local water management bodies. The main authorities involved in the application of environmental and water protection laws are:

- The National Environmental Protection Agency;
- The local environmental protection agencies;
- The local water management bodies;
- The National Environmental Guard.

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## 3. Which are the environmental permits required for implementing environmental impacting projects?

Implementing projects that may generate impact on the environment requires a two-tier authorisation. On the one hand, such projects may only be developed subject to obtaining an environmental agreement (Romanian: *acord de mediu*), which sets out the conditions to be fulfilled to ensure that the implementation (construction) of the project complies with the statutory environmental requirements. The environmental

agreement is one of the documents substantiating the application for a building permit.

On the other hand, the operations phase may not be commissioned until the operator obtains an environmental authorisation (Romanian: *autorizație de mediu*), which is separate from the environmental agreement. Such document lays down the specific rules to be followed when carrying out the authorised activity.

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### **3.1. What is an environmental agreement?**

By law, applying for and obtaining the environmental agreement is mandatory in order to start, amend or expand private or public projects which may have substantial environmental impact.

An environmental agreement is issued further to conducting a complex procedure coordinated by the environmental protection agencies at different levels or, in certain cases, by the Ministry EWF itself.

As a first step in this legal procedure, the environmental authorities conduct a preliminary assessment aimed at establishing the magnitude of the environmental impact possibly generated by the project. For projects deemed to generate minor impact, the law prescribes a simplified authorisation procedure, the project developers being allowed to begin construction works without an environmental impact assessment. For projects generating an important impact on the environment, developers are invited to prepare an environmental impact assessment. To this end, after having consulted the interested members of the public, the competent authority prepares a checklist with the items to be covered in the report. The report is submitted by the environmental authority for public debate. Based on the findings in the environmental impact assessment report and, if the case, on the comments received from the public, the environmental authority takes its decision on issuing the environmental agreement. The decision is published in the media, so as to allow interested parties to challenge it. The environmental agreements are valid for the whole duration of project development. The public potentially affected by the project and the NGOs specialising in environmental protection play an important role in the procedure, as they have the right to participate in the process by submitting their points of view in relation to the project and by taking part in public debates organised by the environmental authorities.

For projects that may generate impact on the environment of neighbouring countries, the Ministry EWF conducts consultations with the relevant authorities of the potentially affected state. Decisions on issuing the environmental agreement in such cases must take into account the comments and suggestions received from the

potentially affected state.

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**3.2. What is an environmental authorisation?**

While the environmental agreement is the document regulating the implementation of environment impact projects, activities with possible impact on the environment may only be carried out subject to an environmental authorisation. The authorisation sets forth the requirements and specific technical conditions to be complied with when carrying out the authorised activities with significant impact on the environment.

Further, the environmental authorisation may provide for a set of measures to be implemented in order to reduce the impact on the environment, establishing also the time schedule for implementing the respective measures. Failure to abide by its terms may trigger the suspension or annulment of the environmental authorisation.

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**3.3. In which cases are integrated environmental agreements and integrated authorisations required?**

For installations subject to the Industrial Emissions Directive, integrated environmental agreements and integrated environmental authorisations are required.

The integrated environmental agreement is the document setting out the conditions to be fulfilled to ensure that development (construction) of the project complies with the statutory environmental requirements. Applying for a building permit is only possible after having obtained the integrated environmental agreement.

The integrated environmental authorisation sets forth the specific technical conditions to be complied with when operating an installation subject to the IPPC regulations. While establishing measures to reduce the impact is allowed in environmental authorisations, the integrated environmental authorisation is issued only if the installation in question complies with the best available techniques.

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**4. How can an investor assess the environmental obligations related to a certain activity?**

Whenever the operator of an activity generating significant impact on the environment is subject to change of control, sale of assets, merger, spin-off, concession or other operations entailing a change of the operator, such operations must be notified to the local environmental protection agency, in order for the latter to inform the parties

involved on the specific environmental obligations they must undertake.

Having received the list of environmental obligations, the parties involved in any of the operations above will negotiate the allocation of such obligations among them. The exact manner in which the parties involved understood to split the responsibility for fulfilment of the relevant environmental obligations must be notified to the local environmental protection agency.

However, it should be noted that the list provided by the public authority may not always reflect accurately the environmental issues related to a specific asset. Whereas the authority usually grounds its assessment on existing regulatory acts, it is advisable to have a technical consultant perform environmental due diligence to confirm potential issues.

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## 5. What permits are required for securing the right to use water resources?

While most waters are included in the public domain of the state and administered by a special governmental agency (Administrația Națională "Apele Române"), the Government has the exclusive right to establish the rules governing the use of waters, irrespective of whether water sources are included in the public domain or not.

Unless the relevant water installations exceed a certain capacity, the use of underground and surface waters is free for small activities specific to households, such as human and animal consumption. The right to use waters for other activities is only granted through administrative acts regulating the terms and conditions of use, namely:

- The water management permit (Romanian: *aviz de gospodărire a apelor*); and/or
- The water management authorisation (Romanian: *autorizație de gospodărire a apelor*).

The water management permit is a prerequisite document when beginning construction works for new investment projects built on/near water sources, or related to the use of waters. Applying for a building permit is possible only after having obtained the water management permit.

The water management authorisation is required before the commissioning and exploitation of new projects built on/near water sources, or which are related to the use of water. The water management authorisation regulates in detail the terms and conditions under which the use of water is allowed.

Exceptionally, for certain projects or activities, the law exempts the project developers/

operators from their obligations to obtain the water management permit or the water management authorisation. In this situation, a mere notification to the relevant branch of Administrația Națională "Apele Române" will suffice.

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## **6. Does Romania have a scheme for limitation of CO2 emissions?**

In 2001, Romania was among the first states to ratify the Kyoto Protocol regarding the framework Convention of the United Nations with respect to climate changes. In 2006, Romania transposed Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community.

As of 1 January 2007, any operator of equipment listed in Annex I to Directive 2003/87/EC must hold a greenhouse gas emission authorisation and an adequate number of greenhouse gas emission certificates allowing a certain level of greenhouse gas emissions.

At the same time, starting 1 January 2007, Romania has implemented a greenhouse gas emission trading scheme.

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## **7. Are there express noise level thresholds to be observed?**

The Romanian standards in the field of noise pollution stipulate that any constructions which may generate environmental noise must be placed in such a way so as not to exceed certain thresholds over inhabited areas.

Currently, the continuous noise level measured under certain technical conditions must not exceed the standard level of 55 dB. During the night, the limit is 45 dB.

Aside from the above general limits, the law prescribes special noise limits applicable to specific cases (e.g., restaurants located in residential buildings).

In the field of noise impact, Romania has implemented Directive 2002/49/EC relating to the assessment and management of environmental noise, thus implementing a system aimed at preventing the negative effects caused by environmental noise. Public authorities must prepare noise maps for the noisy areas identified in the law (for big cities, airports, roads, railways, harbours, sites where industrial activities are performed) and propose action plans that would help prevent and reduce the impact of environmental noise.

## 8. How does Romania plan the management of protected areas?

Romanian legal framework was aligned to EU requirements primarily through the implementation of Directive No. 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, Directive 2009/147/EC on the conservation of wild birds and Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment following accession of Bulgaria and Romania to the EU.

In Romania, there are several types of protected areas, depending on their importance:

- Protected areas of national interest;
- Protected areas of international interest;
- Protected areas of Community interest or Natura 2000;
- Protected areas of local interest.

Management of protected areas is usually ensured by the National Agency for Protected Areas or by special units under the control of public administration bodies, national companies, research institutions, museums or state-owned enterprises.

The management of the Danube Delta Wildlife Reservation is entrusted to the Danube Delta Wildlife Reservation Administration, an entity created especially for this purpose and placed under the direct control of the Ministry EWF.

For each protected area, management plans and regulations are prepared in order to detail the rules and restrictions applicable within the area. Such management plans and regulations are approved by the Ministry EWF. The possible influence of any environmental impact projects on the protected areas is subject to assessment within the environmental impact assessment procedure conducted for the purpose of obtaining the relevant environmental agreement.

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## 9. Does Romania have special rules on environmental liability?

The liability for damages caused to the environment is governed by the principle "the polluter pays" and Romania has implemented Directive No. 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damages. Operators must promptly inform the local environmental protection agency on any damage caused to the environment, as well as on any imminent threat of such damage. In any such situation, the operator must take all necessary repair and/or

precautionary measures.

If the operator does not comply with these obligations, or if the operator is not identified, the relevant environmental protection agency is entitled to take all repair or precautionary measures itself, on the account of the operator who has to bear the related costs. In order to recover the costs, the environmental protection agency may proceed to seizing the goods of the operator. If damage to the environment or a threat of such damage is caused by two or more operators, they will be jointly liable.

# Product Liability & Consumer Contracts

## REGULATORY

### 1. Which are the main laws governing product liability?

The Consumer Code is the main legal enactment regulating product liability and consumer rights; it deals *inter alia* with consumers' access to goods and services, consumers' rights, producers' obligations, as well as the general rules applicable to non-governmental organisations and product security.

In addition, more detailed rules regarding the terms and circumstances when product liability is engaged are regulated by Law No. 449/2003 on selling products and ancillary warranties, Law No. 240/2004 on producers' liability for damages resulting from defective products, Government Ordinance No. 21/1992 on consumers' protection and Law No. 193/2000 on unfair clauses in contracts concluded between professionals and consumers. General norms governing tort and contractual liability as provided by the Civil Code supplement special legislation on product liability.

### 2. Which are the main Governmental and NGO Watchdog Bodies?

The Government's policy in the field of consumer protection is mainly coordinated by the National Authority for Consumer Protection (ANPC). The ANPC is responsible for the constant harmonisation of the Romanian legislation with the EC laws, as well as for supervising compliance with specific legislation applicable to the sale of consumer goods.

Non-governmental organisations in the field of consumer protection have several prerogatives such as the right to participate to consultative councils (organised based on territorial criteria and in charge of enforcing the consumer protection policy and coordinating the activity of public institutions and non-governmental organisations in

the field of consumer policy) and to run consumer information and consulting centres subsidised with public funds.

The observance of the product liability laws ultimately falls within the remit of the courts of law.

## **SCOPE OF PRODUCT LIABILITY RULES**

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### **1. Who is protected?**

The main subject of the protection granted by product liability laws is the “consumer” which is a person legally deemed as having limited knowledge as regards the risks generated by the use of products.

The concept of “consumer” refers to not only the purchaser of a product directly from the producer, but also to any subsequent acquirer (i.e. the end-user), to the extent the concerned product was normally designed for private consumption. Should any of these persons incur damages resulting from a defective product, they may file a claim against the seller.

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### **2. Who bears legal responsibility?**

Product liability applies only to professionals and not to private individuals.

As a general rule, the liability for defective products is borne by the seller, as the primary contact against whom the consumer may claim product liability, and by the producer, as ultimate bearer of responsibility. Under the law, whenever product liability is triggered based on a warranty obligation towards the consumer, the “seller” of the product shall be held liable first. The seller is defined as the person who, during its professional activity, sells products based on agreements concluded with consumers. If the seller’s liability is triggered due to a lack of conformity in the product resulting from an action or omission of the producer, or of another economic operator from the same contractual chain, the seller is entitled to redress against the entity responsible for such lack of conformity. The term “producer” covers the manufacturer of the finished product, of the raw material, or of various components of the product; any person representing itself as producer by way of applying its name, trademark, or other distinctive element on the product; the importer of a product in Romania, who shall be liable on the same terms as the manufacturer, etc.

The Consumer Code broadens the definition of the term “producer”, additionally including certain categories of entities such as: the economic operator that reconditioned the product; the distributor which, within the context of its business, alters the features of the product; the representative registered in Romania of an economic operator headquartered outside Romania; the importer of products aiming a subsequent sale, lease, leasing or any other distribution form.

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### **3. Which types of products fall under the scope of product liability legislation?**

Only movable goods fall under the scope of the product liability laws, including raw materials (either transformed or unchanged), including moveable goods incorporated into another good, be it moveable or immovable.

Legal scholars generally acknowledge that the category of “product” also includes medicines or even the parts of the human body (e.g. organs for transplants) or products of the human body (e.g. blood, male or female reproductive cells). Although not unanimously accepted, opinions have been expressed that also intangible assets (e.g. software) qualify as “products”, because they may harm the corporal integrity or health of the consumers, they may generate pecuniary damages, or even cause death.

## **RULES AND PROCEDURES OF PRODUCT LIABILITY CLAIMS**

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### **1. Which are the defects that trigger product liability?**

Any lack of conformity existing at the time of delivery may constitute basis for product liability. The concept of “defect” covers any deficiency in the product, be it a manufacturing defect or a design defect.

Product liability may also be triggered whenever the product fails to provide the security that the consumer is entitled to expect based on the foreseeable and reasonable purpose of utilisation of the product. However, this source of product liability may only be discussed in the context of tort liability for a damage caused to the consumer.

The notion of the defect is not automatically implied where products are dangerous by their nature (e.g. weapons) should the consumer be properly informed on the dangers associated with such products.

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## 2. Is there any term within which a defect may be claimed?

One needs to distinguish between where (i) the defect is claimed under the warranty obligation of the seller, and where (ii) the defect is claimed under the tort liability for damages caused by defective products.

As regards defects claimed under the warranty obligation the seller bears liability if the lack of conformity becomes apparent within two years from delivery of the goods. The consumer shall inform the seller on the occurrence within two months from the date the lack of conformity was discovered. Unless proven otherwise, any defect which becomes apparent within six months as of the delivery of the goods shall be deemed as having existed at the time of delivery, unless this assumption is incompatible with the nature of the goods or the nature of the defect.

Under tort liability, where the defect caused damages to the consumer, the prejudiced consumer can bring action in court for product liability. Such court actions are subject to a three-year term of statutory limitation, starting on the date the claimant knew or should have cumulatively known of (i) the existence of the damage, (ii) the existence of the defect and (iii) the identity of the producer. The law however provides that, in any case, any claim on product liability must be lodged with the court within ten years as of the date the producer released the product onto the market. Both the right to initiate legal proceedings, as well as the substantive right to indemnification cease upon the expiry of this 10-year term.

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## 3. What defences are there available to the seller / producer against liability for a defective product?

Law No. 240/2004 provides for a number of causes of limitation of the producer's liability, or exemption from liability related to defective products, among which: (i) where the product was not released on the market by the producer; (ii) where the defect that caused the damage did not exist at the moment the product was released on the market, or the defect appeared subsequently due to causes for which the producer bears no responsibility; (iii) where the defect results from complying with certain mandatory regulatory provisions; (iv) where the level of scientific and technical knowledge existing at the moment when the product was released on the market prevented the producer from discovering the defect; (v) where the defect was caused by the consumer's own actions.

Generally, the seller / producer will not be able to limit its liability towards the consumer if the damage occurs both because of a product's defect and a third party's

action or inaction.<sup>1</sup> However, the seller / producer may seek an indemnity from the third party who contributed to the damage (within the same proceeding initiated by the claimant or by separate lawsuit against the third party).

#### 4. What remedies are there available if a lack of conformity / defect occurred?

A distinction needs to be made between where the defect is claimed under the warranty obligation of the seller, and where the defect is claimed under the tort liability for damages caused by defective products.

If defects are claimed under the warranty obligation, the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered. The consumer is entitled to have the goods brought into conformity free of charge by repair or replacement, to have an appropriate discount in the price, or to have the contract partially rescinded (i.e. with regard to those goods). The price discount or the rescission of the contract may be applied only (i) if the defective good has not been repaired or replaced; (ii) if the seller has not provided complete remedy within a reasonable time; (iii) if, in remedying the defect, the seller caused significant inconvenience to the consumer. The consumer is not entitled to have the contract rescinded in case of minor lack of conformity.

By contrast, for defects claimed under tort liability the prejudiced party may seek indemnification. Under Law No. 240/2004, the following damages caused by a defect/lack of conformity must be covered: (i) damages deriving from the death or bodily/health injury, irrespective of whether the person was or not a contracting party (moral damages included); and (ii) damages deriving from the degradation or destruction of an asset, other than the defective product, provided that this asset is of a type ordinarily intended for private utilisation or consumption, and the value of the damage is not less than the equivalent in RON of EUR 500.

#### 5. What is the procedure for product liability claims?

Product liability claims are settled by the relevant courts of law under the rules of the Civil Procedure Code. Civil lawsuits are subject to a three-tier jurisdiction. This means that first court decisions may be challenged in higher courts under first-appeal procedure (on factual and legal grounds), while the decisions passed by appellate

<sup>1</sup> The law provides for a specific exemption of liability in case of producer of components if he proves that the defect was caused by the design of the product into which the component was integrated or by the wrong instructions given by the manufacturer of the product into which the component was integrated.

courts may subsequently be challenged under second-appeal procedure (limited to technical and procedural grounds).

Under the law, the parties may any time prior to or during the litigation conclude a settlement with respect to any product liability claims.

Romania has transposed the EU directive on alternative dispute resolution (ADR) between consumers and traders. This legislation allows the out-of-court settlement of the consumer related disputes, by deferring it to independent and impartial extrajudicial resolution bodies (ADR Entities). It is to be noted that ADR may be used only if both consumer and trader agree in advance on such manner of dispute settlement. The solution issued by the ADR Entity will become binding upon the parties if they accept it, or if the parties do not challenge it within a specific deadline.

The general competence on settlement of disputes between consumers and traders (including disputes on product liability) belongs to the Department for Alternative Dispute Resolution (an independent body within ANPC specially created for this purpose in October 2016).

The ADR systems has a few clear advantages: it is easier to access, less expensive (it does not involve any special fees for ADR Entity), and faster (generally 90 days, and only exceptionally the procedure may exceed this term).

## **CONTRACTS CONCLUDED BETWEEN CONSUMERS AND PROFESSIONAL VENDORS**

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### **1. What clauses are deemed unfair and sanctioned as such?**

Consumer protection legislation focuses on establishing rules designed to ensure that contractual clauses are drafted in an accurate and clear manner allowing the consumer to understand their content. Ambiguous clauses will be construed in favour of the consumer.

Contractual clauses which are not subject to negotiation may be considered unfair if they lead to a significant imbalance between the parties' rights and obligations.

The law provides a non-exhaustive list of clauses deemed unfair, among which:

- Clauses providing for the unilateral right of the seller to amend the contract;
- Clauses whereby the consumer is not entitled to obtain remedies in case the seller

does not fulfil its contractual obligations;

- Clauses whereby the indemnifications the consumer has to pay in case of non-compliance with the contractual clauses are disproportionately bigger than the effective damage incurred by the seller; or
- Clauses providing for the right of the seller to unilaterally terminate the contract without a similar right being granted to the consumer.

Unfair clauses are deemed as null and void under the law. The standard of protection against unfair contractual clauses has been recently raised, as the applicable legal framework currently regulates a form of “*contamination effect*” of contracts containing unfair clauses.

Essentially, in cases where unfair clauses are found in standard contracts, ANPC and specialised NGO’s have been granted the right to ask in court for the systematic elimination of such unfair clauses from the entire portfolio of ongoing standard contracts of similar kind.

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## **2. What other rules govern specific types of contracts?**

Besides the general consumers’ protection legislation applicable to all the contracts concluded between sellers and consumers, there are special legal enactments setting rules applicable to specific types of contracts, of which we mention the following:

- Distance contracts;
- Off-premises contracts;
- Credit contracts;
- Real estate intermediation contracts;
- Package and linked travel arrangements.

### **2.1. Distance and Off-Premises Contracts**

The Romanian legal framework addressing the regime of business-to-consumer contracts has been amended in 2014 with a view to alignment with the provisions of the EU directives on consumer rights. Business-to-consumer contracts legislation establishes harmonised rules on information to be provided to the consumers generally and, particularly, when distance contracts and off-premises contracts are concluded.

Also, this legislation lays down unified rules addressing the consumers’ right of withdrawal from distance and off-premises contracts. More precisely, consumers have 14 days to withdraw from the contract without penalty and without providing any justification.

The only charge that may be imposed on the consumer for the exercise of such right of withdrawal is:

- The direct cost of returning the goods, except when:
  - The trader has agreed to bear them; or
  - The trader has failed to provide to consumer a notice of the right of withdrawal; or
  - The goods delivered to the consumer's home based on an off-premises contract, by their nature, cannot normally be returned by post mail.
- An amount necessary to cover any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods (if the case), unless the trader has failed to provide to consumer a notice of the right of withdrawal.

As a rule, if the consumer has exercised his right of withdrawal, the trader must reimburse all payments received from the consumer, including, if applicable, the costs of delivery not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract. As an exception, if the consumer has expressly opted for a type of delivery other than the standard delivery offered by the trader, the additional costs for such special delivery are not to be reimbursed.

## 2.2. Credit Contracts

Given the value and inherent sensitive nature of credit contracts, special legislation has been enacted as to ensure a minimum standard of protection for consumers entering into credit contracts, by way of imposing express obligations on providers of financial services. Specific norms set forth the information that needs to be provided to customers in the pre—contractual phase, upon marketing and advertising credit products, as well as the rules to be observed upon concluding credit contracts.

Financial services providers must inform consumers, in an accurate and exhaustive manner, on all the costs and risks related to the credit contract. Also, the interest, commissions, fees or other banking expenses need to be mentioned directly in the credit agreement rather than merely indicated by reference to other documents such as general terms of the provider, list of tariffs, etc. Amendments brought to the legal framework in view of the national transposition of Directive 2008/48/EC and Directive 2014/17/EU on consumer credit contracts further provide a broad array of protective measures for consumers (such as an obligation to provide specific information binding upon the financial services providers during the pre-contractual period, prohibition from imposing new, or the increase of the existing commissions, fees, taxes or banking costs, other than those provided by the law, during the performance of the credit agreement; a prohibition from imposing certain contractual clauses detrimental to

the consumers, etc.). Consumers have two procedural means for challenging clauses included in credit contracts which infringe aforesaid statutory standards: either (i) file a complaint with the ANPC followed, where unfair clauses are found, by requesting the court to apply administrative sanctions and amend/annul the unfair clauses; or (ii) directly challenge the defective contractual clauses in court.

### 2.3. Real Estate Intermediation Contracts

Consumer protection legislation sets particular focus on real estate intermediation contracts (including intermediation for sale-purchase and rent). Such contracts need to include, besides the regular clauses, a minimum set of compulsory clauses such as the maximum commission owed to the real estate agency, the exclusivity clause (if the case), as well as a clear determination of the cases where the customer owes the agency a commission. Statutory obligations have been imposed on real estate agents in the pre-contractual phase, such as the obligation to inform the interested customer on any legal or practical deficiencies or inconveniences related to the asset of which the agent is aware.

### 2.4. Package Travel and Linked Travel Arrangements

Romania has recently transposed into its legislation the provisions of Directive (EU) 2015/2302 on package travel and linked travel arrangements (i.e. national transposition via the Government Ordinance No. 2/2018). The enactment introduces enhanced and uniform rules for protection of the consumers in the context of travel / travel-related contracts (i.e. the so-called package travel and linked travel arrangements (LTAs)).

The most relevant legal requirements under the package travel and LTAs legislation may be summarised as follows:

- *Consumer information*: the traders must provide the consumers with a minimum set of information before entering into a contractual arrangement, such as: (a) itinerary with dates and number of nights included; (b) transport provided, including the times of departure and return, stops and connections; (c) accommodation details; (d) meal plan. Also, the law prescribes specific requirements regarding the information to be included in the contract confirmations sent by the traders.
- *Amendment of contractual terms*: travellers can transfer the package to another person after giving the organiser reasonable notice on a durable medium before the start of the package. Notices given by the travellers at least 7 days before the start date of the travel package are deemed reasonable. There are specific conditions applicable to the increase of prices by the traders, namely: (i) the contract expressly reserves that possibility; (ii) the price increase results only from cost of fuel or other power

sources, third-party tax or fee increases, exchange rates; (iii) the increase should be notified at least 20 days before the start of the package (together with a justification of the price increase and a relevant calculation); (iv) as a general rule, the increase cannot exceed 8% of the initial price (additional restrictive rules apply for the price increase exceeding this threshold).

- *Specific remedies for consumers with respect to contract performance*: consumers may ask that non-conformities be remedied within a reasonable period determined by the consumer; where a significant proportion of the travel services cannot be provided as agreed, suitable alternative arrangements of equivalent or higher quality services should be offered at no extra cost; travelers may unilaterally terminate the agreement if the performance of the obligations under the package is substantially affected by the non-conformity and the trader failed to remedy it; specific liability for traders in case of technical errors during the booking process.
- *Insolvency protection*: the law regulates specific obligations so as to provide adequate securities for the refund of all payments made by or on behalf of travelers should travel agencies become insolvent.

# Insolvency

## LEGISLATION

### 1. What are the main regulations regarding insolvency and liquidation in Romania?

Different insolvency legal frameworks are in place for companies, financial institutions and public administrative bodies. Law No. 85/2006 regarding insolvency procedures regulates the insolvency and liquidation of companies and other legal entities that perform commercial activities; Government Emergency Ordinance No. 10/2004 (GEO 10/2004) applies for the bankruptcy of financial institutions, while Government Emergency Ordinance No. 46/2013 (GEO 46/2013) governs the insolvency of public administrative units. In April 2014, the Romanian Parliament passed the law regarding the prevention of insolvency and insolvency procedure (the 2014 Insolvency Law).

The 2014 Insolvency Law regulates the ad-hoc and concordat procedures, the insolvency procedure for legal entities, the cross-border insolvency and the insolvency of groups of companies as well as the bankruptcy procedure for financial institutions and insurance companies.

For ongoing procedures at the time the 2014 Insolvency Law was passed, Law No. 85/2006 will continue to be applied. In the matter of voluntary liquidation, the Companies Law No. 31/1990 provides the legal framework for the liquidation of companies that are not insolvent. In companies under voluntary liquidation that are found insolvent the liquidator must apply for the commencement of insolvency procedures.

Although a law regulating the insolvency of individuals has been adopted in Romania, its applicability is still limited. In order to improve the business environment and the competitive environment, in October 2018 the Romanian Government adopted the Emergency Ordinance No. 88/2018 (GEO 88/2018), which amended and supplemented Law No. 85/2014 regarding the prevention of insolvency and insolvency procedure.

## 2. Is there a pre-insolvency legal framework in Romania?

Starting 2009, legal rules regarding the concordat and ad-hoc mandates apply in Romania as a pre-insolvency legal framework. Nevertheless, pre-insolvency measures are not mandatory. Companies undergoing negotiations for a concordat or operating under an ad-hoc mandate that become insolvent must apply for insolvency within five days after the failure of the negotiations.

The 2014 Insolvency Law follows the same principles as Law No. 85/2006, differing mainly in that, under the 2014 Insolvency Law, the concordat project must be approved by 75% of the creditors table instead of  $\frac{2}{3}$  as per Law No. 85/2006.

Nevertheless, the concordat and ad-hoc procedures are not popular, the practice is limited and success rate remains unknown.

## 3. What is the definition of insolvency in Romania?

Law No. 85/2014 defines insolvency as the situation in which the company's available funds are not covering its due debts, as follows:

- Insolvency is self-evident where the debtor is not able to pay a debt within 90 days from the due date;
- Insolvency is imminent whenever the debtor proves unable to pay a debt from the funds available on the due date.

The law also sets forth a limit for the creditors' claims able to result in the debtor's insolvency at RON 50.000 (approximately EUR 10,000 or USD 12,000).

GEO 88/2018 amends and supplements Law No. 85/2014 as regards State budget claims, to the effect that, where the application for commencing the insolvency procedure is submitted by the debtor, the amount of State budget claims must be less than 50% of the debtor's total claims.

## 4. Are there any grounds on which a debtor may qualify directly for liquidation?

The 2014 Insolvency Law provides that the debtor applying for its own insolvency may choose the simplified procedure, proceeding directly to liquidation.

When the application is made by a creditor, the debtor may qualify directly for

liquidation in the following situations:

- Where the debtor does not own any assets;
- Where the debtor's documents including the accounting documents cannot be found;
- Where the debtor's administrator cannot be contacted;
- Where the debtor's official address does not exist or is not the same as the address submitted to the Trade Registry.

## 5. Which are the main stages of the general insolvency procedure?

The 2014 Insolvency Law provides that there are three main stages that can occur during the insolvency procedure:

- The observation period, lasting from the date the procedure is opened, up to the date a reorganisation plan is approved or the liquidation procedure begins;
- The reorganisation period, beginning after the approval of the reorganisation plan and lasting until the plan is fully implemented or a liquidation procedure begins;
- The liquidation procedure, which lasts until the complete foreclosure of the company.

## PARTIES IN INSOLVENCY/LIQUIDATION

### 1. Who can be appointed as judicial administrator or liquidator?

The 2014 Insolvency Law provides that the judicial administrator and the liquidator can be individuals or specialised companies, members of the Romanian National Union of Insolvency Practitioners (UNPIR) authorised in accordance with Government Emergency Ordinance No. 86/2006.

The syndic judge appoints the judicial administrator or liquidator as nominated by the applicant, or, in the absence of a nomination, the designation will be made from among the members of the Romanian National Union of Insolvency Practitioners (UNPIR) that submitted their application to the case-file.

If no application is submitted, the designation will be made by randomly appointing a practitioner from the UNPIR list.

The 2014 Insolvency Law includes special rules for the insolvency of groups of companies, namely:

- All insolvency cases will be settled by one court for all companies in the group;
- The competent court will be the court having jurisdiction over the mother company or the company among the group with the highest annual turnover;
- For each company a separate insolvency case file will be opened, to be transferred to the syndic judge designated for the first insolvency that was opened;
- The same insolvency practitioner will be appointed for all insolvency cases of the group.

The syndic judge, upon the request of any interested party, supervises observance of all these rules.

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## **2. What are the main responsibilities of the judicial administrator or liquidator?**

The judicial administrator's main responsibilities are (i) to supervise, or take over the debtor's administration as the syndic judge decides; (ii) to prepare the required reports, i.e. the report on the causes and conditions of the insolvency, the activity reports and any other reports requested by the syndic judge; (iii) to collect the receivables and to sell assets as permitted by the law. The judicial administrator must analyse all creditors' claims in the beginning of the procedure and create the creditors' table.

As per the 2014 Insolvency Law, supervision means that the debtor may perform the following operations only subject to the judicial administrator's prior approval:

- All payments, both from the bank account or cash;
- Contract signing or amendments;
- Legal documents related to litigation cases, approval of all measures related to collection of receivables, whether amicable or under legal enforcement procedures;
- Operations resulting in decrease in the estate value, new valuation or cassation of fixed assets;
- Transactions proposed by the debtor;
- Financial reports and activity reports;
- Restructuring measures or changes in the collective bargaining agreement;
- Mandates for the general creditors assembly or creditors committee where the debtor is part of the procedure and for all the shareholders meetings where the debtor is a shareholder.

GEO 88/2018 amends and supplements Law No. 85/2014 as regards the activity

reports that are provided by the judicial administrator or liquidator, so that the report will include information on surveillance of the operations performed on the basis of the preliminary approval and, also, information on tax compliance.

The liquidator takes full control over the debtor's administration and their assets.

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### **3. What are the attributions and powers of the syndic judge?**

The syndic judge decides the opening of the insolvency procedure. At the same time, the syndic judge appoints the judicial administrator or the liquidator and confirms their fees. During the procedure, the syndic judge monitors the judicial administrator's/liquidator's activity by way of their activity reports. It is also for the syndic judge to decide on all the challenges the debtor or its creditors promote during the procedure in connection to the judicial administrator's/liquidator's activity reports, transaction annulments, the administrators' liability, the confirmation or rejection of the reorganisation plan.

## **THE DEBTOR'S REORGANISATION**

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### **1. Who is entitled to propose a reorganisation plan?**

The following categories are entitled to submit a reorganisation plan:

- The debtor, after approval by its General Assembly of Shareholders;
- The judicial administrator;
- One or several creditors representing at least 20% of the claims registered in the creditors' table.

The general deadline for submitting the reorganisation plan is 30 days after the final creditors' table has been published.

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### **2. Which are the main mandatory provisions of a reorganisation plan and the conditions for its admissibility?**

The reorganisation plan must set forth the grounds of the proposed reorganisation, from both an operational and financial perspective, as well as the financing sources for the reorganisation and all the measures to be taken to accomplish the plan.

The duration of the proposed reorganisation plan cannot exceed three years and may only be extended by one year at the request of the judicial administrator and submitted within the first 18 months of execution.

An important element of the plan is the proposed schedule of payment to the creditors, indicating the financing sources, the treatment of claims and a comparative analysis between the number of claims that would be covered by liquidation (in percentage) versus the coverage proposed within the reorganisation plan. In addition, the 2014 Insolvency Law requests that a reorganisation plan must provide for the payment schedule for the debts arisen after the insolvency procedure was opened but before the approval of the plan. Particularly, if the reorganisation plan fails, the claims registered on the final creditors table will be restored. Specifically, all debts are reset to the values stated in the final creditors table out of which the amounts paid under the reorganisation plan will be deducted.

As regards the conversion of State budget claims into securities, GEO 88/2018 amends and supplements Law No. 85/2014 to the effect that, provided that the budgetary creditor consented by vote and only where the conditions expressly provided by the law are fulfilled, the reorganisation plan may provide for the conversion of State budget claims into shares.

So far, the tax authorities typically did not approve reorganisation plans providing for rescheduling, reductions or cancellations of debts owed to the State budget because such allowances would be considered State aid for the debtor. Despite the fact that the 2014 Insolvency Law provides that any such measures regarding budgetary debts proposed in the reorganisation plan do not constitute State aid for the debtor if the creditor collects under a reorganisation plan more than it would collect through bankruptcy, the general practice of the tax authorities is to reject the reorganisation plans that provide for either a claim reduction or rescheduling.

GEO 88/2018 supplements Law No. 85/2014 by establishing the criteria that the budgetary creditor may consider when voting on the reorganisation plan which proposes to reduce the unsecured budgetary claim.

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### **3. Who is approving the reorganisation plan?**

According to the law, the reorganisation plan is approved by the General Assembly of the Creditors with the simple majority of the categories of creditors. Under the law, a few categories of creditors are recognised for the purposes of voting:

- Secured creditors: creditors whose claims against the debtor are secured by assets

under the debtor's ownership;

- Salary receivables: the debtor's employees' claims for unpaid salaries;
- Tax claims: claims against the debtor representing taxes;
- Unsecured creditors: creditors whose claims against the debtor are not secured.

Provided that the debtor declares it from the onset of the procedure, an additional category of indispensable creditors is possible, consisting of those creditors that supply goods and/or services that are mandatory for the debtor to operate normally and cannot be replaced under the same financial conditions. The list is subject to confirmation by the judicial administrator and may be challenged by any creditor. Only one reorganisation plan may be approved. The decision of the General Assembly of Creditors approving/rejecting the reorganisation plan is submitted to the syndic judge for analysis and confirmation by the judicial administrator. Besides the simple majority of the creditors' category, creditors representing at least 30% of the total value of debts on the final creditors table must also approve the plan.

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#### **4. Is it possible to amend the confirmed reorganisation plan during the procedure?**

The reorganisation plan may be amended at any point in time throughout the procedure, provided that the General Assembly of the Creditors approves and the syndic judge confirms the amendments.

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#### **5. Who is responsible for compliance with the reorganisation plan?**

Once a reorganisation plan is confirmed, the debtor will manage its activities under the supervision of the judicial administrator. The special administrator, who is the representative of the debtor's shareholders in the insolvency procedure, will submit a quarterly report to the Creditors' Committee detailing how the reorganisation plan is implemented. After the Creditors' Committee takes its decision, a copy of the report must also be filed with the court.

### **LIQUIDATION**

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#### **1. What are the first steps of the liquidation procedure?**

Prior to liquidation, the liquidator will take over the debtor's assets and archive. All

ongoing contracts are terminated, including the labour contracts. Once the debtor's assets are inventoried and evaluated, the liquidator will proceed under the supervision of the judge to sell all the assets identified. The liquidating debtor's assets may be sold by auction or by direct negotiation with a prospective buyer.

## 2. How are the funds obtained from liquidation distributed?

The funds obtained from liquidation will first cover the procedure costs, including the liquidator's fee, followed by salary claims, tax claims and creditors' claims in accordance with their rank. If funds are obtained from selling assets securing the claims of one creditor, all such funds, after covering the costs of the procedure, will be distributed to the respective creditor to the satisfaction of its claim. The remaining amount, if any, will follow the regular distribution criteria. Among creditors with the same rank, funds will be distributed on a pro-rata basis, in accordance with the weight of each claim in the creditors table.

## PROCEDURE CLOSING AND ADMINISTRATOR LIABILITY

### 1. Under what conditions may the debtor's administrator be held liable for the insolvency?

The liability of the debtor's administrator can be triggered if the administrator used the debtor's assets for his own benefit, or performed commercial transactions of his own while ostensibly working for the debtor, or continued the debtor's activity that led to insolvency, or used ruinous means to procure funds in order to delay the insolvency, or is liable for double-bookkeeping or fraudulent transactions. Under the 2014 Insolvency Law, the debtor is presumed in default if it fails to provide the judicial administrator/liquidator with the required accounting documentation while the causality between such fault and liability is also presumed. The presumption is however relative, as it can be overturned by making available the documents required by law. Besides being directly liable to cover the debtor's debts, the person found liable is banned from being nominated as administrator of any company for the following 10 years after the court decision is final.

### 2. Who can apply for the administrator's liability?

The judicial administrator/liquidator can claim the administrator's liability from the beginning of the procedure, following the presentation of the report regarding the

causes and conditions of the debtor's insolvency. Failing that, the president of the Creditors' Committee, based on the decision of the General Assembly of Creditors, as well as a creditor owing more than 30% of the amount of debts on the creditors table, may file such claim during the procedure.

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### **3. When can the insolvency procedure be closed and to what effect?**

If all claims are paid, the insolvency procedure can be closed at any time. The effect is that the debtor is reinstated in the business environment as a fully operational and functional entity.

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### **4. When can the liquidation procedure be closed and to what effect?**

At any moment throughout the procedure, if the debtor has no funds or assets and the creditors do not agree to cover the procedural costs, the syndic judge may decide to close the liquidation procedure and delete the debtor from the Trade Registry records. The syndic judge also decides to close the procedure once all claims are paid through distribution, to the same effect of having the debtor deleted from Trade Registry records. The remaining goods, if any, are transferred to the debtor's shareholders if they apply for such transfer; lacking the shareholders' application, the sale of assets continues and the resulted funds are collected in an account at the disposal of the debtor's shareholders.

# Criminal Law

## 1. Can a legal entity be held liable under the current Criminal Code?

The Criminal Code (Articles 135 to 151) provides for the possibility of directly indicting the legal entity, which may be held liable for the actions of any of its bodies or representatives acting during its business, in its interest and/or on its behalf.

The Criminal Code also requires that collective entities have legal personality at the time of the crime in order to be liable under criminal law. In this view, the High Court of Cassation and Justice, Criminal Law Division, decided that an individual enterprise which is not a legal entity cannot be held liable under Article 135 of the Criminal Code (Decision No. 1/2016).

The State and public authorities do not fall within the category of persons that can be held liable under criminal law. However, public institutions are not generally exempt from criminal liability. The scope of exemption from criminal liability of these subjects is solely in relation to actions performed during an activity pertaining to the public domain, which cannot be equally carried out by private law entities.

The criminal liability of the legal entity may be cumulated with the that of the individual who perpetrated the crime. However, these two types of liability are not wholly interdependent.

Criminal fines are the only main penalty that can be applied to legal entities, based on the fine-days system. The amount corresponding to one fine-day, varying between RON 100 and RON 5.000, is multiplied by the number of days subject to the fine (between 30 and 600 days) - the general limits of the penalty will range between RON 3.000 and RON 3.000.000.

The law provides for progressive penalties for legal persons depending on the severity of the prison sentence given to individuals. Thus, the special limits of the days subject to the fine range between:

- 60 and 180 days, when the law stipulates only a penalty by fine for that offense;

- 120 and 240 days, where the law provides for a term of imprisonment of no more than 5 years, as such or as alternative to the fine;
- 180 and 300 days, where the law provides for a term of imprisonment of no more than 10 years;
- 240 and 420 days, where the law provides for a term of imprisonment of no more than 20 years; and
- 360 and 510 days, where the law provides for a term of imprisonment exceeding 20 years or life imprisonment.

It should be mentioned that when the offense committed by a legal entity was intended to create a monetary benefit, the special limits of the fine-days provided for by the law for the committed offense may be increased by one-third, without exceeding the general maximum of 600 fine-days. When determining the fine, the value of the monetary benefit obtained or sought shall be considered.

The Criminal Code also provides for a complementary penalty for the legal entity: judicial supervision (Article 144), where the convicted legal entity's operations are to be carried out under the supervision of a judicial proxy for a period of 1 to 3 years.

The other complementary penalties applicable to the legal entity are: dissolution, suspension of activity or of one of the activities of the legal entity for a period of 3 months to 3 years, closing of secondary offices for a period of 3 months to 3 years, prohibition to participate in public procurement procedures for a period of 1 to 3 years, publication of the conviction decision.

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## **2. What main felonies against property by breach of trust are relevant to the business environment?**

Title II (Crimes against property) of the Criminal Code – Special Part, Chapter III (Crimes against property by breach of trust) incriminates a series of acts in view of protecting those financial relations in society that involve an element of mutual trust between participants.

This category includes the abuse of trust (Article 238), the abuse of trust by defrauding creditors (Article 239), simple bankruptcy (Article 240), bankruptcy fraud (Article 241), fraudulent management (Article 242), appropriation of found goods or goods coming into the perpetrator's possession accidentally (Article 243), misrepresentation (Article 244), insurance fraud (Article 245), diversion of public tenders (Article 246) and the material exploitation of a vulnerable individual (Article 247).

The abuse of trust (Article 238) incriminates the acts of a person taking, disposing of

or unlawfully using a movable asset belonging to another by the individual to whom it was entrusted based on a title and for a certain purpose, or the refusal to return it. As an example, this provision is applicable when merchandise is sent to a recipient for maintenance and the latter refuses to return the goods.

Abuse of trust by defrauding creditors (Article 239) can be perpetrated: (i) either by the debtor transferring, concealing, damaging or destroying, in full or in part, his valuables or assets, or invoking fictitious documents or debts in order to defraud its creditors; or (ii) by the debtor acquiring assets or services in full knowledge of being unable to pay for them and thus causing the creditor to incur loss. In practice, we encounter numerous cases where debtors attempt to hide their valuable goods through fictitious transactions.

Simple bankruptcy (Article 240) consists of the failure to submit or the late submission of the request for the opening of insolvency proceedings by the individual debtor or by the legal representative of the legal entity debtor within six months the period of time provided by the law since the occurrence of the insolvency.

Very similarly, bankruptcy fraud (Article 241) incriminates the act of committing fraud against creditors by: (i) falsifying, stealing or destroying the debtor's records or concealing its assets; (ii) claiming inexistent debts or recording undue amounts in the debtor's financial registers or statements; or (iii) where the debtor is insolvent, transferring assets. The main difference between abuse of trust by fraud and bankruptcy fraud lies in the identity of the perpetrator: in the case of abuse of trust, the perpetrator can be any debtor of an individual or a legal entity, while in the case of bankruptcy fraud the debtor must be a legal entity, while the perpetrator is, in most cases, a person holding a certain position in that legal entity, such as a director, manager, official receiver, or shareholder.

Fraudulent management (Article 242) is committed when the individual tasked with the management or preservation of another person's goods causes damages to said goods. This felony can also refer to the administrator or liquidator during the insolvency procedures.

Appropriation of assets found or into the perpetrator's possession by error (Article 243) can apply when certain goods have been accidentally sent to another receiver who refuses to return them.

The felony of misrepresentation (Article 244) applies to misleading contractors during the closing of an agreement, but the parties' reconciliation eliminates criminal liability.

The crime of insurance fraud (Article 245) covers any method by which a person tries

to commit fraud against the insurer for the purpose of gaining unfair benefits.

Similarly, the law incriminates diversion of public tenders (Article 246) in view of fighting increasingly frequent practices such as eliminating a participant from a public tender by fraudulent means, or agreements between participants intended to distort the final award price.

Some of the felonies against property by breach of trust are punished more severely if they produce very serious consequences. Thus, according to Article 256<sup>1</sup> of the Criminal Code, the special limits of punishment shall be increased by half in case of the offenses provided by Articles 239, 242, 244, 245, 247 of the Criminal Code.

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### **3. What are the other relevant felonies related to the business environment?**

Additional relevant offenses are set forth by special laws, such as Law No. 129/2019 on the prevention and sanctioning of money laundering, as well as for the introduction of measures to prevent and combat the financing of terrorism (Chapter X, Article 49), Law No. 241/2005 on the prevention and combating of tax evasion (Chapter II, Articles 3-9) or Law No. 31/1990 on commercial companies (Title VIII, Articles 271-281).

Article 49 of Law No. 129/2019 incriminates money laundering which can consist of: (i) changing or transferring goods known to derive from criminal activities so as to hide or dissimulate their unlawful origin or aiding and abetting the person who perpetrated the crime from which the goods resulted to avoid prosecution, trial or serving a sentence; or (ii) hiding or dissimulating the true nature, the origin, the location, the availability, the circulation of or the ownership over the goods or the rights relating thereto, knowing that such goods derive from criminal activities.

The High Court of Cassation and Justice (Ruling on points of law – Decision No. 16/2016) has ruled that *“The money laundering offense is autonomous, as it is not conditional on the existence of a conviction for the offense from which the goods originate”*.

Tax evasion is incriminated under Articles 3 to 9 of Law No. 241/2005. It can consist of: (i) not restoring, intentionally or culpably, the destroyed accounting records within the term provided in the control documents; (ii) a person’s unjustifiable refusal to submit to the competent bodies the legal documents and assets, in order to hinder financial, fiscal or customs verifications, within no more than 15 days as of the summons; (iii) hindering in any way the competent bodies from entering, as permitted by the law, offices, premises or lands, in order to conduct financial, fiscal or customs verifications; (iv) unauthorised holding or circulation of special-status tax stamps, bands or standard

forms; (v) bad-faith determination of taxes, duties or contributions by the taxpayer, resulting in the unjust earning of money as refunds or returns from the general consolidated budget or compensations owed to the general consolidated budget; (vi) acts committed in order to circumvent the fulfilment of tax obligations, such as hiding the asset or the taxable source, omitting to record commercial operations, recording expenses which do not rely on actual operations, or altering/destroying/hiding accounting documents.

If the acts of tax evasion cause damages in excess of EUR 100,000, in national currency equivalent, the minimum and the maximum limit of the penalty provided by the law shall be increased by 5 years, and if the damages exceed EUR 500,000, the penalty limits shall be increased by 7 years.

Law No. 241/2005 was modified by Law No. 55/2021 which entered into force on 4 April 2021. The new provisions introduce leniency measures when the perpetrator has covered the damages caused to the state budget. If the person accused of tax evasion has paid the due amounts during the stages of criminal investigation or trial, and this value does not exceed EUR 100,000, the court can apply a fine, and if the damages do not exceed EUR 50,000, the criminal fine is mandatory (no prison sentence). Moreover, if the accused pays an additional 20% of the damages and the applicable penalties until a final decision has been reached, he or she will be exempt from punishment and the criminal trial will end. This rule applies for all the defendants even if they did not contribute to the payment.

Acts of unfair competition are incriminated under Article 5 of Law No. 11/1991. These may consist of: (i) use of a firm, logo or package which may create a likelihood of confusion with those legitimately used by another trader; (ii) commercial use of test results or other confidential information that was sent to the authorities in order to obtain permits for the sale of pharmaceutical products or chemical products for agricultural purposes; (iii) disclosure, acquisition or use of trade secrets by trusted persons or third parties; (iv) any commercial operations involving goods or services bearing false identification information.

Other felonies regarding competition are provided for by Articles 5 and 65 of Law No. 21/1996 which imposes criminal sanctions for the act of any person who exercises the position of director, legal representative or who exercises in any other way any management positions, who deliberately creates or organizes deals between entities for any of the following activities: (i) establishing buying or selling prices; (ii) limiting or controlling production, commerce and technical development or investment; (iii) dividing markets or supply sources; (iv) applying unequal conditions for identical benefits; (v) condition the signing of contracts on the acceptance of additional unrelated services.

### 3. Which are the main provisions on corruption?

Acts of corruption are provided for by the Criminal Code - Special Part (Title V - Crimes of corruption and occupational crimes, Chapter I - Crimes of corruption) and by Law No. 78/2000 for preventing, ascertaining and punishing acts of corruption (Chapter III - Felonies).

The provisions of the Criminal Code on the felony of taking a bribe (Article 289) are meant to cover all the cases where a person, directly or indirectly, for oneself or for another person, claims or receives money or other undue benefits, or accepts the promise of such benefits, in relation to the fulfilment, non-fulfilment, expediting or protracting the fulfilment of any act concerning his professional duties, or in relation to the fulfilment of any act which is contrary to such duties.

The felony of giving a bribe (Article 290) refers to promising, offering or giving money or other benefits under the conditions described by the provisions on taking a bribe.

The felony of influence peddling (Article 291) consists in claiming, receiving or accepting promises of money or other benefits, directly or indirectly, for oneself or for another person, committed by a person having influence, or pretending to have influence on an official and who promises to determine such official to perform, not to perform or defer the performance of an act concerning his professional duties or to perform an act which is contrary to such duties.

Buying influence (Article 292) is the correlative felony for influence peddling. Such buying of influence is no longer punished only in the special cases provided by Anticorruption Law No. 78/2000 (the former Article 6<sup>1</sup>, currently repealed). This covers a legislative gap which has often been highlighted by legal scholars.

For all the corruption offenses referred to in Articles 289 to 292 of the Criminal Code, a reduction of the limits of punishment by one third applies (as per Article 308) whenever the acts are committed by persons assimilated to civil servants, namely persons fulfilling, permanently or temporarily, with or without pay, a task of any kind on behalf of an individual who performs a service of public interest for which such individual was vested by the public authorities or who is subject to the public authorities' control or supervision as regards the fulfilment of such public service or within any legal entity.

At the same time, Law No. 78/2000 stipulates that acts of giving a bribe or influence peddling committed by a person exercising a public dignity function, by a judge or a prosecutor, by a criminal investigative body or a person who has been authorised to take notice and sanction misdemeanours committed by one of the persons referred to

in Article 293 of the Criminal Code, shall be sanctioned with the penalty provided for in Article 289 or Article 291 of the Criminal Code, the limits of which are increased by one third.

Anti-corruption Law No. 78/2000 provides for a set of felonies that are also considered acts of corruption, such as: setting a smaller value for the assets owned by public authorities or institutions or undertakings in which the State or an authority of the local public administration is a shareholder, granting illegal subsidies, using subsidies for other purposes than the purpose for which they were granted and acts of corruption perpetrated by the persons in charge with the supervision of undertakings.

Other offenses assimilated to those of corruption are: (i) the act of a person who, having the task of overseeing, controlling, reorganising or liquidating a private economic operator, carries out any task, intermediates or facilitates the conduct of commercial or financial operations, or participates with capital in such an economic operator, if the act has the nature of directly or indirectly creating an undue advantage; (ii) performing financial transactions as acts of commerce, incompatible with the duties of a person, or the conclusion of financial transactions, using the information obtained by virtue of his or her duties, if the purpose is to obtain for himself or another money, goods or other undue benefits; or (iii) the use, in any way, directly or indirectly, of information not intended to be advertised, or of permitting unauthorised persons access to such information if the purpose is to obtain for himself or for another money, goods or other undue advantage.

The act of the person who performs a managerial role in a party, in a trade union or owners' association or legal person without patrimonial purpose (such as a foundation), to use his influence or authority for the purpose of obtaining for himself or for another money, goods or other undue benefits also constitutes a felony under Law No. 78/2000.

Special emphasis is put on the crimes of corruption against the financial interests of the European Union seeking to undeservedly obtain funds from the EU general budget. Thus, the Criminal Code provides that offering false or inaccurate information in view of unfairly obtaining funds from the EU budget and illegally changing the purpose of such funds constitute crimes of corruption.

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#### **4. Which occupational crimes are provided by the Criminal Code and which perpetrators are held liable under criminal law?**

Title V (Corruption and offenses in a public office) of the Criminal Code – Special

Part, Chapter II (Offenses in a public office) contains provisions meant to ensure the protection of workplace social relations, involving an appropriate conduct from the persons exercising their duties.

Offenses in a public office include embezzlement (Article 295), abusive conduct (Article 296), abuse in office (Article 297), professional negligence (Article 298), abuse of power for sexual gain (Article 299), abuse of position (Article 300), use of authority to favour others (Article 301), violating the secrecy of correspondence (Article 302), disclosure of state secrets (Article 303), disclosure of information classified as job secret or not public (Article 304), negligence in storing information (Article 305), unlawful monetary gain (Article 306) and diversion of funds (Article 307).

In some cases, occupational felonies involve the existence of a specific perpetrator, such as an official, who is defined as a person who permanently or temporarily, with or without pay: (i) exercises duties and responsibilities established in accordance with the law, for the purpose of fulfilling legislative, executive or judicial powers; (ii) holds any public office whatsoever; and (iii) exercises, individually or jointly with other persons, in an autonomous state enterprise or in another undertaking or legal entity which is wholly or in majority owned by the State, duties concerning the fulfilment of that entity's business object.

Under criminal law, an official is also the person performing a service of public interest for which he was vested by the public authorities or who is subject to the public authorities' control or supervision as regards the fulfilment of such public service.

The provisions referring to officials' felonies of embezzlement (Article 295), abuse in office (Article 297), professional negligence (Article 298), abuse of power for sexual gain (Article 299), abuse of position (Article 300) and disclosure of information classified as job secret or not public (Article 304) are also applicable to acts performed by, or in relation to the persons fulfilling, permanently or temporarily, with or without pay, a task of any kind for an individual who performs a service of public interest for which such individual was vested by the public authorities or who is subject to the public authorities' control or supervision as regards the fulfilment of such public service or within any legal entity. Moreover, these provisions also apply to individuals working within any legal entity. However, in these cases, the special limits of the punishment are to be reduced by one third. However, if the acts of embezzlement, abuse in office, professional negligence, abuse of position and disclosure of information classified as job secret have caused a material damage in excess of RON 2.000.000 (approximately EUR 420,000), the special penalty limits are increased by one half.

In the case of the offenses of abuse in office or abuse of position, Law No. 78/2000

provides that if the civil servant has obtained an undue advantage for himself or another, the special limits of the penalty shall be increased by one third.

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## **5. How are the safety and integrity of computer systems and data protected under the Criminal Code?**

Title VII (Crimes against public safety) of the Criminal Code – Special Part, Chapter VI (Offenses against security and integrity of computer systems and data) contains legal provisions meant to ensure the safety and integrity of computer systems and data.

Criminal law defines computer systems as any device or set of devices that are interconnected or in a functional relation, one or more of which ensure automatic data processing by means of a computer program; computer data means any representation of facts, information or concepts in a form which can be processed by a computer system.

The following acts constitute felonies: illegal access to a computer system (Article 360), illegal interception of computer data transmissions (Article 361), altering computer data integrity (Article 362), disruption of the operation of computer systems (Article 363), unauthorised transfer of computer data (Article 364) and illegal operations with devices or software (Article 365).

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## **6. How is one's business premises protected under the Criminal Code?**

The felony of trespassing in professional offices consists in the unauthorised entry in any of the offices where an individual or a legal entity works, or the refusal to leave such offices at the request of the person concerned (Article 225).

The new legal provisions protect both companies' premises and the premises of any private-law persons, the offices of public authorities, institutions and State bodies.

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## **7. For which crimes can criminal liability be eliminated due to absence / withdrawal of the preliminary complaint, or to the parties' reconciliation?**

For low-danger crimes, or in cases where the commencement of the criminal action is left at the discretion of the aggrieved party, in view of protecting their right to privacy, a criminal investigation can only commence upon filing a preliminary complaint (Article

295 of the Criminal Procedure Code). The absence or withdrawal of the preliminary complaint eliminates criminal liability.

A preliminary complaint is mandatory for the following criminal acts: trespass on professional premises (Article 225), abuse of trust (Article 238), abuse of trust by defrauding creditors (Article 239), simple bankruptcy (Article 240), bankruptcy fraud (Article 241), fraudulent management (Article 242) and violating the secrecy of correspondence (Article 302).

The term for filing a preliminary criminal complaint is three months from the date when the aggrieved party knew of the perpetration of the act.

Therefore, criminal liability cannot be attributed if the prior criminal complaint fails to comply with the 3-month period prescribed by law or with other formal conditions provided by the law, or if the aggrieved party withdraws their criminal complaint until a final judgement has been given – only in relation to offenses for which the formal criminal action is conditional on the introduction of a prior criminal complaint (Article 158 of the Criminal Code).

Another cause for the elimination of criminal liability is the parties' reconciliation (Article 159 of the Criminal Code), which may occur only for such felonies where the criminal action is commenced ex officio, and only where this possibility is expressly provided by the law. The parties' reconciliation is allowed in the cases of misrepresentation (Article 244), insurance fraud (Article 245) and appropriation of assets found or into the perpetrator's possession by error (Article 243).

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## **8. What does “very serious consequences” mean, and which are the crimes with very serious consequences entailing an aggravation of criminal liability?**

According to Article 183 of the Criminal Code, “very serious consequences” means damage to property exceeding RON 2.000.000 (approximately EUR 420,000) caused by a felony.

Where certain felonies which are provided for by the Criminal Code or by special laws cause very serious consequences, the penalty is harsher. For instance, the special limits of the penalties are increased by half in case of very serious consequences produced by occupational offenses such as embezzlement (Article 295), abuse in office (Article 297), professional negligence (Article 298), abuse of position (Article 300), disclosure of state secrets (Article 303), disclosure of information classified as job secret or not public (Article 304), unlawful monetary gain (Article 306) or

diversion of funds (Article 307), as well as by certain felonies provided for by special laws (Law No. 78/2000 on preventing, ascertaining and punishing acts of corruption, Law No. 191/2003 on water transport crimes, Law No. 535/2004 on preventing and suppressing terrorism and Law No. 204/2006 on optional pensions).

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## **9. Which are the cases in which a person is not held liable for a criminal act?**

There are cases where the lawmaker allows for the violation of lesser legal values to the ones considered of the highest importance; such as the case where an asset may be destroyed in view of saving someone's life. These are the cases where the law deems a certain act, which otherwise meets all the conditions of constituting a felony, to be legally justified, which eliminates the criminal liability for such an act.

The defences are self-defence (Article 19), the state of necessity (Article 20), the exercise of a right or fulfilment of an obligation (Article 21) and the consent of the aggrieved party (Article 22).

The exercise of a right acknowledged by the law constitutes a defence, hence it decriminalises acts perpetrated while making use of a public or private interest that is acknowledged or permitted by the law (such as while practicing a profession in accordance with the law, or while participating in sports competitions or in exercising immunities provided by law).

The fulfilment of an obligation required by the law is a legal justification decriminalising is the act perpetrated while performing an action required by the law for the purpose of fulfilling a legal duty (such as actions taken by the police or other coercive forces of the state with a view to maintaining public order or executing a warrant of arrest).

Consent of the aggrieved party decriminalises the unlawful action where the victim consented to the act that injured his property or interests.

The Criminal Code also provides for causes of impunity (Articles 24 to 31), where certain factual circumstances or mental states eliminate the author's guilt, such as the mental or physical incapacity of the perpetrator at the time of the act (irresponsibility, intoxication and the author's age of minority) or the occurrence of an unforeseeable, uncontrollable and unavoidable event (physical constraint, moral constraint, non-imputable excess and fortuitous case).

Besides these, there are also a few special causes of impunity provided for by law. For example, in the case of giving a bribe, the bribe giver who has been constrained by

any means by the bribe taker will not be punished. Similarly, the bribe giver will not be punished when he denounces the act before the criminal investigative body has been informed of it by other means (this case of impunity is also applicable to the buyer of influence).

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## **10. Which are the rules for establishing and applying the main types of punishment measures in the case of concurrent crimes?**

The Criminal Code contains rules for the establishment and application of the punishment for concurrent crimes. These rules apply to both “real” concurrency situations (where the same person perpetrated two or more crimes, by distinct actions or omissions, before a final ruling was passed to convict the perpetrator for any of the crimes in question, including where one of the crimes was intended to facilitate or conceal another crime) and “formal” concurrency (where an action or omission perpetrated by the same person constitutes more than one crime, due to the circumstances in which it was perpetrated or to its consequences). The rules refer to the establishing and application of the main punishments provided under Romanian criminal law, which are imprisonment for life, imprisonment for a duration ranging from 15 days to 30 years, and the criminal fine.

Generally, the Criminal Code provides for harsh main punishments for concurrent crimes, as concurrency is viewed as an aggravating circumstance. Upon establishing the punishment for each of the concurrent crimes, the court will apply the punishment as follows: (i) where imprisonment for life and one or more shorter imprisonment durations or criminal fines have been established, the life sentence shall apply; (ii) where all the punishments established consist of various durations of imprisonment, the court shall mandatorily apply the harshest of them plus one third of the duration of all the other durations compounded; (iii) where all the punishments established consist of criminal fines, the court shall apply the harshest of them, plus one third of all the other fines combined; and (iv) where an imprisonment sentence and a criminal fine have been established, both shall apply.

# Tax

## GENERAL ASPECTS

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### **1. What is the legislation applicable to tax matters? Is the Romanian tax legislation fully harmonised with the EU law?**

Romanian tax matters are mainly covered by Law No. 227/2015 regarding the Tax Code, as further amended and supplemented, and by Government Decision No. 1/2016 approving the Norms for the application of the Tax Code, as further amended and supplemented. Moreover, certain provisions from the Anti-Tax Avoidance Directive (i.e. deductibility limitations for exceeding borrowing costs, exit taxation, controlled foreign companies (CFC) rules, anti-abuse rules) were implemented in the Romanian tax legislation.

Also, the provisions of the Council Directive (EU) 2018/822 of 25 May 2018 (also known as DAC 6) have been implemented in the Romanian tax legislation through Government Ordinance No. 5/2020 amending and supplementing Law No. 207/2015 on the Fiscal Procedure Code, generating obligations with respect to the automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

With regard to indirect taxes, Romanian law is generally in line with European law: Title VII of the Tax Code on VAT is generally aligned with Directive 2006/112/EC, and Title VIII of the Tax Code refers to harmonised excise duties following Directive 92/12/EEC. Customs duties are governed by the Regulations of the European Commission (European Regulation No. 952/2013, as further supplemented by other Regulations and the European Regulation No. 2447/2015 laying down the Norms of application of the European Regulation No. 952/2013).

At the end of 2020, the main law governing tax procedural matters, the Fiscal Procedure Code (Law No. 207/2015) was subject to important amendments on aspects such as: the nullity of fiscal administrative acts (e.g., tax assessment decision), late payment interest and penalties, reasons for suspension of the tax audit, suspension of the statute of limitation.

## 2. Which are the main taxes payable by companies doing business in Romania?

The main taxes payable by the companies doing business in Romania are:

- Corporate income tax;
- Micro-enterprise tax;
- Income tax;
- Social security contributions (predominantly due by individuals, but the compliance obligations lay with the employers);
- Withholding tax;
- Value added tax;
- Excise duties;
- Customs duties;
- Local taxes.

The list is not exhaustive; it is only an indication of the most important taxes. Except for the customs duties, all the taxes mentioned above are covered by the Tax Code.

## 3. Who is subject to micro-enterprise tax in Romania?

Newly established companies and legal entities with a recorded annual turnover of up to EUR 1,000,000 are subject to micro-enterprise tax on their income.

Micro-enterprises with a share capital of RON 45.000 or more may opt to pay corporate tax if they have at least two employees.

The applicable tax rate is 1% on income derived for micro-companies employing at least one individual and 3% for entities with no employees.

## 4. Who is subject to corporate income tax in Romania?

The following taxpayers are subject to corporate income tax:

- Romanian resident companies;
- Foreign companies performing business activities in Romania through permanent establishments;
- Foreign companies which incur revenues in connection with immovable property located in Romania or from sale of shares in Romanian companies;
- Legal persons set up in accordance with European legislation, having a registered

office in Romania;

- Foreign companies which have the effective place of management located in Romania.

A company is to be considered resident in Romania if its head office is registered in Romania or if its place of effective management is located in Romania.

Special tax is applicable to taxpayers subject to corporate income tax carrying out activities related to hotels, restaurants, catering and bars, and calculated based on the surface area multiplied by a specific fixed tax base.

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## **5. Is there a holding company regime available in Romania?**

The Romanian taxpayer-favourable participation exemption regime, enforced starting 2014 for Romanian companies that hold shares in other domestic entities or in legal entities located in countries with which Romania has a double taxation treaty, is a viable option for local and regional businesses to create tax-efficient corporate structures. This holding tax regime, coupled with the wide double taxation treaty network available (close to 110) and low administrative costs, aims to grant access to Romania among the European jurisdictions with a long tradition in this area, such as The Netherlands, Luxembourg, Cyprus and Switzerland.

Similar to other jurisdictions, the participation exemption regime in Romania allows tax exemption for dividend income, capital gains and liquidation proceeds derived from subsidiaries, under certain conditions (minimum 10% participation in the subsidiary's share capital for an uninterrupted period exceeding one year at the moment when income is derived). This creates a favourable structure allowing companies to achieve a tax-efficient exit from businesses. Moreover, the provisions of the holding regime also apply in respect of subsidiaries incorporated in Romania, creating a solid incentive for local businesses to develop their own corporate holding structure.

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## **6. What is a permanent establishment?**

A permanent establishment is a taxable presence for corporate income tax purposes of a non-resident in Romania. While registration of a branch in Romania typically implies a permanent establishment, one can also be created in the absence of a registration with the Trade Registry. A permanent establishment is generally defined as the place of business through which the activity of a non-resident is conducted, fully or partially, directly or through a dependent agent. From the moment of creating the permanent establishment, Romanian authorities have the right to tax the profits of the foreign

enterprise derived from the activity performed in that permanent establishment.

The Romanian legislation explicitly states conditions which trigger a permanent establishment:

- *Fixed base permanent establishment* – created through a place of business with a certain degree of permanency through which business is conducted in Romania (with some exceptions);
- *Agency permanent establishment* – created through agents with a dependent status which operate in Romania on behalf of the foreign company.

The registration, filing and payment requirements are similar to those for a Romanian company.

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## **7. What does opening a branch in Romania entail in terms of taxation?**

Branches have to be registered with the Romanian tax authorities. The registration, filing and payment requirements are similar to those for a Romanian company.

A branch is considered to have the same legal personality as the parent company and, therefore, does not constitute a separate legal entity (no owned share capital, separate name, etc.). The branch's object of activity cannot be more extensive than that of the parent company.

Funds distribution to the head office country are not regarded as dividend distribution, therefore, no withholding tax liability should arise.

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## **8. What are the applicable transfer pricing provisions?**

All transactions carried out between related parties should be compliant with the arm's length principle. Otherwise, the Romanian tax authorities are entitled to estimate the amount of the transfer prices and perform transfer pricing adjustments at the level of taxpayer's revenues or expenses.

The arm's length principle is currently applicable in Romania to all transactions carried out between related parties, including those taking place between a non-resident legal entity and its Romanian permanent establishment.

In determining the market value of the transactions carried out between related parties,

the most appropriate method must be selected from the following:

- Comparable uncontrolled prices method;
- Cost plus method;
- Resale price method;
- Transactional net margin method;
- Profit split method;
- Any other method recognised by the OECD Transfer Pricing Guidelines.

Although Romania is not an OECD member, the national legislation expressly stipulates that within the application of transfer pricing rules, the OECD Transfer Pricing Guidelines will also be considered.

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## 9. What are the transfer pricing documentation requirements in Romania?

Taxpayers engaged in intra-group transactions exceeding certain thresholds have the obligation to prepare the local transfer pricing file in order to document the compliance of the transfer prices applied and the arm's length principle.

Depending on the category of the taxpayer (i.e., large, medium and small) the obligation to prepare the transfer pricing documentation can be either annual or at the specific request of the tax authorities during a tax audit.

The content of the transfer pricing documentation was approved by Order No. 442/2016 of the President of the National Agency for Tax Administration. The Order is supplemented by the OECD Transfer Pricing Guidelines and the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union.

Country-by-Country (CbC) documentation requirements are also applicable in Romania for entities part of multinational groups with a consolidated turnover higher than EUR 750,000,000. In this respect, a notification regarding the statute of the Romanian company within the Group (i.e., constituent entity or reporting entity) should be submitted to Romanian tax authorities (form R405).

Depending on the statute of the Romanian company and the country of residence of the reporting entity within the Group, the obligation to submit the CbC report (form R404) may also arise.

CbC related requirements are applicable starting with the year 2016.

## 10. Who must register as a VAT taxpayer?

VAT registration is mandatory for persons established in Romania carrying out taxable operations exceeding the EUR 88,500 (or RON 300.000) threshold. Below this threshold, VAT registration is optional.

If the annual turnover reaches or exceeds the EUR 88,500 / RON 300.000 threshold, VAT registration must be requested until the 10th day of the month following the one in which the threshold was reached/exceeded.

Seeking professional advice is highly recommended where the intention is to register the company as a VAT payer.

Separately, non-resident taxable persons performing specific operations in Romania are required or could opt to register for VAT purposes, as the case may be, irrespective of the value of operation.

## 11. What is a fixed establishment?

A company becomes established for VAT purposes in Romania either by having its place of business or by creating a VAT fixed establishment in Romania.

The notion of fixed establishment for VAT purposes is different from that of permanent establishment in terms of corporate income tax. The definition of the permanent establishment for corporate income tax is not relevant for determining the existence of a fixed establishment from a VAT perspective.

A VAT fixed establishment is a structure characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to perform the supply of goods or services in which it intervenes. For example, a branch with no human resources may not create a fixed establishment from a VAT standpoint.

## 12. How are capital gains computed and taxed in Romania?

Capital gains derived by Romanian resident companies are included in ordinary profit and therefore taxed at 16%. Capital losses related to sale of shares are, in general, tax deductible. Mergers, spin-offs, transfers of assets and exchanges of shares between two Romanian companies should not trigger capital gains tax as they are generally neutral from a fiscal perspective. In the case of a relocation of the registered office

of an EU based Company from Romania to another EU Member State, if certain conditions are met no tax will be imposed on the difference between the market and fiscal value of the transferred assets and liabilities. Moreover, no tax will be levied on such movements at the shareholder level. Capital gains from the sale/transfer of shares held in a Romanian or foreign legal entity located in a country that has concluded a tax treaty with Romania are exempt from tax on condition that at least 10% of its participation is held for a minimum period of one year.

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### **13. What is the fiscal period for reporting purposes in Romania?**

For corporate income tax computation, as a general rule, the fiscal year is considered to be the calendar year. The accounting year is also usually the calendar year, but entities are allowed to adopt an accounting year other than the calendar year. Taxpayers who have opted for an accounting year different from the calendar year are allowed to choose as fiscal year the same period as for their financial exercise.

For VAT purposes, the standard fiscal period is the calendar month. Quarterly VAT returns may be submitted by taxable persons with an annual turnover of less than EUR 100,000. When a taxable person performs at least one intra-Community acquisition of goods, VAT returns must be submitted monthly.

Half-yearly or annual reporting is also allowed, under special conditions.

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### **14. Which is the level of late payment interest and penalties for tax liabilities?**

Late payment of tax liabilities is subject to interest at a rate of 0.02% per day of delay, with an additional late payment penalty of 0.01% per day of delay.

Separately, a penalty for failure to declare is currently in force, of 0.08% per day, starting from the day following the due date until the date of payment. This penalty applies to the main tax obligations declared incorrectly or not declared by the taxpayer and established by a tax inspection authority decision. The penalty can be decreased by 75% upon taxpayer's request, if the main tax obligations established by decision are met by payment or compensation or the taxpayer is granted rescheduling of payment, according to the law. The penalty is increased to 100% of the main tax obligations in cases of tax evasion detected by the legal authorities according to the law.

The late payment interest and penalties could be fully annulled according to the tax

amnesty introduced in May 2020 in the COVID-19 context (through Government Emergency Ordinance No. 69/2020, as subsequently amended and supplemented).

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## 15. What is the tax statute of limitation in Romania?

The statute of limitation period for tax matters in Romania is of five years, calculated from 1 July of the year following the year when the tax obligation arises (meaning that, in fact, the statute of limitation is up to six years).

However, the statute of limitation is extended to 10 years in the case of fraud, starting from the date when the criminal act occurred. The statute of limitation is suspended during fiscal inspections.

On the other hand, the storage period for accounting ledgers and documents is of 10 years from the end of the financial year during which they were drawn up.

Payrolls must be kept for 50 years. If business is interrupted, accounting documents must be archived or submitted to the state archives.

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## 16. How is the salary income defined?

Salary is defined as income in cash and/or in kind received by individuals based on employment agreements and is taxed at a flat rate of 10%. Certain types of income are assimilated to salaries, including remuneration paid according to non-competition clauses and other taxable benefits such as: meal tickets, gift tickets, nursery tickets, holiday tickets, amounts representing compensatory payments, private use of company cars and telephones.

Administrator compensation, fees received by members of the General Meeting of Shareholders, the Management Council, the Board of Directors and the Supervision Council are also treated as salaries.

The compliance obligations with respect to salary income are: for employees (and directors remunerated based on mandate agreements) of Romanian companies, branches and representative offices of foreign companies, their employers are liable to calculate, withhold and transfer salary taxes on a monthly basis; for foreign individuals performing activities in Romania based on foreign employment agreements, the individuals are liable to submit a monthly income statement and pay monthly income tax.

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## 17. What is the tax regime applicable to personal income derived from independent activities?

The income derived from independent activities is taxed at 10% tax rate (mandatory social charges are deductible) and covers, among others: income from freelance activities (authorisation needed), including income from liberal professions.

Mandatory social contributions are also due. As such, individuals earning income from independent activities are required to pay the social insurance contribution of 25% applicable on a chosen income, which cannot be lower than the national minimum gross salary.

A health insurance contribution (10%) is also payable, in certain conditions, by individuals earning income from independent activities, income generated by association with a legal entity, rental income, investment income, income from agricultural, forestry and fishery activities or income from other sources. The monthly calculation base of the contribution is the national minimum gross salary in force for the month for which the contribution is due.

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## 18. How is the income from freelance activities assessed?

Income from freelance activities is assessed on the basis of entries in the single-entry bookkeeping ledgers that providers of independent activities are obliged to keep. The net income generated by freelance activities is calculated as gross income minus deductible expenses. Fines, late-payment penalties, donations, private scholarship, protocol expenses are considered non-deductible expenses in excess of the upper limits set by law. It is the individual's obligation to declare each year the income obtained from independent activities, based on a statement (the Single Tax Return) to be submitted by 25 May of the year following the one for which the income is calculated. It is also the individual's obligation to declare the income and to compute the correspondent income tax. The income tax is payable by the same date.

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## 19. How is the income from intellectual property assessed?

Income from intellectual property is regulated under a separate tax regime than that applicable to income from independent activities.

The payer of the income (legal entity or other types of entity required to keep accounting records) must calculate, declare, withhold and pay the following: an income tax of 10% on a calculation base determined by deducting a flat rate of 40% from the

gross salary, as well as pension contributions and health contributions (unless the taxpayer is exempt, as is the case for retired people or individuals obtaining salary income) if the estimated level of income is at least equal to 12 national minimum gross salaries.

The filing and payment deadline for income tax and social contributions is the twenty-fifth of the month following that to which the income relates.

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## 20. How is the rental income assessed?

Gross annual income represents the income earned by the owner during the year as stipulated in the rental agreement registered with the Romanian tax authorities. Net taxable income is determined by deducting a 40% expense allowance from the gross income and is taxed at a flat rate of 10%.

It is the individual's obligation to declare the rental income each year, based on the Single Tax Return form - to be submitted by the 15<sup>th</sup> March of the year following the one for which the income is calculated. It is also the individual's obligation to declare the income and to compute the correspondent income tax. The income tax is payable by the same date.

Moreover, revenues obtained by individuals from rental activities are subject to mandatory social contributions; i.e. rental income is also subject to a 10% health contribution applied to 12 minimum wages if the income obtained from rental income/ capital gains etc. exceeds 12 minimum wages, otherwise, health insurance contribution is not due.

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## 21. How is the gambling income assessed?

Progressive tax rates are applicable in relation to gambling income as per these brackets:

- 1% on total amounts cashed by each participant from one gambling operator not exceeding RON 66.750;
- RON 667,5 + 16% for amounts ranging between RON 66.750 and RON 445.000; and
- RON 61.187,5 + 25% for amounts exceeding RON 445.000.

The obligation to compute, withhold and pay the tax lays with the gambling operator.

## TAX CURIOSITIES

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### **1. Is it possible to request the tax authorities' opinion on the tax implications of envisaged operations?**

Companies may request a tax binding ruling be issued by the National Agency for Fiscal Administration, subject to a fee of EUR 5,000 for large taxpayers, respectively EUR 3,000 for other taxpayers. The taxpayer may propose the content of the tax binding ruling in the request submitted.

Should the requesting company not agree with the binding ruling, it may notify the issuing authority within 30 days; in this case, the tax binding ruling does not have legal effect.

Should the terms and conditions of the tax binding ruling be observed by the taxpayers, their provisions become applicable and mandatory against tax authorities.

Companies may also request a so-called "non-binding ruling". Even if it is not binding against the tax authorities, it is generally taken into consideration in practice. The advantage is that the procedure to obtain such an opinion is smoother and that the opinion could also be applicable in retrospect, if the same legislative provisions were in place.

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### **2. Can Advance Pricing Agreements be obtained by the Romanian entities?**

Taxpayers engaged in related-party transactions may request the National Agency for Tax Administration to issue an Advance Pricing Agreement (APA) for new transactions.

Generally, the APA is issued for a period of up to five years. In exceptional cases, it may be issued for a longer period for long-term agreements.

As long as there are no material changes regarding the legal presumptions, the APAs are applicable and binding on the tax authorities. In this respect, APA beneficiaries have the obligation to submit annual reports attesting to full compliance with the terms and conditions agreed.

Should the requesting party not agree with the provisions of the APA, it may notify the issuing authority within 30 days; in this case, the tax ruling does not have legal effects.

Unilateral and bilateral/multilateral APAs are available.

Under the Fiscal Procedural Code, an APA must be issued within 12 months for unilateral APAs and within 18 months for bilateral/multilateral APAs.

The fees applied by the Romanian tax authorities to issue an APA are:

- EUR 20,000, in case of large taxpayers or if the consolidated value of transactions covered in APA exceeds the equivalent of EUR 4,000,000 or if the taxpayer is classified as large taxpayer within the period of validity covered in APA.
- EUR 10,000 EUR, in case of small and medium size taxpayers.

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### **3. Are there any tax consolidation options available in Romania for corporate income tax purposes?**

The consolidation option was introduced in Romania in December 2020 through Law No. 296/2020. The profits or losses of the companies forming the tax group will be accumulated and offset, if applicable, resulting in a net position of the entire group. In this respect, a significant advantage is obtained by deducting losses from the profits of other members of the group, considerably improving the cash flow position of the group members. Law No. 296/2020 provides the conditions that must be met in order to set up the tax group, the operating rules, the period of time for which the consolidation applies, the rules on carrying forward losses and anti-abuse provisions.

Also, personal establishments triggered by the same foreign company in Romania may cumulate their fiscal results under certain conditions.

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### **4. What provisions should be observed in respect of fiscal losses?**

Fiscal losses incurred by Romanian companies may be carried forward for a period of seven years based on a first-in first-out method. The loss incurred by permanent establishments of Romanian companies, located in non-EU / EFTA Member States with which Romania does not have a Double Taxation Treaty in place, may only deducted for tax purposes from the revenues derived by that permanent establishment abroad.

As regards foreign legal persons, the fiscal losses attributable to their permanent establishment in Romania may only be carried forward for a period of five years.

## 5. Is the VAT group available in Romania?

The VAT group concept available in Romania is different from the European concept according to which the transactions between the members of the group are outside the scope of VAT. The Romanian VAT group simply allows consolidating the VAT positions between the members of the group by submitting a joint VAT return. Certain conditions must be fulfilled to register a VAT group of companies in Romania, such as: the group must be formed by a minimum of two taxable persons 50% owned directly or indirectly by the same persons, all members must apply the same fiscal period and the VAT group must be requested for a minimum of two years. Order No. 3006/2016 of the National Agency for Fiscal Administration, as subsequently amended and supplemented, establishes the implementation and administration procedures for such VAT group and approves specific forms in this respect.

## 6. Is there any special VAT treatment applicable in case of business transfers?

A business transfer (also referred to as “transfer of a going concern”) can be performed without the application of VAT, as it is not considered a VAT taxable supply of goods under Romanian law (in line with the European VAT Directive). To qualify as a business transfer, the transaction must meet certain conditions provided by law, such as: (i) the transferee must be a taxable person established in Romania, (ii) the transfer is a universal transfer of assets and/or services which are not being treated individually but as a total unit by the transferor, irrespective whether the transfer of assets is total or partial, (iii) the recipient of the assets must prove his intention to continue the economic activity that has been transferred, and not to immediately liquidate such activity or sell the stocks and assets. The fulfilment of conditions should be interpreted in a flexible manner, on a case by case basis, while taking into account European jurisprudence (e.g., cases C-497/01 Zita Modes, C-440/10 Schriever, C-651/11 X). As per the VAT law, specific documentation must be prepared for the business transfer. Also, if the transferee is not registered for VAT purposes in Romania and does not intend to register for VAT purposes further to the take-over of the business, certain VAT adjustments may be required. Therefore, taking into consideration that usually large amounts are involved, attention should be paid in case of business transfers in order to comply with all the legal conditions in force.

## 7. Is the late payment interest rate applicable also for late refunds to the taxpayers?

Taxpayers are entitled to receive interest from the state budget for late refunds;

the interest is of 0.02% per day of delay. The procedure is provided by Order No. 1.899/2004 of the Minister of Finance. As an important reference, the European Court of Justice decided in the case C-565/11 (Mariana Irimie) that the interest granted on repayment of a tax which was levied in breach of European Union law cannot be limited to that accruing from the day following the date of the claim for repayment of that tax.

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## **8. Are there any mechanisms available to taxpayers in order to avoid the double taxation situations arising further to transfer pricing adjustments?**

In Romania, taxpayers can avoid double taxation situations arising from transfer pricing adjustments through different mechanisms depending on the fiscal residence of the counterparty involved in the intra-group transaction subject to assessment. Thus, in double taxation cases involving only related parties incorporated in Romania, this situation can be solved based on a local procedure in place through the provisions of the art. 283 of the Fiscal Procedure Code. As such, further to the tax assessment being considered final following all the administrative and judicial legal means of action, the Romanian tax authorities have the obligation to issue an Adjustment/Assessment Decision based on which the counterparty has the right to amend its corporate income tax returns for the relevant years.

If the transfer pricing adjustment is related to a transaction carried out by a Romanian taxpayer and its related party resident in another state, the double taxation situation can be eliminated through the Mutual Agreement Procedure (MAP).

Based on the current national regulations, the initiation of the MAP can be requested as follows:

- Based on the provisions of the treaty for the avoidance of double taxation concluded by Romania with other states;
- Based on the Arbitration Convention (Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises) – available for double taxation cases which involve a Romanian company and its related party, resident in another European Union Member State;
- MAP under the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union transposed into the Fiscal Procedure Code by Ordinance 19/2019 - available for double taxation cases which involve a Romanian company and its related party, resident in another European Union Member State.



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